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THE
FEDERAL REPORTER.

VOLUME 102.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 102.

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OF THE

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

AURACHER v. OMAHA & ST. L. R. CO.

(Circuit Court, S. D. Iowa, W. D. March 21, 1900.)

1. REMOVAL OF CAUSES—JURISDICTION ACQUIRED BY FEDERAL COURT.

An action in a state court against a railroad company to recover overcharges alleged to have been exacted from plaintiff in violation of the interstate commerce act is one in which the state court is without jurisdiction of the subject-matter, and a federal court cannot, therefore, acquire jurisdiction by removal.

2. SAME—SUITS REMOVABLE—CONTROVERSY OVER QUESTION OF JURISDICTION.

A controversy over the question of the jurisdiction of a state court over the subject-matter of an action is one which renders the cause removable, where it is between citizens of different states and the requisite amount is involved, and the question of the state court's jurisdiction may be raised and determined in the federal court after removal.

On Motion to Dismiss for Want of Jurisdiction.

Plaintiff sued defendant railroad company in the district court of Page county, Iowa, to recover certain alleged overcharges amounting to \$2,390. Defendant removed the case to the federal court, on the ground of diverse citizenship, the amount in controversy being over \$2,000. When the transcript from the state court was filed, defendant moved to require plaintiff to file a bond for costs, the motion was sustained, and plaintiff gave a bond. Defendant then moved to strike the petition for want of jurisdiction for the reason that the state court, from which the case came, had no jurisdiction of the subject-matter; it being a suit in the state court under the provisions of the interstate commerce act.

W. P. Ferguson and Harl & McCabe, for plaintiff.

J. G. Trimble and G. B. Jennings, for defendant.

SHIRAS, District Judge. This action was brought in the district court of Page county, Iowa, to recover damages for alleged overcharges on shipments of produce by plaintiff over the line of the defendant company, a common carrier engaged in interstate commerce business. Upon petition of the defendant company the case was ordered removed into this court, the application for removal being based upon the provisions of the judiciary acts of 1887-88. From the averments of the pleadings and admissions of counsel, it appears,

and must be held, that the action is based upon alleged violation of the interstate commerce act, and the defendant now moves that the action be dismissed for the reason that the state court had not jurisdiction over the subject-matter of the controversy. Granting this to be true, the question arises whether the case should be dismissed for want of jurisdiction in the state court over the case as originally brought, or whether it should be remanded to the state court because it is not properly removable.

When the argument was had, I expressed the opinion that, under the special circumstances of the case, the proper order would be to remand the case to the state court upon the ground that the removal was improvidently made, because the state court did not have jurisdiction over the subject-matter concurrent with the United States court; but upon reflection I hold that the question of jurisdiction is a controversy which justified the removal, as the parties are citizens of different states, and the amount involved exceeds \$2,000, exclusive of interest and costs.

It is not seriously questioned that the subject-matter of the action upon the merits is not within the jurisdiction of the state court, and this court, as its successor, is therefore without jurisdiction, and the motion to dismiss must be sustained. Plaintiff excepts.

UNITED STATES, to Use of EDWARD HINES LUMBER CO., v.
HENDERLONG et al.

(Circuit Court, D. Indiana. May 21, 1900.)

No. 9,675.

1. COURTS—JURISDICTION—CONTRACTOR'S BOND—ACTION IN NAME OF UNITED STATES.

Under the act of congress of August 13, 1894 (28 Stat. 278), requiring contractors for the construction of public buildings to give bond for the prompt payment of those furnishing labor or materials, and authorizing any person who has supplied labor or material for the prosecution of such work to bring an action on said bond in the name of the United States, such action may be brought in the name of the United States, for the use of the laborer or material man, in any proper state court.

2. SAME—AMOUNT IN CONTROVERSY.

Under the judiciary act of March 3, 1887, § 1 (24 Stat. 552, c. 373), as corrected by act of August 13, 1888 (25 Stat. 433, c. 866), giving the circuit courts of the United States jurisdiction "of any controversy in which the United States are petitioners or plaintiffs," a circuit court has not jurisdiction of an action brought in the name of the United States, under authority of act of congress of August 13, 1894 (28 Stat. 278), to recover upon a contractor's bond for labor or material furnished in the construction of a public building, where the amount in controversy is less than \$2,000.

At Law.

Rich & Rich, Grant Crumpacker, and John G. Williams, for plaintiff.

Wm. Johnston and E. C. Field, for defendants

BAKER, District Judge. This is an action brought in this court by the plaintiff to recover from the defendants the value of certain lumber furnished to Henderlong Bros. & O'Neill, who, as contractors, were erecting a post-office building for the United States at South Bend, Ind. The action is upon a bond executed by Henderlong Bros. & O'Neill as principals, and by the other defendants as sureties. The amount of the debt is alleged to be \$1,262.25, for which amount judgment is demanded.

The act of congress in pursuance of which the bond in suit was executed was approved August 13, 1894 (28 Stat. 278). It is entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," and provides that:

"Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond with good and sufficient sureties with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor and furnishing affidavit to the department under which the work is being or has been prosecuted, that labor or material for the prosecution of such work has been supplied by him or them and payment for the same has not been made, shall be furnished with a certified copy of said contract and bond upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit, against said contractor and sureties and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense.

"Sec. 2. Provided, that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant."

The case was submitted to the court for trial, and, the court having heard the evidence, the question of the jurisdiction of the court has been raised; and it therefore becomes necessary to determine whether the court has jurisdiction of this action, it being shown by the allegations of the complaint and by the evidence introduced on the trial that the amount in controversy is less than \$2,000.

The statute under which the bond in suit was given does not prescribe the court in which the laborer or material man shall bring his suit to enforce the right of action which is thereby secured to him. In the absence of statutory regulation, the overwhelming weight of authority makes it certain that the laborer or material man could maintain an action in his own name against the principal and sureties in the bond for the recovery of the value of the labor or material supplied in the prosecution of the work. The statute, however, authorizes the laborer or material man to "bring suit in the name of the United States for his or their use and benefit," and doubtless in the courts of the United States the suit should be brought in that way. It is not by any means certain that the laborer or material man may not bring suit in his own name in any state court of competent jurisdiction in accordance with the course of practice in such courts. As the statute does not prescribe the

court in which the suit shall be brought, there would seem to be no doubt that it may be brought in the name of the United States, for the use of the laborer or material man, in any proper state court. It is manifest that it was not the purpose of this statute to create or confer any new jurisdiction on the courts of the United States for the enforcement of the claims of laborers or material men. It proceeds on the assumption that the existing jurisdiction of the courts is sufficient to secure the enforcement of the rights secured to them by the bond. The authority was granted to the laborer and material man to bring suit in the name of the United States for his or their use and benefit as a mere matter of convenience. If this court possesses jurisdiction, it must be found in the first section of the judiciary act of March 3, 1887 (24 Stat. 552, c. 373), corrected by the act of August 13, 1888 (25 Stat. 433, c. 866). So much of that section as is pertinent to the present discussion was construed in *U. S. v. Sayward*, 160 U. S. 493, 498, 16 Sup. Ct. 371, 40 L. Ed. 508, to read as follows: "Second. Of any controversy in which the United States are petitioners or plaintiffs." It was there held that, in any controversy in which the United States are plaintiffs or petitioners, the circuit courts of the United States are given jurisdiction, regardless of the amount or value of the matter in suit. The right of action created by the bond in favor of laborers and material men is exclusively vested in them by the statute. They alone are authorized to bring the suit, and to prosecute the same to final judgment and execution. The United States have no interest, either directly or indirectly, in the controversy; nor can they be made liable for costs. The United States, as sole plaintiffs, could not maintain a suit in their own name upon the bond for the recovery of the value of labor or materials supplied to the contractor in the prosecution of the work. Is the present suit a controversy in which the United States are plaintiffs or petitioners, within the true meaning of the first section of the present judiciary act? A controversy, in the sense of the statute, is a case at law or in equity brought before some competent court of justice for forensic discussion and judicial decision. In order that the United States shall become plaintiffs in a case or controversy in a judicial tribunal, they must have some interest in the matter in issue. Where the plaintiff's statement of his case discloses that he has no interest in the controversy, and it affirmatively appears that the right to the matter in controversy is vested wholly in some one else, it is difficult to perceive how such person can be said to have a case or controversy. The term "parties" includes all persons who are directly interested in the subject-matter in issue, who have a right to make a defense, control the proceedings, or appeal from the judgment. Strangers to the suit are persons who do not possess these rights. *Hunt v. Haven*, 52 N. H. 162. The plaintiff is he who, in a personal action, seeks a remedy in a court of justice for an injury to, or a withholding of, his rights. The legal plaintiff is he in whom the legal title or right of action is vested. The equitable plaintiff is he who, not having the legal title to the right of action, is in equity entitled to the thing sued for. Such are the accepted definitions of the terms "parties" and "plain-

tiffs." The United States are neither the legal nor equitable plaintiffs in the present action. They are seeking no remedy for any injury to, or for the withholding of, any of their rights; nor have they any equitable right to or interest in the thing sued for. They have neither the legal right of action, nor any equitable interest in the matter in controversy. The United States are simply a formal or modal party,—a mere name, used for convenience only. The right of action is vested solely in the Edward Hines Lumber Company, and it, and not the United States, is the real party plaintiff in the pending controversy. The statute merely delegates authority to the laborer or material man to use the name of the United States for his use and benefit in any court having jurisdiction of the subject-matter and the parties. It can hardly be supposed that it was the purpose of the statute to authorize a laborer or material man to prosecute petty claims, involving only a few dollars, in this court, when a more speedy and inexpensive trial can be had in the courts of the state. This is obvious from the fact that congress has manifested a steady purpose to restrict, rather than to enlarge, the jurisdiction of the courts of the United States. No reason is perceived why the courts of the United States should take cognizance of the suits of laborers and material men, unless the citizenship of the parties, and the amount involved in the controversy, are such as would give jurisdiction as in the case of other suitors. These views find support in the decisions of the supreme court in *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108; *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159; *Walden v. Skinner*, 101 U. S. 577, 588, 589, 25 L. Ed. 963.

The case of *Browne v. Strode*, *supra*, was a suit upon a bond given by an executor to the justices of the peace of Stafford county, Va., for the faithful execution of the testator's will in conformity with the statute of that state. The object of the suit was to recover a debt due from the testator, in his lifetime, to a British subject. The plaintiffs were the justices of the peace for Stafford county, and they and the defendants were all citizens of the state of Virginia. Notwithstanding this, it was held that the circuit court of the United States had jurisdiction, on the ground that the real party plaintiff was a British subject, for whose use and benefit the suit was brought.

The case of *McNutt v. Bland*, *supra*, was an action in the circuit court of the United States, instituted in the name of Alexander McNutt, governor of the state of Mississippi, who sued for the use of Thomas Leggett and others, citizens of the state of New York, against Bland, Humphreys, and Geissen, citizens of the state of Mississippi. It was founded upon a bond executed by Bland, as sheriff of Claiborne county, in the state above mentioned. It was insisted that the circuit court had no jurisdiction of the action, because all the parties plaintiff and defendant were citizens of the same state. The supreme court, however, sustained the jurisdiction of the court below on the ground that the parties for whose use the suit was brought were the real plaintiffs. The court said:

"The constitution extends the judicial power to controversies between citizens of different states. The eleventh section of the judiciary act gives jurisdiction to the circuit courts of suits between a citizen of the state where

the suit is brought and a citizen of another state. In this case there is a controversy and suit between citizens of New York and Mississippi. There is neither between the governor and the defendants. As the instrument of the state law, to afford a remedy against the sheriff and his sureties, his name is in the bond, and to the suit upon it, but in no just view of the constitution or law can he be considered as a litigant party. Both look to things, not names,—to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law. This court must have acted on these principles in *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108, which was a suit on an administration bond of an executor for the faithful execution of the testator's will, in conformity with a law of Virginia (5 Hen. St. p. 461) which requires all such bonds to be payable to the justices of the county court where administration is granted, but may be put in suit and prosecuted by and at the costs of the party injured. The object of that suit was to recover a debt due by the testator to a British subject. The defendant was a citizen of Virginia. The persons named in the declaration as plaintiffs were the justices of the county, who were also citizens of Virginia, yet it was held that the circuit court of that state had jurisdiction. We are aware of no subsequent decision of this court which in the least impairs the authority of that case, or contravenes the principle on which it was decided,—that where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists."

In the case of *Walden v. Skinner*, *supra*, the supreme court said:

"Where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive rule of law compelled to use the name of another to perform merely a ministerial act, who has not, nor ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists."

These cases establish the principle that the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists. From these considerations it follows that in the present suit the only party plaintiff before the court is the Edward Hines Lumber Company, and, as the cause of action is for a sum less than \$2,000, the court is without jurisdiction, and the action must be dismissed. So ordered.

SPEARS et al. v. FLYNN et al.

(Circuit Court, W. D. Michigan, S. D. May 10, 1900.)

JURISDICTION OF FEDERAL COURTS—PATENT AND COPYRIGHT CASES—PLACE OF BRINGING SUIT.

The provisions of the judiciary acts of 1887 and 1888, that no civil suit shall be brought in the federal courts against any person in any other district than that of which he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant, are not applicable to suits within the special jurisdiction given the circuit courts of the United States in patent and copyright cases, and such suits may be brought in any district where the defendant can be served with process.

In Equity. On motion to dismiss as to certain defendants.

Frank F. Reed, for complainants.

Howard, Roos & Howard, for defendants.

WANTY, District Judge. A bill was filed in this cause by the complainants, none of whom are residents of this district, against several nonresident defendants and one resident defendant, for infringement of a copyright. Service of process was had upon all of the defendants within this jurisdiction, and the nonresident defendants now move to dismiss the cause as to them because the act of 3d March, 1887, as corrected by the act of 13th August, 1888, provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," and gives this court jurisdiction only as to the resident defendant. Under the general words above quoted of the judiciary act, suits under the special jurisdiction of the circuit courts in copyright and patent causes would be included, and it was generally so held before the decision of the supreme court in *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1121. Since the expression of the court in that case, it has been held by Judge Townsend, sitting in the Southern district of New York, in *Union Switch & Signal Co. v. Hall Signal Co.*, 65 Fed. 625, and by the circuit court of the district of Massachusetts in *Donnelly v. United States Cordage Co.*, 66 Fed. 613, that the provision of the judiciary act referred to applies to all suits without exception. But the expressions of the court in *Re Hohorst*, *supra*, followed by the opinion in *Re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, clearly indicate that the general words in the judiciary act do not affect the jurisdiction which had been granted to the circuit courts of the United States in patent and copyright cases, and they may be brought in any district where the defendant can be served with process. *Lederer v. Rankin* (C. C.) 90 Fed. 449, and cases cited in that opinion. The motion is overruled.

AULTMAN & TAYLOR CO. v. BRUMFIELD, Treasurer.

(Circuit Court, N. D. Ohio, E. D. May 31, 1900.)

No 5901.

1. COURTS—CONFLICT OF JURISDICTION—INJUNCTION—INTERFERENCE WITH PROCEEDINGS IN STATE COURT—CONSTITUTIONAL LAW.

An action having been brought for the recovery of a back assessment, and the taxpayer having appeared therein, he commenced an action in a federal court to enjoin the treasurer from proceeding in said action in the state court, on the ground that the statutes under which he acted were in conflict with the fourteenth amendment to the United States constitution, providing that "no state shall deprive any person of life, liberty, or property without due process of law." *Held*, that the bill must be dismissed, since the exercise of such power is expressly forbidden by Rev. St. U. S.

§ 729, providing that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.

2. SAME—CIVIL RIGHTS ACT.

Rev. St. U. S. § 720, prohibiting the issue of injunctions by the federal courts to stay proceedings in a state court, is not so far modified or repealed by section 1979, providing that every person who, under color of any statute of any state, causes any citizen of the United States to be subjected to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law or suit in equity for redress, as to permit a federal court to entertain a bill to restrain a county treasurer from proceeding in an action in a state court for the recovery of a judgment for a back assessment upon the personal property of complainant, although in the proceeding in which such prima facie case was made the requirement of due process of law was not observed, contrary to the fourteenth amendment to the United States constitution.

3. SAME—QUESTIONS ARISING UNDER UNITED STATES CONSTITUTION—REMEDY.

Where the defense to an action in a state court involves the construction and application of the fourteenth amendment to the United States constitution, but defendant cannot remove the suit to the circuit court of the United States, because the federal question does not appear upon the face of plaintiff's statement of his claim, and the right set up under the constitution is denied to him by the highest court of the state to which the controversy can be carried, defendant's remedy is to sue out a writ of error from the supreme court of the United States, and thus obtain a review of the federal question involved.

Wm. A. Lynch, Harter & Krichbaum, Bell & Brinkerhoff, Cummings & McBride, and Bricker & Workman, for complainant.

Brucker & Cummins, Douglass & Mengert, and J. B. Jones, for respondent.

Before LURTON, Circuit Judge, and RICKS, District Judge.

LURTON, Circuit Judge. The complainant is a manufacturing corporation organized under the laws of Ohio. The respondent is a citizen of the state of Ohio, and is the treasurer of Richland county, Ohio. In January, 1899, the auditor of Richland county, acting under sections 2781 and 2782 of the Revised Statutes of Ohio, made a back assessment against the complainant corporation upon personal property alleged to have been omitted from its tax returns for the years 1893, 1894, 1895, 1896, 1897, and 1898. The aggregate of the back assessment for the several years, with penalties, amounts to more than \$250,000. These assessments were certified by the auditor to the county treasurer, who placed them for collection upon the personal tax duplicate of the county. Two courses were then open to the treasurer for the collection of the tax thus assessed. He might have issued a distress warrant under section 1095 of the Revised Statutes of Ohio, or he might bring an action at law against the tax debtor in the court of common pleas for the recovery of a judgment against him, as provided by section 2859 of the Revised Statutes of Ohio. If he resorted to the first course, and the taxpayer had reason to believe that the assessment was illegal, it was open for the latter to enjoin the collection of the tax, under section 5848, Rev. St. Ohio. *Whitbeck v. Minch*, 48 Ohio St. 210, 31 N. E. 743; *State v. Jones*, 51 Ohio St. 492, 517, 37 N. E. 945; *Railroad Co. v. Wagner*, 43 Ohio St. 75, 1 N. E. 91; *Groesbeck v. City of Cincinnati*, 51 Ohio

St. 365, 37 N. E. 707. The county treasurer, in respect to the back tax assessed against complainant, did not resort to a distress warrant, but instituted suit in the common pleas court of Richland county, Ohio, and sought to recover judgment against it, and to collect same by execution. Section 2859, Rev. St. Ohio, provides that, in a suit against a tax debtor assessed under sections 2781, 2782, Id., "the tax duplicate shall be received as prima facie evidence on the trial of said suit of the amount and validity of such taxes appearing due and unpaid thereon." The complainant was duly served with process, and required to appear and defend the said suit, and did so appear and plead. In this situation, and while said suit was pending and undecided, this bill was filed. The complainant in its bill denies that it had omitted to make true returns of its personal property subject to taxation for either of the years for which it has been back assessed, denies that it made false returns, and, in the most strenuous terms, avers that the assessment thus made by the county auditor was unjust, arbitrary, and illegal. It also sets out certain matters which occurred in the auditor's office pending his action, which operated to mislead complainant as to the purpose of the auditor, and by which it was cut off from making a full defense.

Section 1071, Rev. St. Ohio, provides that the county auditor shall receive, as compensation, 4 per centum of any taxes collected and paid into the county treasury on property omitted, and placed by him upon the tax duplicate, under sections 2781 and 2782, already cited. Complainant avers that, in a proceeding started before the auditor by the tax inquisitor for the correction of the return of a taxpayer for the purpose of back-assessing omitted property, the county auditor acts in a quasi judicial capacity, and is required to hear and weigh evidence, and decide all questions of both fact and law in issue between the tax inquisitor and the taxpayer. Upon this premise complainant avers that sections 2781 and 2782, under which the county auditor can alone act, are in conflict with that provision of the fourteenth amendment to the constitution of the United States, which provides that "no state shall deprive any person of life, liberty or property without due process of law." In short, the contention is that the county auditor is given a direct interest in finding against the supposed delinquent taxpayer, and no compensation if he finds for him, and that an assessment which results from the prejudiced or interested action of the county auditor is not "due process of law." Upon the theory that the law of Ohio, under which these assessments were made, is obnoxious to the constitution of the United States, as not providing for due process of law, the complainant has sought the interposition of a court of the United States.

The objection thus made to the competency of the county auditor, by reason of the mode in which he is compensated, was presented to the supreme court of Ohio, and decided in favor of the validity of the law, in the case of *Probasco v. Raine*, 50 Ohio St. 378, 34 N. E. 536. The same question came before this court in *Meyers v. Shields* (C. C.) 61 Fed. 713, where the opinion was by RICKS, District Judge, where the law was held invalid, as not constituting due process. In *Meyers v. Shields*, cited above, the jurisdiction of this court was clear. The

bill in that case was filed before jurisdiction had attached in any state court, and no question arose as to the power of this court to enjoin an action in a state court for a judgment upon the back assessment there complained of. Neither was there any doubt as to the efficiency of a remedy in this court which did not include an injunction against a prior and pending suit in a court of the state in which the validity of the same assessment was involved. The views of Judge RICKS, as to the invalidity of sections 2781 and 2782 of the Revised Statutes of Ohio, are fully expressed in his opinion in *Myers v. Shields*, cited above, and to the opinion there announced he still adheres; but, in the view we have as to the equitable jurisdiction of this court to grant any practical or efficient relief without enjoining the pending suit in the court of common pleas, we find it unnecessary to consider the merits of the case, or pass formally upon the constitutional question upon which the jurisdiction of this court is invoked.

The prayer of the complainant's bill is that the defendant, who, as treasurer of Richland county, is the plaintiff in the action now pending in the court of common pleas, be enjoined and perpetually restrained from proceeding with his said action, and from in any manner collecting, or attempting to collect, the tax so assessed against the complainant. An injunction pendente lite was granted by one of the judges of this court upon the filing of the bill, by which the action of the state court has been stopped, and issues have been made upon all the questions of fact and law upon which the justice or validity of the tax assessed depends. The case comes on now for a final hearing, and also upon preliminary motions by the defendant to dissolve the interlocutory injunction, and to dismiss the bill for want of jurisdiction in consequence of the prior jurisdiction acquired by the court of common pleas.

It is very plain that unless this court can stop the proceeding in the state court, and draw to itself jurisdiction over the whole subject, no efficient relief can be afforded the complainant. But this is precisely what this court is forbidden to do by section 720 of the Revised Statutes of the United States. That section is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This section is from the judiciary act of 1793. In view of our complex system of governments and courts, it gives legislative sanction to a rule of action long recognized by courts of concurrent jurisdiction, that a court first acquiring jurisdiction shall retain it, and decide every question which occurs in the cause, and that the right to exercise such jurisdiction will not be taken away by proceedings subsequently started in another court. *Peck v. Jenness*, 7 How. 612, 624, 12 L. Ed. 841. "These rules," said Mr. Justice Grier, in the case cited above, "have their foundation, not merely in comity, but on necessity; for if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other." The

statute has many times been given application, and the necessity for its observance impressed upon subordinate courts. *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Diggs v. Wolcott*, 4 Cranch, 179, 2 L. Ed. 587; *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345; *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 640; *Association v. Hurst*, 7 C. C. A. 598, 59 Fed. 1. It is true that there are cases in which an injunction has been sanctioned in which proceedings in a state court have been stayed, but it will be found, upon examination, that in every such instance the injunction was for the purpose of protecting the subject-matter of the litigation over which the court issuing the injunction had first acquired jurisdiction. *French v. Hay*, 22 Wall. 250, 24 L. Ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497; *Providence & N. Y. Steamship Co. v. Hill Mfg. Co.*, 109 U. S. 578, 599, 600, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; *Moran v. Sturges*, 154 U. S. 256, 270, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Iron Mountain R. Co. v. City of Memphis*, 37 C. C. A. 410, 96 Fed. 113. There can be, of course, no pretense that the jurisdiction of this court first attached, or that there is, in any true sense, any jurisdiction over any res which has been or may be interfered with by the common pleas court.

But it is said that the complainant has been subjected to the deprivation of certain rights and immunities secured by the constitution for the protection of their property, and that a tax has been placed upon the tax duplicate of the county which, in any court, is at least *prima facie* evidence of the validity and amount of the tax, and of the fact that it is due and unpaid, and that the proceeding by which this *prima facie* case of liability has been constructed was a proceeding in which the requirement of due process of law was not observed, and that this bill is an action in which complainant invokes the protection of the courts of the United States against the deprivation of the rights guaranteed to it by the fourteenth amendment of the constitution. But if it is plain that no efficient relief can be granted to the complainant under such a bill, unless the court can stop the proceeding in the state court, and draw to itself original jurisdiction to hear and determine the issues presented by the bill, we are still confronted with the positive provisions of section 720, forbidding an injunction against a proceeding in a state court.

In *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 1 Abb. U. S. 388, Fed. Cas. No. 8,408, a bill was filed in the circuit court of the United States which, among other things, sought to enjoin the defendant from prosecuting certain pending suits in the state courts based upon alleged violations by the complainant of the privileges of the defendant company under a law of the state which secured to it a monopoly of the business of slaughtering cattle in a district including the city of New Orleans. The complainant claimed that the state law under which the slaughter-house company was organized, and under which its monopoly was secured, was violative of the rights and privileges secured to it, as a citizen of the United States, by the fourteenth amendment. The case was heard before Bradley, circuit justice, and Woods, then circuit judge. The court construed the fourteenth

amendment in accordance with the contention of the complainant, and held that the right to engage in any lawful employment in a lawful manner was a fundamental right guarantied by the fourteenth amendment, which had been violated by the law of Louisiana, which granted a monopoly of the business of slaughtering to the defendant corporation. But, when it came to enjoining the suits pending in the courts of the state against the complainant, the great justice said:

"The objection that the circuit court of the United States cannot enjoin proceedings in the state court is an objection which cannot be surmounted. The fourteenth amendment authorizes congress, by appropriate legislation, to carry its provisions into effect. Congress, in the exercise of the power thus given, would undoubtedly have the right to authorize the federal courts to take jurisdiction of cases of this sort, and to enjoin proceedings in the state courts, as well as proceedings in the federal courts. But congress has not as yet assumed that jurisdiction, and therefore the courts are left to the provisions regulating the proceedings of the United States courts passed 70 or 80 years ago. Section 3 of the act of 1793 declares that no writ of injunction shall be granted to stay proceedings in any court of a state. This act has never been repealed. The court, therefore, feel compelled to refuse the injunction to restrain the defendants from proceeding with the legal remedy which they have instituted in the state courts. The remedy of the parties is to allow the proceedings to pass to judgment, and, if the highest court of the state should decree against the construction of the fourteenth amendment which is claimed by them, and which this court has assented to, then they can carry the case up by writ of error to the supreme court of the United States, and have the whole question reviewed."

But it has been urged that section 720 has, by implication, been repealed or modified so far as it would prevent the full exercise of jurisdiction under section 1979 of the Revised Statutes. That section reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This section was part of the act of April 20, 1871, being the act entitled the "Civil Rights Act." The section in question is in the nature of a declaratory law, giving a right of action to every person who has been subjected to the deprivation of any right, privilege, or immunity secured by the constitution or laws of the United States, against the person who has subjected the plaintiff to the loss of the right or immunity so secured. It does not deal with the question of jurisdiction, and in no way refers to the court within which such action is to be brought. It is impossible to see any ground upon which it can be held that section 720 is in any way affected.

It is true that in *Tuchman v. Welch* (C. C.) 42 Fed. 548, 557, the court did express the opinion that section 720 was repealed by this section, so far as it would prevent redress for the party whose rights or privileges had been obstructed by state legislation conflicting with the provisions of the fourteenth amendment. The opinion expressed by Judge Phillips was purely dictum, as the case involved

no such question, and the view taken by him has not received the sanction of any court to which we have been referred.

In *Hemsley v. Myers* (C. C.) 45 Fed. 283, 289, the effect of section 1979 upon section 720 came directly before Caldwell, circuit judge, who, speaking of section 720, said:

"This section, save the exception, is as old as the judicial system of the United States. Its prohibition is absolute and unqualified, except where the injunction is authorized by law in proceedings in bankruptcy. This exception serves to emphasize the prohibition as to all other cases. In cases where the jurisdiction of the court of the United States first attaches, the statute has no application; but in the cases we are considering the jurisdiction of the state courts first attached, and that fact, independently of the statute, according to a well-settled rule, is a bar to the jurisdiction of this court. To the observance of the rule enunciated by this section, and other cognate rules, we are indebted for the almost uniform harmonious relations that have existed between the state and the United States courts from the foundation of the government down to the present time. The rule would have probably been the same independently of the statute. The state courts observe the rule towards the courts of the United States upon principle, and without any statute requiring them to do so. It is not merely a rule of comity, but an absolute rule of law, obligatory on the courts of both jurisdictions, and absolutely essential to the maintenance of harmonious relations between the state and the United States courts, and indispensable to the due and orderly administration of justice in both. Appeals may be taken in certain cases from the state courts to the supreme court of the United States, and in this way suitors claiming a right or privilege under the constitution of the United States, or an act of congress, or a treaty, may have the validity of their claim finally determined by the supreme court of the United States; but the district and circuit courts of the United States possess no appellate or supervisory jurisdiction over the state courts. The circuit courts of the United States and the state courts are each destitute of all power either to restrain or review the process or proceedings in the other. This rule has had the approval of the courts, lawyers, legislators, and laymen from the beginning of our system of government. The rule commends itself to the common sense of all mankind, and there can be no higher evidence of the soundness of a rule of law than that there is a universal consensus of opinion that it is sensible and just. The contention of the counsel for the plaintiffs is that the statutes and rules of law which have been adverted to, and which, in the opinion of the court, preclude it from exercising jurisdiction in these cases, have been repealed or abrogated, either wholly or partially, by section 1979 of the Revised Statutes of the United States, first enacted as a part of the civil rights bill, April 20, 1871. And the learned judge who delivered the opinion of the court on the motion for a temporary injunction seems to entertain the same view. The section reads as follows: 'Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' The provision in the section, as originally enacted, conferring jurisdiction on the district and circuit courts of the causes of action enumerated in the section, has been transferred to the head of jurisdiction of those courts, respectively. The section does not repeal, limit, or restrict the previously existing rules affecting the relations of the state and the United States courts, nor does it abolish the distinction between law and equity, or change the rules of pleading or mode of proceeding in any respect. If the section was stricken out of the statute, the rights, privileges, and immunities of the citizens under the constitution and laws would remain to them, and the mode of seeking redress for a deprivation of these rights would be the same that it is now. The section declares that the mode of proceeding to obtain redress for a deprivation of

these rights shall be by 'an action at law, or a suit in equity, or other proper proceeding for redress.' If the case is one which, under the well-understood rules of pleading, is cognizable only at law, then an action at law is the 'proper proceeding for redress'; and, if it is one cognizable only in equity, then a suit in equity is the 'proper proceeding for redress.' No new mode of proceeding is enacted, and no new right created by this section. As it now stands in the Revised Statutes, it may be properly denominated a 'declaratory' statute. And the statutes and rules of law defining and regulating the powers, relations, and jurisdiction of the state and the United States courts with reference to each other are not affected by this section in the slightest degree. The demurrer to the bill is sustained, the temporary injunction dissolved, and the bill dismissed for want of equity."

In *Moore v. Holliday*, 4 Dill. 52, Fed. Cas. No. 9,765, the bill, among other things, sought to enjoin certain suits pending in courts of the state for the collection of taxes imposed by the state in violation of a supposed contract for a different mode of taxation. Touching this aspect of the relief sought, Dillon, circuit judge, said:

"So far as the bill in this case asks to enjoin suits already brought and now pending in the state courts, to enforce the collection of any of the taxes complained of, it is sufficient to remark that an express statute of the United States has prohibited such interference since the act of March 2, 1792, re-enacted in section 720 of the Revised Statutes."

In *Rensselaer & S. R. Co. v. Bennington & R. R. Co.* (C. C.) 18 Fed. 617, 618, it was sought to enjoin a suit in a state court upon the ground that the act upon which the suit was brought was a state statute which was void as in conflict with the constitution of the United States. The relief was denied, Judge Wheeler saying:

"The rights of citizens of other states to have their litigation generally, and the rights of all to have federal questions, tried in the federal courts, are provided for by the statutes relating to the removal of cases from the state to the federal courts, and to writs of error from the supreme court of the United States to the highest courts of the state, and are not left at all to be effectuated by injunction from one court to the other."

Similar conclusions were reached as to the effect and construction of section 720 in *Railroad Co. v. Scott* (C. C.) 13 Fed. 793; *Dillon v. Railway Co.* (C. C.) 43 Fed. 109.

In *Association v. Hurst*, 7 C. C. A. 598, 59 Fed. 1, the circuit court of appeals for this circuit affirmed District Judge Barr in denying an injunction against a sale of land by a sheriff under an execution from a state court on a sale bond filed against sureties, although the land levied upon belonged to a stranger to the proceeding. Speaking of section 720, which prohibited an injunction against "any proceeding in any court of the state," Taft, circuit judge, speaking for the court, said:

"That section was passed, not to preserve comity and harmonious action between courts of the same sovereign exercising concurrent jurisdiction, but to attain such an end, and prevent unseemly conflict between courts of different sovereigns exercising concurrent jurisdiction over the same territory. The purpose of the statute is so important that a liberal construction should be given to accomplish it."

A repeal or modification of section 720 should not be lightly presumed. To preserve harmony and comity between the courts of the United States and those of the state, it is essential that it shall be observed in its spirit as well as in its letter. Under the act of 1875,

as amended by the act of August 13, 1888, the circuit courts of the United States are given original jurisdiction, "concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority." So, any suit of which original jurisdiction is given may be removed by the defendant from a state court to the circuit court of the United States.

But it is well settled that, although the decision of a case pending in a state court may depend upon the construction and application of the constitution of the United States, the suit is not removable by the defendant unless the federal question appears on the face of the plaintiff's pleadings. If it does not so appear from the plaintiff's statement of his own claim, the want cannot be supplied by any pleadings filed by the defendant. *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017.

The remedy of a defendant in a suit in which the decision must turn upon the construction or application of the constitution of the United States, where the federal question is not disclosed by the plaintiff's statement of the case, is to present the question by his pleadings, and, if the right thus set up under the constitution or laws of the United States is denied to him by the highest court of the state to which the controversy can be carried, he may sue out a writ of error from the supreme court of the United States, and thus obtain a review of the decision of the state court upon the federal question directly involved. It would be strange, indeed, if a defendant to an action in a state court, whose defense involved the construction and application of the constitution of the United States, but who could not remove the suit because the federal question did not appear upon the face of the plaintiff's statement of his claim, should have the right to transfer the case to a court of the United States by an independent injunction bill, whereby the state court should be deprived of jurisdiction, and the decision of the same question drawn into the United States court. The provisions for a review by writ of error afford to the complainant ample means for obtaining redress, if in fact it has been subjected to the deprivation of rights secured to it by the provisions of the fourteenth amendment. The conclusion we reach is that this court can grant no efficient or practical relief without it can enjoin the pending suit in the state court and draw to itself the decision of all the questions involved by the defense which can be there presented. This we cannot do without violating the plain terms of section 720. The injunction heretofore granted must be dissolved, and the bill dismissed for want of equitable jurisdiction, but without prejudice to the right of complainant on the merits of the case.

CINCINNATI BREWING CO. v. BETTMAN, Collector.

(Circuit Court, S. D. Ohio, Western Division. April 21, 1900.)

No. 5,337.

JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—SUIT AGAINST INTERNAL REVENUE COLLECTOR.

A federal court has original jurisdiction of an action against a collector of internal revenue, growing out of the administration of his office, only on the ground of diversity of citizenship, and where the requisite jurisdictional amount is involved, though any such action may be removed from a state court by the defendant, at his option, under Rev. St. § 643, authorizing any officer acting by authority of any revenue law of the United States to remove any such action brought in a state court to the circuit court of the United States at any time before trial or final hearing.

Action at law against defendant, as collector of internal revenue, to recover a rebate paid under protest on a sale of revenue stamps. On demurrer to petition. Sustained.

Shepherd & Shaffer and James E. Neal, for plaintiff.
Wm. E. Bundy, for defendant.

THOMPSON, District Judge. This case is submitted to the court upon demurrer to the petition, the ground of demurrer being that the court has no original jurisdiction of the subject-matter of the action. The petition shows that during the forenoon on the 24th day of July, 1897, the plaintiff purchased of the defendant internal revenue stamps of the face value of \$22,600, and was allowed by the defendant a deduction from the face value thereof of $7\frac{1}{2}$ per cent., under the provisions of section 3341 of the Revised Statutes of the United States. Afterwards, in the afternoon of the same day, the president of the United States signed the act of congress of July 24, 1897, by which the provision of said section 3341 authorizing the deduction was repealed, and thereafter the defendant, acting under the instructions of the commissioner of internal revenue, collected from the plaintiff the amount of the deduction, to wit, \$1,695, payment being made by the plaintiff under protest. This suit is now brought to recover the said sum of \$1,695, upon the ground that the collection thereof was illegal. The petition further shows that the parties are citizens of the state of Ohio, or, rather, fails to show that they are citizens of different states, and that the amount claimed is less than \$2,000.

Under the fiftieth section of the act of congress of June 30, 1864, providing for internal revenue, etc. (13 Stat. 241), extending the provisions of the act of congress of March 2, 1833 (4 Stat. 632), to all cases arising under the laws for the collection of internal revenue duties, the action might have been maintained; but section 50 of the internal revenue act of 1864 was repealed by the sixty-eighth section of the act to reduce internal revenue taxation, of July 13, 1866 (14 Stat. 172), and such suits must now be brought in the state courts, although they may be removed thence under the provisions of section 643 of the Revised Statutes of the United States. This suit should have been brought in the state court, and the defendant

would then have had the option of trying it there, or removing it to this court. The demurrer will be sustained, and the case dismissed, at the costs of the plaintiff. 4 Stat. 632; 13 Stat. 241; 14 Stat. 172; Sections 629, 643, Rev. St. U. S.; Insurance Co. v. Ritchie, 5 Wall. 541, 18 L. Ed. 540; City of Philadelphia v. Collector, 5 Wall. 720, 18 L. Ed. 614; Collector v. Hubbard, 79 U. S. 8, 20 L. Ed. 272; Vinal v. Improvement Co., 34 Fed. 228; Crawford v. Hubbell (C. C.) 89 Fed. 1; Nunn v. Brewing Co., 40 C. C. A. 190, 99 Fed. 939.

FARMERS' LOAN & TRUST CO. v. BALTIMORE & O. S. W. RY. CO. et al.
VETTE v. HARMON.

(Circuit Court, D. Indiana. February 3, 1900.)

No. 9,663.

CARRIERS—INJURY TO PASSENGER—CONTRACT LIMITING LIABILITY.

A railroad company cannot relieve itself by any contract from its duty to exercise the greatest possible care and diligence to secure the safety of its passengers, and the fact that a passenger when injured was traveling on a free pass, by which he assumed all risk of accident or damage, whether occurring from negligence or otherwise, is no defense to an action to recover for the injury on the ground that it was caused by the negligence of the company or its employés.¹

In Equity. This was a petition by Victor C. Vette filed against the receiver of the defendant railway company to recover for a personal injury. On demurrer to answer.

Chambers, Pickens & Moores, for petitioner.

Robert E. Hamill and W. R. Gardner, for receiver.

BAKER, District Judge. Plaintiff charges that he was a passenger riding in a passenger car of the defendant, and that he was seriously injured by the derailment of the car in which he was riding, occasioned by the careless and negligent management of the train, and by the unsafe and insufficient condition of the railroad track, ties, etc. The defendant answers, first, in general denial; and also in two special paragraphs. Each of the two special paragraphs of answer sets up as ground of defense against the negligence charged in the complaint that the plaintiff was traveling on a pass which had been issued to him at his request gratuitously, and without any consideration whatever therefor, and that said pass embodied the following contract: "This pass is not transferable. The person accepting and using it assumes all risk of accident and damage to person and baggage, whether occurring from negligence or otherwise." The plaintiff has demurred to each of the special paragraphs of answer, and in argument insists that the contract set up does not relieve the defendant from liability to respond in damages for the injury which plaintiff sustained through the negligence and carelessness of the defendant and his servants. The

¹ Limitation of liability by carriers for injuries to passengers, see note to Clark v. Geer, 32 C. C. A. 301, 86 Fed. 447.

question of the right of a railroad company to relieve itself from responsibility for an injury received by a person traveling on a free pass, such injury resulting from the negligence of the company's servants, is one upon which there is a serious conflict in the decisions of the courts of last resort of the various states of the Union. I think, however, that the question is practically settled, so far, at least, as to be binding upon this court, by the decisions of the supreme court of the United States. The case of *Railroad Co. v. Derby*, 14 How. 468, 14 L. Ed. 502, was an action brought by Derby against the railroad company to recover damages for personal injury received by him while riding as a passenger on the defendant road. He was a stockholder of the railroad company, and was riding gratuitously at the invitation of the president of the road at the time of his injury. It was insisted that he could not recover because he was riding as a gratuitous passenger, and that the high degree of care imposed upon a common carrier of passengers for hire did not apply. The supreme court of the United States, however, discussing the question, remarked:

"When carriers undertake to convey persons by the powerful, but dangerous, agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross."

The case of *The New World v. King*, 16 How. 469, 14 L. Ed. 1019, was an action for personal injuries received by King through the negligence of the master and sailors employed in navigating the steamboat *New World*. King was traveling as a passenger gratuitously. The supreme court declared that whether precisely the same obligations in all respects on the part of the master and owners of the boat existed in this case as in that of an ordinary passenger paying fare the court did not find it necessary to determine. After quoting the above language copied from the opinion of the court, the supreme court say, at page 474, 16 How., and at page 1021, 14 L. Ed.: "We desire to be understood to reaffirm that doctrine as resting not only on public policy, but on sound principles of law." The same principle is reaffirmed, and the same language quoted, in *The City of Panama*, 101 U. S. 453, 462, 25 L. Ed. 1061. In the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, which was an action brought by Lockwood, a drover, to recover for personal injuries sustained by him through the negligence of the carrier, it was sought to defeat any recovery by proving that the pass on which he was traveling contained an express agreement that the company should not be liable for any damages or injuries received by him when riding on the pass, occurring from the negligence of the defendant or its servants. On page 383, 17 Wall., and page 641, 21 L. Ed., after a very extended and careful review of the authorities as to the effect of such contract, the supreme court say:

"In the case before us the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its train. A failure to exercise such care and diligence is negli-

gence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case which caused the injury sustained by the plaintiff was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary."

If, as affirmed by the supreme court, it is the duty of a carrier who undertakes to convey a passenger gratuitously by the powerful, but dangerous, agency of steam, to exercise the greatest possible care and diligence, and that any negligence in such a case might well deserve the epithet of gross, it would seem to be clear that the contract relied upon in this case is unavailing, because it is a contract to relieve the carrier from its own gross negligence. The court does not understand that the law will permit a carrier to relieve itself from responsibility for negligence which may well deserve to be characterized as gross in any case. For these reasons the demurrer to each paragraph of the answer is sustained, to which the defendant at the time excepts.

UNION CENT. LIFE INS. CO. v. PHILLIPS.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1900.)

No. 838.

1. APPEAL—PLEADINGS—AMENDMENTS.

All matters of amendments to pleadings, particularly trial amendments, are within the discretion of the trial court, and its action is not reviewable on a writ of error.

2. BILL IN EQUITY—RIGHT TO MAINTAIN.

A bill in equity cannot be sustained as ancillary to a suit at law, where neither the parties nor the subject-matter is the same, and where the complainant on the facts stated has a complete remedy at law.

3. SAME—RELIEF GRANTED.

Where a party having a right to resort to court of equity to compel the delivery of a life policy is properly in that court after loss has occurred, the court will give such final relief as the circumstances of the case demand.

4. INSURANCE—CONTRACT.

Plaintiff's intestate applied to defendant for a life policy, using defendant's blanks and answering the questions therein in full. Defendant's medical examiner recommended her for insurance, and on the following day plaintiff paid the premium to defendant's general agent, taking a receipt therefor, which provided that the applicant was insured from the date thereof, in accordance with the conditions of the policy, if the applicant should be accepted. The policy was issued, and forwarded to the agent, with a blank instructing him that all applications on lives of women should be submitted to the home office, with a copy of the blank, properly filled in. All material questions propounded to the agent in the blank were substantially answered by the applicant in her application, and he had already obtained sufficient information to enable him to make satisfactory answers. On receipt of the policy, he sent plaintiff this message: "Policy came O. K. I will be there shortly, and deliver it." Eight days later, and before the policy was delivered, the assured died; whereupon the agent returned the policy to the home office, and

thereafter defendant refused to deliver it, kept plaintiff in ignorance of its terms, and refused to pay the loss, though furnished with proofs of loss. *Held*, that there was a completed contract of insurance, which a court of equity would enforce.

5. SAME—VERBAL AGREEMENT.

A verbal understanding between the insurer's agent and one representing the assured in her negotiations for a life policy, to the effect that it should be payable to her sister instead of her legal representatives, as stated in the application and policy, cannot be used to alter or vary the policy, so as to affect the insurer's liability.

6. SAME—ACTION ON POLICY.

A condition indorsed on an undelivered life policy, payable to the legal representatives of the assured, provided that no suit should be brought thereon after one year from death. Owing to a misapprehension as to who the beneficiaries were, a suit at law on the policy was brought by a wrong party within the 12 months. The error was not discovered until a few days after the expiration of the 12 months, when a bill in equity was filed by the proper party plaintiff to compel delivery of the policy, which defendant had wrongfully refused to do, and to obtain a decree for the amount due thereon. *Held*, that plaintiff was not barred by the limitation indorsed on the policy.

7. APPEAL—REVERSAL.

Where the variance between the evidence and the bill filed in a United States district court is such that the latter requires amendment to support the decree, the circuit court of appeals will reverse it, and remand the case to the lower court for an amendment and further proceedings.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Action by William T. Phillips, administrator of Willis Arlena Pugh, deceased, against the Union Central Life Insurance Company. From a decree for plaintiff, defendant appeals. Reversed.

Phillips, as guardian of Ella L. Pugh, minor, brought suit at law for \$5,000 and damages and attorney's fees in the superior court of Bibb county, Ga., against the Union Central Life Insurance Company of Ohio, on a policy alleged to have been issued by that company on the life of Willis Arlena Pugh, an older sister, also a minor, for the benefit of, and payable to, the said Ella L. Pugh, the plaintiff; alleging that the policy had been executed and forwarded by the company to its manager, T. S. Lowry, Macon, Ga., about the 1st day of June, 1895, and that said Lowry thereupon became the agent of the assured for the delivery of said policy, and the said Lowry undertook and agreed as such to deliver, but had refused to deliver it; that the assured died on the 12th day of said month of June. Plaintiff also alleged demand for the policy and for payment, and due proof of claim and death, and that payment had been refused; giving notice to defendant to produce application and policy of insurance sued on, and praying for judgment. There was exhibited to the petition the receipt of Lowry, manager, to W. T. Phillips, of May 8, 1895, for \$36.95, and for note for \$100, being the first annual premium, and embodying agreement "that said Willis Arlena Pugh is to be insured from date of this receipt in accordance with the provisions, conditions, and stipulations of the policies of said company. If, however, the application shall be declined by the company, this agreement to be null and void, and the amount returned to said Phillips by me on surrender of receipt." Defendant removed the cause into said United States circuit court, and therein appeared and pleaded, denying all the allegations in plaintiff's petition except paragraphs 2, 12, and 16; among the paragraphs emphatically denied being paragraph 14, which expressly alleged that the application and policy were for the benefit of, and payable to, said Ella L. Pugh.

The case was called for trial on the 15th of December, 1896, a year and a half after the death of the assured, and defendant's attorneys handed a policy to plaintiff's attorneys in response to notices given in petition and otherwise,

accompanying the said policy with written and sworn response of John M. Patterson, president of defendant, showing the policy furnished to be the only one ever executed by defendant on life of the deceased. Plaintiff's attorneys, upon discovering the policy was not payable to Ella L. Pugh, but, in case of death of said Willis A. Pugh, to her executors, administrators, or assigns, moved to amend the suit at law by making it a suit in favor of Phillips as administrator of Willis A. Pugh, deceased, on a policy payable to such administrator, instead of a suit, as it then stood, in favor of Phillips as guardian of his minor ward, Ella L. Pugh, on a policy payable to her; the plaintiff incorporating in his motion allegations to the effect that defendant had refused to allow him to see the application or policy, and had concealed the terms, conditions, and provisions of the same, and that it then for the first time came to his knowledge that the same was payable to the legal representative of deceased. The court refused to allow the amendment, but by a separate order, on motion of plaintiff's counsel, ordered that plaintiff be allowed "thirty days in which to file a bill on the equity side of the court, and in default thereof said case stand dismissed."

On the 4th of January, 1897, Phillips, the same natural person, but as administrator of Willis A. Pugh, the deceased, and not as guardian of Ella L. Pugh, his minor ward in life, nor as plaintiff in the suit at law, filed a bill in the same court against the same defendant in aid of the common-law suit, under order of the judge at chambers, granted on that day, in which order the judge required the defendant to show cause why the common-law action should not be enjoined. Complainant alleged in his bill substantially what the plaintiff did in the common-law petition, expressly alleging in paragraph 8 that said Lowry, manager, after receiving said policy, held the same as agent of orator, and alleging, additionally, that said Lowry, as manager, on the 3d of June, 1895, after receiving said policy, "wrote and mailed to orator, at Delight, Twiggs county, Ga., a postal notifying your orator that said policy had been received by him 'O. K.,' and that he would shortly come down and deliver same," which postal was duly received at Delight post office on June 5, 1895, and that before he went to Twiggs county, and turned over said policy to orator or Willis Arlena, but while he still held the same as agent of Willis Arlena, to wit, on the 11th of June, 1895, the said Willis Arlena died. The complainant also charged fraud on the part of defendant, its agents and attorneys, in failing and refusing to deliver and exhibit the policy or copy thereof, and in repossessing itself of the same, and that orator was illiterate, and could not read, and believed the application was made by Willis Arlena for a policy to be payable to her sister Ella Louise Pugh, minor ward of orator, and that said policy had been so issued, and did not discover otherwise until said policy and application were produced under notice in court in the common-law suit on the 15th of December, 1896; that he had, under such impression that the policy was payable to said Ella Louise, made proof of death, and demand of payment, and brought the said suit as her guardian, in Bibb superior court, to recover the amount due on said policy. Complainant also charged that defendant refused to allow his counsel to inspect said policy, or give a copy thereof, to prevent proper suit being brought within one year after death, and thus invoke the one-year clause to defeat said suit. He prayed injunction against common-law suit, delivery of policy, recovery of the money, and for damages, and for attorney's fees, and for general relief.

Defendant demurred to the bill as follows: "(1) No jurisdiction; (2) no equity; (3) not maintainable in aid of the cause therein referred to, or as ancillary thereto, or as supplemental thereto; (4) not maintainable as an original bill, or as a bill in the nature of an original bill, or bill not original; (5) because under averments and exhibits not maintainable in cause or court in aid of suit, complainant not being party to suit, and the cause of action in bill not being same cause of action in suit, and right of recovery in bill not being same right of recovery in suit; (6) because complainant (as administrator of deceased) had never made proof of death, proof of claim, or demand for payment; (7) because it appeared from the terms of the contract sued on and exhibited that the time within which suit could be brought and maintained thereon, either in law or in equity, had expired before the filing of the bill; (8) because complainant not entitled to any relief prayed."

Defendant filed an answer for cause, as required by the order of the judge, denying all the material allegations of the bill, including the averments of fraud, and pleading the one-year clause, and complainant and defendant supported bill and answer by affidavits.

The court heard the demurrer and rule to show cause at the same time, and on the 29th of April, 1897, overruled the demurrer, and refused the injunction; the defendant filing, and having the court to note, exceptions to the order overruling said demurrer.

The respondent duly filed its answer June 5, 1897, denying all the material allegations in the bill, including those of fraud; and also, in denying the delivery of the policy, alleged that the same was "forwarded to said Lowry upon condition that he would visit the said Willis Arlena Pugh at her residence, and after enabling himself to do so, by acquiring all necessary and proper information, answer in writing certain questions hereafter given in the opinion; that in forwarding said policy to the said Lowry the same was accompanied with this form, and the said Lowry was instructed and required before delivering it to visit the residence of the said Willis Arlena, and to fully answer in writing the said questions; that the said Lowry had no instructions or authority to otherwise deliver the same, and he never made said visit or answered said questions, and was never in a position to act for respondent in delivering said policy; that he received the same as agent of this respondent; that he so held the same as agent of this respondent until as such agent he returned the same to this respondent; that no contract of insurance ever existed between respondent and the said Willis Arlena, except the conditional contract set forth in said receipt; that respondent never approved said application, and never delivered said policy, and never authorized it to be delivered, except upon the conditions stated; that at the time said Lowry wrote the postal card he assumed that there would be no difficulty in his making the necessary written statement, as required of him by the company, upon his visit to the residence of the said Willis Arlena, and fully expected when he made said visit to complete the said examination and answer said questions in writing as required, and then to deliver the said policy; that before he made said visit or statement the said Willis Arlena died, leaving the said contract of insurance incomplete, and not binding upon respondent." Respondent further alleges that until the motion to amend the common-law suit was made it never knew or had any notice that said Phillips was guardian or ex officio administrator of said Willis Arlena, or that there was any guardian of the said Willis Arlena, or any administrator of her estate. This respondent, having completed no contract of insurance with the said deceased, owed her administrator or heirs or creditors no duty in relation to any policy, and did not feel called upon to ascertain whether her estate was represented, or whether, if so, her administrator had any claim upon this respondent, and this respondent did not see proper to invite suit from any quarter upon a claim that did not legally or morally exist, and, unless such course was a fraud, respondent has been guilty of no fraud whatever; that all proceedings, correspondence, claims, and demands upon the part of Phillips and his attorneys had been by him and them in right of said Phillips as guardian of the said Ella Louise Pugh. Respondent also alleges in said answer that the failure of complainant to bring suit as administrator of deceased within one year from the death of the said Willis was no fault of respondent; that said bill was filed long after the said period had elapsed, and that the act of the said complainant in trying to connect the same with the suit at law was a mere device on his part to avoid the one-year stipulation in said policy; that, if said policy ever became binding upon respondent, the same limitation became binding on the deceased, and was in full force and effect, and said administrator on this account had no right of action against respondent. Respondent alleged tender of money and interest paid on premium, and also the note, and also alleged continuous tender of both, averring deposit of the same with the clerk.

On the hearing the following decree was rendered:

"This cause coming on to be heard at the present term, to wit, on the 3d day of January, 1899, on the bill and answer and proofs in the case, and was argued by counsel; and it appearing to the court that the plaintiff's intestate made a proposal in writing for insurance, which contains all the necessary

terms of a valid contract for a policy, and that the defendants accepted this proposal; that this acceptance made a legal contract between the parties which it was the duty of the court to order to be specifically performed; that as equity does complete justice, and if said policy had been delivered in pursuance of the contract the plaintiff would then have had a complete cause of action on the common-law side of the court, and would have been entitled to recover the amount of said policy, and as equity would decree to be done that which ought to have been done: Thereupon it is ordered, adjudged, and decreed that the said agreement entered into between the plaintiff's intestate and the defendant, set forth in the bill of complaint and proofs in this case, be specifically performed. It is further ordered, adjudged, and decreed that the plaintiff recover of the defendant the sum of four thousand and nine hundred dollars as and for the principal debt and her damage in this behalf sustained, a deduction having been made for the agreed amount of said policy of one hundred dollars, the unpaid premium; that in addition to said principal sum, that the plaintiff also recover the further sum of eleven hundred and sixty-two $\frac{88}{100}$ dollars, the same being the interest upon said unpaid principal at the rate of seven per cent. per annum, the same being the legal rate of interest from the 13th day of October, 1895, to the present date; and the further sum of ——— dollars for his costs in this behalf sustained.

"Open Court, March 6, 1899.

Emory Speer, Judge."

With the decree Judge Speer filed a written opinion, which is found in the transcript, and is reported in 101 Fed. 33.

Du Pont Guerry and Robert Ramsey, for appellant.

Washington Dessau, Isaac Hardeman, C. A. Turner, B. M. Davis, and N. E. Harris, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge, after stating the facts, delivered the opinion of the court.

The ruling of the circuit court in the action at law refusing the amendments offered has been much discussed, but, as the ruling was not brought before us by a writ of error, we are very clear that the ruling complained of is not subject to review, and we only remark that the power of the court with regard to amendments in an action at law is very broad, under section 5106, Code Ga., and section 954, Rev. St. U. S., and that it is generally settled that all matters of amendments to the pleadings, particularly including trial amendments, are within the discretion of the trial court, and its action allowing or refusing amendments is not reviewable on writ of error. The bill in this case cannot be sustained as ancillary to the suit at law, because the parties are not the same, the subject-matter is not the same, and as to all the matters stated in the bill the plaintiff has an adequate remedy at law. As an original bill it is demurrable for want of equity, the complainant on the facts stated having a complete and adequate remedy at law. If the contract of insurance was complete, and the policy made out and delivered, though afterwards withdrawn and retained by the insurance company, it could have been pleaded and proven without difficulty or obstruction in an action at law. "A court of equity has no jurisdiction of a suit on a bond which, it is alleged, was, through the fraud of a person not a party to the suit, delivered up to be canceled, but which it was claimed was still in force, where no discovery was sought, and where the bill furnished a substantial copy of the bond. * * *

The bill cannot be sustained on the ground of discovery, for discovery

is expressly waived, nor on the ground of account, for the complainant states with precision the amount he claims, and, if anything is to be added by way of interest or expenses, that can be ascertained as well in a court of law as of equity. Does the fact that the bond is not in the possession of complainant, but that its possession has been obtained by the fraud of one of the obligors, give a court of equity jurisdiction? It does not, if, notwithstanding these facts, there still remains to complainant a plain, adequate, and complete remedy at law. These circumstances do not, either in stating the case by pleading or in proving it by evidence, in a court at law, present any obstacle to a complete and adequate remedy. When a party pleads a deed or claim, or justifies under it, he must, as a general rule, make proof of it. But there are exceptions to this rule, among which is the case where the deed is lost or destroyed, or is in the possession of the opposite party. These circumstances dispense with the necessity of proof. Steph. Pl. 439-441. In proving the averments of the declaration, when the instrument sued on was lost or in possession of opposite party, there would be no obstacle in a court of law. Even where a written instrument which is required in evidence is in the possession of a third person, yet, if there is a privity between such person and the party, a notice to the party is sufficient to let in evidence of its contents. And in case the other party refuses to produce an original deed or agreement which is in his possession, and which he has had notice to produce, secondary evidence of the contents will be received without proof of the execution of the original. 1 Phil. Ev. 440, 452. This is substantially the rule enacted by the Code of Georgia, without regard to the means by which the paper got into the possession of the opposite party. See Code, §§ 3508-3510. * * * The rule to govern such cases is laid down with great precision and clearness by Mr. Justice Campbell in the case of *Hipp v. Babin*, 19 How. 271, 15 L. Ed. 633. The result of the argument is that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment, which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." *Insurance Co. v. Guerard*, 3 Woods, 427, 430, 432, Fed. Cas. No. 5,461.

As the case is presented here, however, it clearly appears that while the preliminary contract for insurance was entered into, and the first premium paid, the policy was not delivered; thus presenting a case where the complainant may invoke the aid of a court of equity to compel a specific performance of the contract. "It has been objected that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted. But it by no means follows from this that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only, remedy would have been in that court to enforce a specific performance, and compel the company to issue the policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt a count could have been framed upon the agreement to insure so as to have maintained the action at

law. But the present proceeding would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and, being properly in that court after the loss happened, it is, according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand. Such relief was given in the case of *Motteux v. Assurance Co.*, 1 Atk. 545, and in *Perkins v. Insurance Co.*, 4 Cow. 646. See, also, *Bell v. Holford*, 1 Duer, 66; *Shelton v. Westervelt*, Id. 110; *Cooke v. Cooke*, 2 Phil. 583." *Tayloe v. Insurance Co.*, 9 How. 390, 404, 13 L. Ed. 187.

The case shows that on March 30, 1895, Miss Willis Arlena Pugh made application to the Union Central Life Insurance Company for insurance on her own life, using therefor the blanks of the company, and answering in full all questions therein propounded. The eighth answer is as follows: "Amount of policy, \$5,000; kind of policy, 20 paymt. option; premium, how payable, A." On the 7th of May following she was examined by a medical examiner of the company, and was by him recommended on that day for insurance in the company. On the 8th of May following her grandfather and guardian, the present complainant, paid a part of the premium to the company's general agent and department manager, taking receipt therefor, and giving a note for the balance due. The receipt given is as follows:

"Union Central Life Insurance Company, Cincinnati, Ohio.

"Macon, Ga., May 8, 1895.

"Premium, \$136.95.

"Insurance, \$5,000.

"Received of W. T. Phillips, thirty-six $\frac{95}{100}$ and note for one hundred dollars, being first annual premium on the application for a policy of insurance in the Union Central Life Insurance Company of Cincinnati, Ohio, for 5,000 dollars on the life of Willis Ilena Pugh. It is hereby understood and agreed that the said Willis Ilena Pugh is to be insured from the date of this receipt, in accordance with all the provisions, conditions, and stipulations of the policies of said company, provided said application shall be approved and accepted by said company. If, however, the application shall be declined by the company, this agreement to be null and void, and the amount (receipt whereof is herein acknowledged) is to be returned to said W. T. Phillips by me on surrender of this receipt.

T. S. Lowry, Mgr."

In accordance with the application, a written policy was prepared by the insurance company, and forwarded to the general manager, accompanied by a blank as follows:

"The Union Central Life Insurance Company—Agent's Statement—
Woman's Life.

"Submitted with Application on Life of Willis A. Pugh. Residence: Delight, Ga. No. 130,501. T. S. Lowry, Agt.

"Note. All applications on the lives of women must be submitted to the home office, with a copy of this form properly filled in.

"See rules with regard to applications of women in rate book.

"(1) Have you personally seen the applicant at her own residence?

"(2) Are you personally acquainted with her? If so, how long have you known her?

"(3) Why is she applying for life insurance? Was it suggested to her by you? If not, how was the insurance brought about?

"(4) If married, is her husband insured in this company, and, if so, for what amount? If he is not insured, why not?

"(5) Does the applicant reside with her parents or other member of her family?

"(6) State applicant's occupation in full.

"(7) If applicant is a widow, state number of children living, if any, and age of each."

"(9) If beneficiary is other than child, for what purpose is the insurance applied for?

"(10) What is the age of the beneficiary proposed, and is he dependent on the applicant for support? Give full particulars.

"(11) Is the applicant directly or indirectly engaged or in any way connected with the manufacture or sale of intoxicating liquors?

"(12) Does she now reside in a house where such trade is carried on?

"(13) Does the applicant propose to pay the premiums on the policy applied for out of her own means? If not, by whom are the premiums to be paid?

"[Signed]

"Approved, _____, General Agent.

"Date, _____, 18—."

_____, Agent.

The general manager testifies that he also received a letter with the policy, directing him to deliver the policy only after he had followed the instructions of the company. This letter is lost. It gave him instructions to deliver the policy only after he had obtained satisfactory information that would enable him to answer the questions satisfactorily. Further, he testifies as follows:

"Q. I will get you to state whether you had in this particular instance any express authority to deliver this policy. A. No, sir; I had express authority not to deliver it,—instructions not to deliver it until I had seen the applicant at her home, and was enabled to answer the questions satisfactorily."

The material questions propounded to the manager in the blank aforesaid are all substantially answered by the applicant in her application. The information sufficient to enable the manager to make satisfactory answers had apparently been already obtained by him, for on June 3d, 25 days after the payment of the premium, he sent to Phillips, Miss Pugh's guardian, a postal card with this message: "Policy came O. K. I will be down there shortly, and deliver it. Yours, sincerely, T. S. Lowry, Department Manager, Macon, Ga." Before the manager made the proposed visit, and before the policy was delivered to the assured, or any one for her, Miss Pugh died, on the 11th of June, 1895; whereupon the manager returned the policy to the home office of the company. Thereafter the company neglected and refused to deliver the policy, concealed, or at least for over one year kept the complainant in ignorance of the terms of, the same, and, although furnished with proofs of death of the assured, refused to pay the loss. These facts and circumstances present a case of equitable cognizance, and we are of opinion, under the evidence in the record, a case for equitable relief.

The appellant contends that there was no contract,—no meeting of minds,—and, if there was a contract, the condition indorsed on the undelivered policy, and, in substance, generally found in life insurance policies, to wit, "No suit to recover under this policy shall be brought after one year from the death of the insured," bars a suit in equity as well as an action at law.

In regard to these questions we concur with the learned judge in the court below, who found and held as follows:

"Now, it appears in the testimony that the grandfather of Willis A. Pugh, who had represented her in the negotiations with the defendant company, wished that the policy should be made payable, not to the heirs and administrators of the applicant, but to her younger sister, and he was of the opinion that it was issued in that form until it was produced in court. It now turns out that it was made payable to her legal representatives. This was a variance between the terms of insurance as proposed by Mr. Phillips and as they were expressed in the policy, and it is insisted, therefore, that the minds of the insured and insurer never met upon this contract of insurance, and it is therefore no contract. While it may be true that Willis A. Pugh might have had the terms of the policy corrected in accordance with her wishes if she had lived, yet, having died, it is, in my opinion, not competent for the insurance company to take advantage of its own mistake. The contract was to insure her life, and that contract was of force, and a court of equity, under the circumstances, will enforce it. It is, moreover, true that the written application which Willis A. Pugh signed requested the policy to be made out as it was drawn, and the verbal understandings with her grandfather and the agent of the insurance company anterior to this written application, and the policy drawn pursuant thereto, cannot alter or vary it so as to avoid the liability of the defendant company. * * * Nor will the defense of the statute of limitation avail the defendant company. Under a misapprehension as to the beneficiary of the policy, suit was brought thereon within the 12-months period by the guardian of the younger sister. The suit was erroneously brought, for the terms of the application and the policy place the title to its proceeds in the legal representatives of the deceased. A few days after the expiration of the 12 months this bill was filed by the proper party plaintiff to compel the defendant company to deliver the policy, which it had refused to do, and also sought a decree for the amount due thereon. This being true, I think it would be unconscionable to allow the company to take advantage of its own mistake. It was, as we have seen, a completed contract, and, although death had intervened before the actual delivery of the policy, it was the plain duty of the company to deliver the policy to the legal representative of Miss Pugh. Instead of doing this, it took the policy out of the state. Thus deprived of the opportunity to correct their mistake by an inspection of the policy, the legal representative of Miss Pugh technically fell under the bar of the statute, but a court of equity, under the circumstances, will not hold him barred. The company is estopped from pleading the statute."

In *Neale v. Neale*, 9 Wall. 1, 19 L. Ed. 590, it was decided that:

"In the absence of obligatory rules of court to the contrary, a court of equity, after a cause has been heard and a case for relief made out, but not the case disclosed by the bill, has power to allow an amendment of the pleadings on terms that the party not in fault has no reasonable ground to object to. And this amendment will be allowed on a bill for specific performance where the subject-matter and general purpose of both bills is the same, and the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision, and are supported by proofs, taken under the original bill, which entitle the complainants to the relief which they seek." "When the facts of the case show the plaintiff to have an equitable title to relief, this court, while it may be unable to afford such relief upon the case made by the bill, has in several instances asserted its power to remand the case to the court below for an amendment of the pleadings and such further proceedings as may be consonant with justice. In *Crocket v. Lee*, 7 Wheat. 522, 5 L. Ed. 513, plaintiff filed a bill to obtain a conveyance of land covered by a certificate of settlement right, the legal title to which was in the defendant, and he was decreed by the court below, in conformity with another bill filed by the defendant, to convey to the defendant the land covered by his patent. It was contended in the supreme court that the defendant ought not to be allowed to recover on his cross bill by reason of his failure to make the proper averments with respect

to the invalidity of the plaintiff's title. The court adopted the view of the appellant in this particular, but remanded the case, with directions to permit the parties to amend their pleadings. In *Watts v. Waddle*, 6 Pet. 339, 8 L. Ed. 437, this court affirmed the decree of the circuit court refusing the specific execution of a contract; but, after reviewing the evidence in detail, it further ordered that, to give relief for the rents and profits of the land in controversy, the decree of the circuit court dismissing the bill should be opened, and the case remanded for further proceedings in conformity with law and justice. In delivering the opinion of the court, Mr. Justice McLean observed that 'a new ground of relief has been assumed in the argument here that was not made in the circuit court, which is that, although this court should be of the opinion that a specific execution of the contract ought not to be decreed, still the complainants are entitled to a decree for the rents and profits of the land while it was in the possession of the defendants. * * * There is no rule of court or principle of law which prevents the complainants from assuming a ground in this court which was not suggested in the court below, but such a course may be productive of much inconvenience and of some expense.' So, in *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, where possession had been taken of land, and improvements made, under an imperfect agreement for purchase, though the court would not grant relief upon the ground of part performance, yet the bill was maintained for the purpose of affording the party reasonable compensation for beneficial and lasting improvements. * * * Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made. *The Anne v. U. S.*, 7 Cranch, 570, 3 L. Ed. 442." *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 413, 415, 12 Sup. Ct. 188, 35 L. Ed. 1055.

In the present instance the variance between the case made by the evidence and that by the bill is such that the latter requires amendment to support the decree, and, under the controlling authorities cited, we deem it our duty to take such action as will permit such amendments as the equity rules warrant and as counsel may advise, upon such terms as may be just. The decree of the circuit court is reversed, and the cause is remanded, with instructions to therein proceed in accordance with the views herein expressed, and otherwise as equity requires.

WILKINSON v. WASHINGTON TRUST CO. OF CITY OF NEW YORK et al.

(Circuit Court of Appeals, Eighth Circuit. May 8, 1900.)

No. 1,311.

1. RECEIVERS—REPORTS—ATTORNEY'S FEES.

A receiver is not entitled to an allowance for disbursements to attorneys for making reports to the court, involving nothing more than a simple narrative of his acts, and an account of his receipts and disbursements.

2. SAME—COMPENSATION—DISCRETION OF CHANCELLOR.

A decree of foreclosure against a water and light company allowed the receiver in the suit a certain sum, and appointed him special master to make the foreclosure sale and carry out the decree. Eight months thereafter he filed his reports as receiver and as master in chancery,

and in the latter capacity asked an allowance of \$2,500 for his services, but made no request for further compensation as receiver. Thereupon a decree was entered approving his report as master, allowing him the compensation asked, and providing that he turn over to himself, as receiver, the amount remaining in his hands, to meet such liabilities as might be established against the receiver. After four years, upon being directed to file a duplicate of his final account as receiver, he asked an allowance of \$2,500 additional compensation, which was refused. *Held*, the discretion of the chancellor would not be reviewed, no abuse being shown.

3. SAME—APPEAL WITHOUT MERIT—INTEREST—PENALTY.

A receiver conceded in his final report that he held \$6,676.85 above his demands for reimbursement for fees paid to his attorneys, which had been withheld from the beneficiaries of the trust for about four years. When called upon for an account and payment, he sought to obtain an allowance for attorney's fees and additional compensation in the sum of \$3,250, and, upon the same being disallowed, took an appeal, and continued to hold the entire sum in his hands. *Held*, that he should be charged 6 per cent. interest upon the sum in his hands from the date of the order appealed from, and 10 per cent. upon the same amount as damages for the delay caused by the appeal.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

J. M. Moore and W. B. Smith, for appellant.

F. G. Bridges and W. T. Wooldridge, for appellees.

Before SANBORN and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal of Charles B. Wilkinson, the receiver of the property of the Pine Bluff Water & Light Company, from an order of the circuit court which refused to allow him \$2,500 additional compensation for his services as receiver subsequent to a decree of foreclosure rendered on January 23, 1893, and which also refused to award him \$750 in payment of the services of attorneys at law whom he had employed to prepare and present his reports. In a suit brought by the Washington Trust Company of the City of New York, the trustee for the mortgage bondholders, against the mortgagor, the Pine Bluff Water & Light Company, the appellant, Wilkinson, was appointed receiver of the property of the water and light company on October 24, 1891; and the works of that company were operated under his direction as receiver from that time until some time in September, 1893, when they were delivered to the purchaser under a decree of foreclosure which had been rendered in the case on January 25, 1893. The decree of foreclosure allowed to the appellant, Wilkinson, \$6,500 as compensation for his services as receiver, and appointed him special master to make the foreclosure sale and to carry out the provisions of the decree. He sold the property under the decree for \$240,000 on April 5, 1893. On December 15, 1894, he filed his report as receiver, and on the same day his separate report as special master. In the reports filed at this time he did not ask for any further compensation as receiver, nor for the payment for services of attorneys in preparing these two reports, although he now complains that he has not been allowed \$2,500 additional compensation for his services as receiver between January 25, 1893, and September, 1893, and that he has not been allowed \$500 which he paid to Mr. H. D. Wood for preparing and

presenting these reports. When these reports were presented they disclosed the facts that he had paid his attorneys \$1,441.50 for legal services and expenses; that he had paid to the solicitors for the complainant, for their services and expenses, \$6,500; and that he had paid to himself, as compensation for his services as receiver, \$6,500; and in his report as master he prayed that he might be allowed \$2,500 as compensation for his services as special master, and that he might "be permitted to pay to himself, as receiver, the balance in cash remaining in his hands, to meet such liabilities as may be established against the receiver, and to be subject to the order of the court herein." Thereupon the solicitors for the complainant stipulated that a decree might be entered, approving this report, and allowing the appellant \$2,500 for his services as special master, and that upon turning over to himself, as receiver, the sum of \$11,000 then in his hands as master, for the purposes mentioned in his report, he might be discharged as special master. Upon that stipulation an order to that effect was entered, and his reports were confirmed. After the appellant, as master, paid to himself, as receiver, this \$11,000 in 1894, he seems to have had no more trouble with his accounts until on November 5, 1898, the court ordered him to file a duplicate of his final account as receiver within 15 days from that date. He did not comply with this order within the time there specified, but on January 23, 1899, he filed a final report, in which he credited himself with \$250 paid H. D. Wood, attorney, for legal services in preparing, filing, and obtaining confirmation of his report as special master, with \$250 paid to Mr. Wood for legal services in preparing, filing, and obtaining confirmation of his report of December 15, 1894, as receiver, and with \$250 paid J. M. Moore and W. B. Smith for legal services in preparing, filing, and obtaining confirmation of his final report as receiver; and after allowing himself these credits he disclosed the fact that he still had in his hands a balance of \$6,676.85, out of which he prayed the court to allow him \$2,500 additional compensation. The court refused to make the allowance, struck from his credits the three items of \$250 for legal services preparing his reports, and adjudged that he should pay over the sum of \$7,176.85 to the successors in interest of the bondholders.

There was no error in the order of the court striking out the \$750 paid by the appellant for the services of attorneys in preparing and presenting his reports as receiver and master. It is one of the indispensable personal duties of a receiver and of a master to make a report of his acts, and of his receipts and disbursements, to the court which appoints him. If he is incapable of keeping accounts and of reporting his receipts and disbursements, he ought not to accept the appointment. But if he does accept it, and his reports, like those in hand, involve nothing more than a simple narrative of his acts, and an account of his receipts and disbursements, he cannot be permitted to receive compensation for the discharge of these, his personal duties as receiver, and to charge the trust with moneys expended by him to hire others to discharge them for him. Such allowances would pay twice for the same services. In ordinary cases the making and presentation to the court of reports of the acts, receipts, and disbursements of receivers and masters is one of their indispensable duties. The com-

pensation allowed them as receivers or masters pays them for this service, and they cannot be allowed disbursements which they may have made to hire attorneys or others to discharge these duties for them, because such allowances would effect two payments for the same service, and because *cestuis que trustent* are always entitled to a report of the doings of their trustee, without expense or charge to them. *Gunn v. Ewan*, 35 O. C. A. 213, 214, 93 Fed. 80, 81.

Nor was there any substantial ground for a challenge of the order of the court below refusing to allow the appellant \$2,500 additional compensation as receiver. It is true that from the entry of the decree of foreclosure on January 25, 1893, until September, 1893, the works of the water and light company were operated under the direction of the appellant as receiver. But it is equally true that they were actually operated by one of his employes, to whom the trust estate paid \$250 per month for his services, that the court had allowed to the appellant \$6,500 for his services as receiver, and that it allowed him \$2,500 for his services as special master, during these very eight months between the date of the decree and the delivery of the property to the purchaser. The only question presented by the appeal here is whether it was unreasonable for the court below to refuse to allow him an additional compensation of \$2,500. We are of the opinion that the action of the circuit court in the premises was just and right, and, even if the issue were doubtful, we should not disturb or reverse its action unless the record disclosed a clear mistake of fact, or a plain error of law. A court of equity has the power to fix the compensation of the receiver it appoints. He is its creature,—one of the means by which it exercises its power. In the administration of a trust by a court through its receiver, the chancellor, who appoints, supervises and directs his action, necessarily knows, better than any record can teach an appellate court, what his appointee has done, and what is a just and reasonable compensation for his services. His allowances of this character ought to be, and are, largely discretionary with the chancellor, and they should not be disturbed unless there has been a manifest disregard of right and reason. *Trust Co. v. McClure*, 49 U. S. App. 43, 45, 24 C. C. A. 64, 65, 78 Fed. 209, 210; *Trustees v. Greenough*, 105 U. S. 527, 537, 26 L. Ed. 1157; *Stuart v. Boulware*, 133 U. S. 78, 82, 10 Sup. Ct. 242, 33 L. Ed. 568.

The principles and rules of equity to which we have adverted have long been settled, and have been uniformly applied to cases of this character for centuries. In view of this fact, the course which this receiver has pursued is unwarranted and reprehensible. He conceded in his final report that he has had in his possession a balance of \$6,676.85, which belonged to the beneficiaries of the trust he was administering ever since 1894. On their petition for an account and for the payment of the balance to them, the court ordered him to make a final report in 1898. In January, 1899, he made his report, in which he sought to obtain from the trust \$3,250 more than he was entitled to receive. The court which appointed him, and which had the right to fix his compensation, refused to allow this \$3,250, and ordered him to pay to the beneficiaries \$7,176.85. He has paid nothing to the beneficiaries,—not even the \$6,676.85 which he concedes to be due

to them,—but has presented an appeal without merit to this court, and has thus delayed the payment of the balance he owed for more than a year. Courts and their officers should be active and prompt to pay over to beneficiaries trust moneys in their control, and receivers must not be permitted to prolong their possession of property by frivolous appeals or baseless claims. The order and decree below are affirmed, with costs, and it is further ordered that the court below require the appellant to pay to Messrs. Bridges and Wooldridge, solicitors for the Equitable Securities Company, and James M. Gifford and Charles N. Fowler, receivers of the Equitable Mortgage Company, the beneficiaries of the trust named in the order and decree, in addition to the sum of \$7,176.85 named in said order, interest at 6 per cent. per annum on \$7,176.85 from April 5, 1899, until said sum and interest is paid, and 10 per cent. of said \$7,176.85 damages for the delay caused by this appeal.

GROECK et al. v. SOUTHERN PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 552.

1. PUBLIC LANDS—GRANT TO RAILROAD—SELECTION BY RAILROAD COMPANY—APPROVAL BY SECRETARY OF INTERIOR.

Act July 27, 1866 (14 Stat. 294) § 3, granting lands in aid of the Southern Pacific Railroad Company, and providing that the lands shall be selected by the company "under the direction of the secretary of the interior," does not require that the selection shall be approved by the secretary.

2. SAME—COMPLIANCE WITH RULES OF INTERIOR DEPARTMENT.

The selection of lands by the railroad company having been made in the form, and accompanied by the certificates, affidavits, costs, and fees, required by law and the rules prescribed by the secretary of the interior, and also in compliance with the general circular of instructions issued by the secretary of the interior, prescribing the form and procedure for the selection of lands by railroad companies within the indemnity limits, it was made "under the direction of the secretary of the interior," within Act July 27, 1866 (14 Stat. 294) § 3.

3. SAME—FILING MAP OF WHOLE ROUTE.

Since Act July 27, 1866 (14 Stat. 294), conferred upon the Southern Pacific Railroad Company a present grant of land incapable of identification at the date thereof, but entitled the railroad company to select the granted lands opposite each 25 miles of road as the same was constructed and approved in the manner required by the act, the right of the company to select lands was not dependent upon its filing with the commissioner of the general land office a map of the definite location of every portion of the entire road, if the road was completed opposite the land selected.

Appeal from the Circuit Court of the United States for the Southern District of California.

Joseph H. Call, for appellants.

William Singer, Jr., for appellee.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. In this suit a decree was rendered in the circuit court in favor of the appellee, the Southern Pacific Railroad Company, upon a bill in which the said railroad company, as complainant, sought to establish a trust in, and to compel the conveyance of, 80 acres of land to which Otto Groeck had obtained a patent, which land, the bill alleged, had been granted by the United States in aid of the construction of the complainant's railroad. 93 Fed. 707. On a former appeal of the same case this court passed upon the principal questions which are involved. *Railroad Co. v. Groeck*, 31 C. C. A. 334, 87 Fed. 970. The case was then presented upon a plea to the bill. It now comes before the court upon issue joined upon an answer to the bill and a stipulated statement of the facts. Two questions in addition to those which were considered upon the former appeal are now presented: First, was it necessary that the selection of the indemnity land by the railroad company, including the land which is in controversy in this suit, should have been approved by the secretary of the interior? And, second, is the right of the railroad company to the land in controversy affected by the fact that no map of the definite location of a certain portion of the road was ever filed? Upon the first point it is urged by the appellant that an absolutely essential step to the acquisition of the indemnity land was the approval of the selection thereof by the secretary of the interior. The granting act does not, by its terms, require that the selection shall be approved by the secretary. The language of the act in that respect is that the indemnity land shall be selected by the company "under the direction of the secretary of the interior." Act July 27, 1866 (14 Stat. 294, § 3). It is urged that in this instance the selection was not made under the direction of the secretary of the interior, for the reason that that officer had approved the pre-emption entry of Groeck, to whom had been issued a patent for the land, and had denied the right of the appellee to select this tract of land, and that under the circumstances it was impossible that the selection could have been made under the secretary's direction. In the stipulation of the facts it is recited that the selection "was in the form, and accompanied by the certificates, affidavits, costs, and fees, required by law and the rules and regulations prescribed by the secretary of the interior and the commissioner of the general land office," and that the list was rejected "solely because of the pre-emption settlement, filing, entry, and patent of the defendant Groeck." It is stipulated, also, that the secretary of the interior had approved and issued a general circular of instructions relating to the adjustment of railroad land grants, prescribing the form and procedure for the selection by railroad companies of lands within the indemnity limits, and that the circular provided, among other things, that "the lists must be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office. When so examined and tested, and found correct in all respects, they will become final locations, and you will, on the payment of the requisite fees to the receiver, so certify." It is admitted that the railroad company complied with this circular in all respects. We entertain no doubt that the steps so taken entitled

the company to a patent. On the former consideration of this case, and upon the facts which now appear in the stipulation, we held that the pre-emption entry of Groeck was made upon land which had been reserved from settlement, and that it was therefore absolutely void, and that the railroad company was not, by its delay in building the road, barred from asserting its title to the land in question so long as the United States had declared no forfeiture of the grant on account of the delay, and had not offered the lands to others for entry under the general land laws. Considering the language of the grant, it must be held that indemnity lands are selected under the direction of the secretary of the interior whenever the grantee thereof complies with the directions which the secretary has published for the regulation of such selection. The secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed. Nor has the secretary in this instance made any regulation which has injuriously affected the right of the grantee. He had the power to prescribe in advance the method of making such selection, and, having prescribed it, and his directions having been followed, it cannot be said that the lands were not selected in the manner required by the granting act. That the secretary erroneously supposed that this land belonged to the defendant Groeck, and was not subject to selection as indemnity land under the grant, cannot affect the substantial rights of the grantee.

It is contended that the railroad company never acquired the right to select as indemnity land the tract in controversy, for the reason that it did not file a map of the definite location of its whole route. It is said that the right to make selection of indemnity lands did not accrue until the filing of such map of definite location. The statement of facts recites that the railroad company filed maps, in several sections, of the definite location of the whole road, excepting the portion thereof between Alcalde and Tres Pinos, and that the said maps were filed along the line which was shown on the general route map, and that that was the line upon which the road was constructed. In section 4 of the granting act of July 27, 1866 (14 Stat. 295), it is provided that when "it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situate opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid." By the granting act there was conferred upon the grantee a present grant of land, incapable of identification at the date thereof, but the title to which,

when identified, took effect by reason of the grant itself, which grant conferred the right to select the granted lands opposite each 25 miles of road as the same was constructed and approved in the manner required by the act. No question is made that the road opposite the land in controversy in this suit was so constructed, and that the map of the definite location of that portion of the road was filed, and that the said land was selected by the company. The right of the company to select the land in controversy was not made to depend upon its filing a map of the definite location of every portion of the road, or the construction of the entire road. In these respects the grant differs from that which was under consideration in the case of *Railroad Co. v. Herring*, 110 U. S. 27, 3 Sup. Ct. 485, 28 L. Ed. 56. In that case the grant was of "every alternate section of land designated by odd numbers for six sections in width on each side," to take effect "as soon as the road is completed." The lands were to be withdrawn only when the company had filed a map definitely showing its line. Concerning the question when the company's right to select indemnity lands attached, the court, construing the language of the granting acts, said:

"We are of opinion that no right of selection in any of these lands accrues until the entire line of the road to be built has been established by the company, and filed in the general land office at Washington, and that until then no duty devolves on the secretary to withdraw or withhold the land from sale or pre-emption. This is the necessary inference from the language both of the original grant of 1856 and the amendatory act of 1864."

But in the case now before the court the granting act, by its own terms, withdrew the land when the general route map was filed, as we held on the former appeal of this cause; and the indemnity lands were then withdrawn, as well as the primary lands. The joint resolution of June 28, 1870 (16 Stat. 382), authorized the construction of the road, "as near as may be," along the line of the general route so established, and directed the secretary "to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six." There is nothing in the provisions either of the granting act or the joint resolution to indicate that the right to select indemnity lands was dependent upon the completion of the whole line of the road. On the contrary, it is clear that the intention was that such selections might be made immediately upon the construction and acceptance of each 20-mile section. Both the primary lands and the lieu lands were to be patented as fast as the road was constructed and accepted, and the indemnity lands were selected. Congress subsequently affirmed this construction of the grant by declaring forfeited the grant of lands coterminous with the uncompleted section of the road, thereby confirming the grant of lands coterminous with the remaining sections of the road as it was completed. We find no error in the decree of the circuit court. The decree will be affirmed.

ALTSCHUL v. GITTINGS, Sheriff of Harney County.

(Circuit Court, D. Oregon. May 12, 1900.)

No. 2,236.

1. PUBLIC LANDS—CONSTRUCTION OF GRANT—IDENTIFICATION OF LANDS GRANTED.

A grant by congress to a state, to aid in the construction of a wagon road, of "alternate sections of the public lands, designated by odd numbers, three sections per mile, to be selected within six miles of said road," being of only one-half the odd-numbered sections within the designated limits, does not attach to any particular lands until the selections have been made, and approved by the land department, and until that time the lands granted are not taxable by the state.

2. SAME—CONTINGENT INTEREST OF GRANTEE BEFORE SELECTION—RIGHT TO SALE FOR TAXES.

Where a grant of lands has been made by congress, to be selected within certain limits from a larger quantity, until such selection has been made the grantee has such a contingent interest in all the lands subject to selection that it may maintain a suit in equity to enjoin an unauthorized sale thereof for taxes.

In Equity. Suit to enjoin sale of lands for taxes. On exceptions to bill.

Williams, Wood & Linthicum, for complainant.
Milton W. Smith, for defendant.

BELLINGER, District Judge. This is a suit to restrain the sale of land on which the defendant made a sheriff's assessment for the year 1893. The lands in controversy, with some slight exceptions, are within the limits of the grant made by the act of congress of July 5, 1866 (14 Stat. 89), to the state of Oregon to aid in the construction of a wagon road. The act provides "that there be, and hereby is, granted to the state of Oregon alternate sections of the public lands, designated by odd numbers, three sections per mile, to be selected within six miles of said road." A portion of the lands upon which this assessment was made are without the limits of this grant, and as to these lands the complainant claims no interest. The remainder of the lands which the defendant proposes to sell for a delinquent tax are lands which had not been selected at the date of the alleged assessment, and lands which had been selected by the agents of the company, but which, at the time of the assessment, were in contest on account of claims made by different persons under the land laws of the United States, which contests were existing at the date of presentation for filing of the selection lists; but none of the selections so made had been certified or approved by the secretary of the interior or by the commissioner of the general land office. The questions presented arise upon numerous exceptions to the bill of complaint, which have the effect of raising the question as to the sufficiency of the bill. In support of these exceptions it is contended that the grant in question was a present grant; that the right to the patent—the equitable title—had vested in the wagon-road company at the time the assessment in question was made. If this is true, then these lands were liable

to the tax levied upon the assessment complained of. A number of cases are cited in support of the contention that this grant is a present grant, and that the right of the company in and to the lands was fully vested when the assessment was made. Among the cases cited are the case of *U. S. v. Willamette Val. & O. M. Wagon-Road Co.* (C. C.) 55 Fed. 711, and *Id.* (D. C.) 42 Fed. 357, and the case of *Cahn v. Barnes* (C. C.) 5 Fed. 326. In the two former cases suits were brought to cancel patents which had been issued, and the defense was that of bona fide purchase for value. The case of *Cahn v. Barnes* was one of conflict between the claimants, respectively, under the swamp-land act and the wagon-road grant in question. All three of these cases relate to the same grant. In the case in 42 Fed. the court says:

"As soon as the line of the road was designated, the grant attached to the odd-numbered sections within the prescribed limits on either side of the said line, and took effect from the date thereof."

In support of this view the court cites the case of *Cahn v. Barnes*, supra, and the case of *Pengra v. Munz* (C. C.) 29 Fed. 830. In the case of *Cahn v. Barnes* the court says:

"The wagon-road grant was a grant in præsenti, also, of the odd sections for six miles on either side of the road wherever it might be located between the termini named, which, so soon as the line of the road was designated, attached to such sections within the prescribed limits on either side of said line, and took effect from the date thereof."

In the case of *Pengra v. Munz* the grant was of "the alternate sections of the public lands designated by odd numbers, for three sections in width on each side of said road, as the same may be located," while the grant of the *Willamette Val. & C. M. Wagon-Road Company*, under which the other cases arose, was a grant of three sections per mile merely. Between such grants there is a very obvious distinction, and yet the court in the cases cited treats both grants as grants of three sections per mile in width on each side of the proposed road. The grant in the case of the *Willamette Val. & C. M. Wagon-Road Company*, as in this, was not of the odd-numbered sections on either side of the line of road, but only of the alternate sections designated by odd numbers to the extent of three sections per mile, to be selected within six miles of said road; that is to say, the grant was of three sections per mile, instead of six. The difference is a vital one. If the grant had been of three sections per mile within the limits of six miles on either side of the road, it would have applied to all the odd-numbered sections. In such case the grant would become specific as to these sections upon the location and construction of the line of road. Nothing more would be necessary to identify the lands granted. In this case selections are necessary before the lands to which the grant attaches can be identified. Here the right conferred is to three sections of lands designated by odd numbers out of a total of twice that number, for each mile in length of road constructed. How can the assessor undertake to identify the particular sections inuring to the company under this grant until selections are made? Until such time the grant, as to the question presented, is precisely what

the grant is within indemnity limits as usually provided for in railroad grants. It is known that one-half of the odd-numbered sections are liable to be taken under the grant. But it is not known, and cannot be known, until selections are made, which of the odd-numbered sections are to make up the half to which the company is entitled; and it is immaterial that the company has selected these lands so long as these selections have not been approved by the land office. The approval and certification of the lands by the land department is a necessary preliminary to the identification of the lands taken. Without identification the grant cannot attach, and until it does attach there is no title that can be the subject of levy and sale, for taxes or otherwise.

It is argued, however, that if the lands which the sheriff threatens to sell do not belong to the company, it cannot be injured by the proposed sale. But the wagon-road company has an interest in all the odd-numbered sections within the prescribed limits, since its selections must be made from their number. There is a well-recognized distinction between the legal title to lands and an interest in such lands. What the company has is a contingent interest in the lands from which its selections are to be made; and the sale of these lands would operate to prejudice this interest, since, when selections are made, and the grant becomes in this way specific, the company is liable to be confronted with a tax title to these lands, or to some of them, and will therefore be exposed to the danger of a multiplicity of suits, with the consequent vexation and injury. The exceptions to the bill of complaint are overruled.

CHURCHILL et al. v. BUCK.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,295.

1. APPEAL—REVIEW—ACTION TRIED TO COURT.

On a writ of error to review a judgment at law in a case tried without a jury by stipulation, the correctness of special findings of fact made by the circuit court is not open to inquiry, but the appellate court is required to determine whether such findings are sufficient, under the pleadings, to support the judgment rendered.

2. PARTNERSHIP—DEATH OF PARTNER—RIGHT TO POSSESSION OF FIRM REAL ESTATE.

On the death of a partner, the right to possession of real estate owned by the firm vests in the survivor, and, on his death before the settlement of the partnership business, in his legal representatives; and until the business of the partnership has been settled up, and its debts paid, an administrator of the partner first deceased cannot maintain an action to recover possession of any portion of such real estate.

3. APPEAL—REVERSAL—DIRECTING JUDGMENT IN LOWER COURT.

Where the facts found by the trial court cover all the issues, and are adequate to support the judgment rendered in favor of the plaintiff, a new trial will not be awarded on reversal, but a judgment for defendant will be directed.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

On the 1st of March, 1898, the defendant in error (hereafter called "plaintiff") commenced an action in the United States circuit court for the Western division of the Eastern district of Arkansas against the plaintiffs in error (hereafter called "defendants") for an undivided one-half interest in the lands in controversy, situate in Desha county, Ark., alleging that said Thomas J. Martin died seized of the undivided one-half interest in said land as tenant in common and as partner with A. W. Blakemore, now deceased; that plaintiff was on the 23d of April, 1894, appointed administrator of the estate of said Martin by the probate court of Desha county, Ark.; that he had given bond and qualified as such, and had filed his inventory, showing that no asset of said Martin had come to his hands as such administrator; that large claims had been probated against said estate in Desha county (and he filed with said complaint copies of Martin's will, his letters of administration, his inventory, and the claims probated against his estate); that the defendant holds the land as receiver of said United States circuit court, and claims title by and through the said Thomas J. Martin, deceased, as tenant in common with said A. W. Blakemore, deceased, by virtue of a mortgage executed by Mrs. A. W. Blakemore, the heir at law of said Martin; that said United States circuit court gave the plaintiff permission to sue said receiver for said land; and that said receiver sold the same without right, and plaintiff is entitled to the immediate possession thereof.

On the 22d of June, 1898, the defendants answered and alleged that Thomas J. Martin, the testator, died at his home, in the county of Jefferson and state of Kentucky, on the 1st day of January, 1883; that his will was duly probated in said county and state on the 22d day of January, 1883; that a duly-authenticated copy of said will was admitted to probate and duly recorded at the May term, 1883, of the probate court of Watson division of Desha county, Ark.; that the fourth clause in said will provides that "in the division of my estate my daughter shall have the right, at her option, expressed within two years after my death, to take whatever interest I may own in the state of Arkansas, purchased of the estate of H. D. Newcomb, at the price it cost me"; that the property referred to in that clause of the will is the undivided one-half of the real estate described in the complaint; that by the fifth clause of said will the testator appointed his son, T. J. Martin, Jr., and A. W. Blakemore, the husband of his said daughter, executors, with full power to settle, compromise, and adjust indebtedness; to sell and dispose of property, and to make divisions among devisees, which executors entered upon the discharge of their duty, and continued to do so until the business of the estate was settled, partition made among the devisees, and they were discharged as such by the court of the domicile having jurisdiction in the premises; that the executors of said H. D. Newcomb, then deceased, having on the 1st day of February, 1878, sold, under power conferred in his last will, the entire real estate described in the complaint, to said Thomas J. Martin and A. W. Blakemore, to secure the purchase money thereof, the said Thomas J. Martin and his wife and A. W. Blakemore and his wife on the 8th of February, 1878, reconveyed the same to the said executors of H. D. Newcomb, by way of mortgage or trust to secure a part of the purchase money remaining unpaid, which mortgage was in full force and unpaid at the time of the death of the said T. J. Martin; that, under the provisions of the will of the said Thomas J. Martin, his daughter, Mrs. Annie M. Blakemore, and her husband, A. W. Blakemore, uniting with her for that purpose, elected to take as part of her share in the estate of her father, at the original cost to the estate, all his interest in the said property in Arkansas, bought of H. D. Newcomb's executor, above described, which election was reduced to writing by them, duly acknowledged, and recorded in the Watson division of the Desha county probate court, at its May term, 1883; that the said Annie M. Blakemore afterwards paid to the executors of H. D. Newcomb, deceased, her father's proportionate amount of the unpaid purchase money, and received from said executors, together with her said husband, who had paid his part thereof, a deed conveying to them, respectively, the entire property described above, which deed was duly executed, acknowledged, filed, and duly recorded in the Watson division of Desha county, Ark., on the 26th day of April, 1883; that the said Annie M. Blakemore paid to and settled with the executors of her father's estate the entire amount paid

by him for said interest, being an undivided one-half interest in the property described, whereby she became the owner in fee of the full equal, one undivided half interest in said land, her husband, the said A. W. Blakemore, owning the remaining undivided one-half, whereby she alleges that the right, title, and interest of the said Thomas J. Martin, his heirs, legal representatives, and devisees, were divested out of them, and they, and every of them, were without right to occupy or repossess the same. In the second paragraph of her answer she alleges that under the terms of her said father's will, and of her election and payment of the sum due, and of the conveyance by the executors of the said H. D. Newcomb, deceased, with the consent and concurrence of the executors of her father's will, which conveyance was, as stated, placed of record in the Watson district of Desha county in July, 1883, she became the owner in fee of the said undivided one-half interest of her father in the land sued for; that she remained in possession thereof, holding and claiming the same adversely against all parties, until the 9th day of April, 1890, when she, together with her husband, conveyed the same to David Houghton in trust to secure a loan of \$30,000 and interest thereon, which conveyance was duly executed by herself and her husband, and placed of record in the Watson district of Desha county, on the 9th of April, 1890; that the said Colonial & United States Mortgage Company loaned the said sum of \$30,000 to the said Annie M. Blakemore and A. W. Blakemore, her husband, on the faith and assurance that they were the owners in fee of said property; that they were in possession thereof, and had been since 1883, holding and claiming the same as their own, no one denying or contesting their right in the premises; that the loan was made in good faith, and the security accepted in good faith, upon the belief and assurance that they were the owners in fee thereof, and had the right to secure the same by said conveyance; that subsequently, the indebtedness becoming due and remaining unpaid, the Colonial & United States Mortgage Company and David Houghton, trustee, brought suit in the United States circuit court for the Western division of the Eastern district of Arkansas to foreclose their mortgage upon said property, at which time and in which suit the said Annie M. Blakemore and the children and heirs of A. W. Blakemore, who had died, and the administrator of his estate, and the plaintiffs herein, were made parties thereto, and required to answer, and in said cause such proceedings were had that in the month of February, 1898, a decree in their favor was pronounced, declaring a lien upon the said property for the indebtedness due as aforesaid, and providing that if not paid on or before the 1st day of April, 1898, Sam Churchill, as special master of said court, should advertise and sell the property at Dumas, Ark., on the 21st day of April, 1898, in satisfaction thereof, which was done, and the property sold by him to the defendant the Colonial & United States Mortgage Company; that said sale was reported and filed on the following day, and the sale confirmed, and said master directed to execute a deed of conveyance to said purchaser, which was done on that day, and the deed submitted, and approved by the court, and a certified copy of its approval attached thereto, whereby the said Colonial & United States Mortgage Company became the owner and entitled to retain possession thereof. The fourth paragraph in said answer is as follows: "The defendant states that the said Annie M. Blakemore and the parties claiming under her have been in peaceful and adverse occupancy and possession of the premises herein sued for for more than seven years next preceding the institution of the suit, claiming the same adversely to the interest of all other parties." The fifth paragraph is as follows: "The defendant states that neither the plaintiff, nor the party or parties under whom he claims, has or have been in possession or control of the property herein sued for at any time within seven years next preceding the institution of this suit." The sixth paragraph is as follows: "The defendants say that the plaintiff is not entitled to the possession of said premises, and has not been, nor has any one under whom he claims been, in possession thereof at any time since the year 1883, and therefore this suit is barred." The third paragraph sets up an estoppel, and the seventh paragraph in the answer, laches, in this: that the said Thomas J. Martin died in the month of January, 1883, and letters of administration were not issued upon his estate until April, 1894. A demurrer was sustained to both these paragraphs, and exceptions noted.

Before the trial was begun, a written stipulation was filed, waiving a jury, and agreeing to submit the case to the court, sitting as a jury. The court found generally the issues for the plaintiff, and set forth the following special findings of fact: "T. J. Martin and A. W. Blakemore were partners, owning several plantations in the state of Arkansas, which they farmed together; owning, also, a large amount of personalty, consisting of mules, horses, and farming implements, and a stock of merchandise, with which they carried on a mercantile business on their principal farm. Both parties were residents of the state of Kentucky. The farm which they owned and cultivated in Arkansas, and in controversy in this action, was situated in the county of Desha, and had been purchased by them from the executors of D. H. Newcomb, deceased, a part of the purchase money having been paid by them in cash; but the larger part was to be paid thereafter, and for the payment thereof a lien was reserved in the deed of conveyance. The lands in controversy were the lands thus purchased and held by them in partnership. On January 8, 1883, T. J. Martin died in Kentucky, leaving a will, which was duly probated in the courts of Kentucky, and a copy thereof at a later day filed and recorded in Arkansas, after having been admitted to probate by the probate court of Desha county, Arkansas. The will provided that his daughter, Annie M. Blakemore, who was the wife of his partner, A. W. Blakemore, could take his interests in the Arkansas estate, if she so elects, within two years after his death, and, if she so elects, she should be charged with the amount of their cost to the testator in the settlement of the estate. This devise was subject to the payment of the debts due from Martin & Blakemore on said interests in Arkansas. On April 26, 1883, within four months after her father's death, she elected to take his Arkansas property, and filed a written declaration to that effect, with a copy of the will, which was admitted to probate by the Arkansas court on that day. After the death of Martin, A. W. Blakemore, the surviving partner of the firm of Martin & Blakemore, and who was the husband of Annie M. Blakemore, remained in exclusive possession of all the firm property, including all of the lands in controversy in this action, carried on the farming operations and also the mercantile business, collected the rents and accounts, and out of the assets thus collected paid off the balance due on the purchase of these lands, amounting to over \$10,000, continued the same books of the business, plantation as well as mercantile, employed the managers of the plantations and store, executed papers and mortgages at times in the name of the firm by him as survivor, but generally carried on the business in the name of A. W. Blakemore, and paid the taxes on the property in that name, until January, 1894, when for the first time his wife entered into possession of half of the property, and thereafter everything was carried on in the name of A. M. and A. W. Blakemore, and the taxes paid in that manner. In 1883, after the death of T. J. Martin, when A. W. Blakemore, as surviving partner of the firm, out of the assets of the firm paid off the balance of the purchase money due on the lands in controversy, it was discovered that there was a misdescription of the lands in the deed; and thereupon the executors of Newcomb's will made a new deed, describing the lands correctly, and reciting that Martin having died, and his daughter, as his devisee, having elected to take these lands, the new deed was made to A. M. Blakemore and A. W. Blakemore (Mrs. Blakemore being substituted as one of the grantees, in place of her deceased father), which deed was duly recorded in the recorder's office of Desha county, Ark., on July 20, 1883, in which county said lands were located. The court further finds that from the time of the death of T. J. Martin until January, 1894, A. W. Blakemore was in exclusive possession of these lands and all other property of Martin & Blakemore, as surviving partner of the firm of Martin & Blakemore, and that the devisee, Mrs. A. M. Blakemore, did not take possession of this property until January 1, 1894. There was no administration on the estate of T. J. Martin in Arkansas until April 23, 1894, when the plaintiff was duly appointed as such administrator by the probate court of Desha county,—the county wherein these lands are situate,—for the benefit of the Arkansas creditors of T. J. Martin, deceased. He immediately qualified as such, and has ever since been acting as such. On April 5, 1890, A. W. Blakemore and his wife, Annie M., executed a mortgage to the defendant, the Colonial Mortgage

Company, on the entire interest in these lands, to secure a loan for a large sum of money. In November, 1895, they having defaulted in the payment of the interest, that company instituted suit in equity in this court to foreclose the mortgage, and by the order of the court these lands were placed in the hands of the defendant Churchill, as receiver. In April, 1896, the plaintiff in this cause made himself a party to the foreclosure proceedings; setting up his title to the undivided half interest of T. J. Martin, deceased, and praying that the same be turned over to him, and not to be held subject to the mortgage executed by Mrs. Annie M. Blakemore. At the final hearing that petition was dismissed, the decree reciting that the court had no jurisdiction in the foreclosure proceedings to adjudicate his title; but the decree specially provides that his petition was dismissed without prejudice to his bringing any other action, if he so desires. There was a decree of foreclosure and an order of sale. Thereafter, and while the lands were still in possession of the receiver, this court granted to the plaintiff leave to sue the receiver in ejectment for the undivided half in these lands claimed by him; and this suit was instituted by him, within three months after his petition had been dismissed, without prejudice in the equity cause. The decree in the equity cause was entered on the ——— day of February, 1898. A sale was had, and the Colonial Company became the purchaser of the entire plantation at that sale, which sale was confirmed, and a deed executed, with the approval of the court, to the company, who thereupon asked and was made a party defendant to this action. The court also finds that several claims, amounting to several thousand dollars, have been duly allowed and probated by the probate court, in which the administration of the estate of T. J. Martin is pending, in favor of creditors of T. J. Martin who are residents of the state of Arkansas; that the administrator has no personal assets belonging to the estate, and, in order to pay off these debts, it is necessary for him to sell the real estate of the deceased, and he has been directed by the judgment of the probate court of Desha county to take possession of the realty, and institute suit therefor, if necessary. And the court further finds that Mrs. A. M. Blakemore, as whose grantee the defendant claims title, did not take possession of any part of the lands until January 1, 1894, and that her husband until that day held the entire plantation as surviving partner of the firm of Martin & Blakemore, and not as agent for his wife. The court also finds that other plantations have been purchased by Martin & Blakemore during the lifetime of Martin, which they managed in partnership, but these are not involved in this action; they having been sold by a decree of the Desha county chancery court in a proceeding of foreclosure for the unpaid purchase money instituted after Martin's death. And from these facts, and upon the declarations of law made, the court finds the issues in favor of the plaintiff, and renders a verdict for plaintiff, and orders judgment accordingly."

N. W. Norton, G. B. Rose (J. M. Prewett, U. M. Rose, and W. E. Hemingway, on the brief), for plaintiffs in error.

Jacob Trieber and X. J. Pindall, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ROGERS, District Judge.

ROGERS, District Judge, after stating the case as above, delivered the opinion of the court.

Under the repeated decisions of this court and of the supreme court of the United States, the correctness of the special findings of fact by the circuit court cannot be inquired into by this court. See *Searcy Co. v. Thompson*, 27 U. S. App. 715, 13 C. C. A. 349, 66 Fed. 92 (Judge Thayer delivering the opinion of the court), where the cases upon this subject are reviewed. There are several assignments of error in this case, but, in the view we take of it, it is unnecessary to notice them. While the truth or correctness of the

special findings of fact by the circuit court are not open to inquiry, it is equally well settled that we may, upon the pleadings and special findings of fact, look to see whether they are adequate to support the judgment rendered in the case. *Walker v. Miller*, 19 U. S. App. 404, 8 C. C. A. 331, 59 Fed. 869; *Tyng v. Grinnell*, 92 U. S. 469, 23 L. Ed. 733.

The defendant in error, George E. Buck, sues in his trust capacity, as administrator with the will annexed of the estate of T. J. Martin, deceased. It appears from the special findings of fact that his testator, T. J. Martin, and his son-in-law, A. W. Blakemore, as partners, purchased and held the lands, Martin's undivided half of which is sued for in this case, as partnership property; that on January 8, 1883, Martin died; that Martin's undivided half of the property was inherited by his daughter, Mrs. Annie M. Blakemore, the wife of A. W. Blakemore; that said Blakemore on April 5, 1890, mortgaged said property to the Colonial & United States Mortgage Company, Limited; that the mortgage was foreclosed and the property was bought in by the mortgage company in February, 1898; and that Sam Churchill, receiver, held the same at the institution of this suit as the receiver of the United States court of the Western division of the Eastern district of Arkansas, under the decree of which court the mortgage was foreclosed, and the sale had and approved. It further appears from the findings of fact that A. W. Blakemore, the surviving partner of Martin, took possession of said property upon Martin's death, and held the same in his exclusive possession from that time until January, 1894. The court further finds that on January 1, 1894, Mrs. A. M. Blakemore took possession of the undivided half of said property. But the court does not find that the said A. W. Blakemore surrendered the lands to his wife; nor does it find that the partnership business of the firm of Martin & Blakemore had ever been settled up, and the debts paid; nor does it find that Mrs. Blakemore was entitled to the possession thereof at any time. It may be remarked in this connection that there is no allegation in the complaint that the partnership of Martin & Blakemore was ever settled; and it is affirmatively shown by appropriate allegations in the complaint, which are not denied, and by exhibits thereto, that the probated claims, for the payment of which the administrator of Martin sues to recover this land, are partnership promissory notes executed by the firm of Martin & Blakemore, whereby it affirmatively appears that the partnership of Martin & Blakemore has never been settled.

Counsel for defendant in error, in their brief, admit, and cite authorities to show, that which is a familiar principle, namely, that the surviving partner has the exclusive right of possession, management, and control of the entire property of the partnership for the purpose of winding it up. 2 Bates, Partn. § 715, and numerous authorities there cited; *Clay v. Freeman*, 118 U. S. 97, 6 Sup. Ct. 964, 30 L. Ed. 104; *Marlatt v. Scantland*, 19 Ark. 443. Therefore A. W. Blakemore, so long as he lived, had the exclusive right to the possession of the property in controversy for the purpose of settling the affairs of the partnership. So far as the court's special findings of fact are

concerned, it does not appear that A. W. Blakemore is not now alive, and the partnership in process of settlement, with ample assets in his hands for that purpose. In point of fact, it appears from the record, dehors the special findings of fact, that A. W. Blakemore died on the 20th of January, 1895. But the death of Blakemore did not confer the right to the possession of this property to Martin's administrator. On the contrary, upon the death of the surviving partner, Blakemore, the right to the possession of the partnership property devolved upon his personal representatives. In 2 Bates, Partn. § 714, the author states the rule as follows:

"Under the usual working of the *jus accrescendi*, on the death of the last survivor of joint parties his rights and liabilities at law descend upon his legal representatives. Thus, in enforcing partnership claims, the representative of the last surviving partner is the proper plaintiff to collect outstanding accounts. So, in enforcing claims against the partnership, the representative of the last survivor is the proper party. Where both persons die, and the same person is administrator of both, he cannot be sued in his double capacity, nor could the several administrators of each estate be sued. The administrator of the surviving partner is charged with the duty of completing the settlement, not as owner, but as trustee in possession."

Dayton v. Bartlett, 38 Ohio St. 357.

It not appearing from the special findings of fact that Blakemore, the surviving partner, had surrendered the land in controversy to his wife, Annie M. Blakemore, or that the partnership of Martin & Blakemore had been settled at the institution of this suit, and it affirmatively appearing from the admissions in the pleadings and the exhibits attached thereto that said partnership had not been settled, it is clear that the administrator of Martin is not entitled to the possession of the lands, and therefore the judgment is not supported by the special findings of the court. The conclusion reached on this point renders it unnecessary to consider other assignments of error. Where, as in this case, the facts found cover all the issues, and are inadequate to support the judgment, the case will not be reversed for a new trial, but there must be a general judgment for the defendants. *Ft. Scott v. Hickman*, 112 U. S. 150, 164, 165, 5 Sup. Ct. 56, 28 L. Ed. 636; *Allen v. Bank*, 120 U. S. 20, 40, 7 Sup. Ct. 460, 30 L. Ed. 573. Judgment reversed, and case remanded to the circuit court, with directions to enter judgment for the original defendants.

CONNOLLY et al. v. DUNBAR.

(Circuit Court, E. D. Pennsylvania. May 23, 1900.)

ASSIGNMENT—CONSTRUCTION—PARTIALLY EXECUTED CONTRACT FOR WORK.

An assignment of the right to do the work specified in a contract, made after a portion of such work had been completed by the assignor, refers only to the work still to be done, and does not vest in the assignee the right to recover the retained percentage due on the work previously done.

On Motion for New Trial.

Frank P. Prichard and Thomas S. Gates, for plaintiff.
James M. Beck, for defendant.

McPHERSON, District Judge. I have considered the two matters that were especially urged upon my attention as reasons for granting a new trial, but without seeing sufficient ground to change the opinion that I have heretofore expressed.

As it seems to me, Fenner's assignment to the plaintiffs gave them no more than the right to go on with the work from the point where Fenner was ready to leave it. This is the natural and ordinary meaning of the language used by the parties: "For value received I hereby transfer the above contract, or right to do the work referred to in foregoing letter, to the firm of N. K. & M. Connolly." It was not the whole of the original contract that was thus transferred. "The above contract" is explained by the clause immediately succeeding to mean merely "the right to do the work referred to"; and, in the nature of things, this could not embrace work that had been already done, but could only include what still remained. I think, therefore, that the assignment gave the plaintiffs no right to the retained percentage of the work that had then been finished by Fenner, and that this part of their claim was properly excluded from the jury's consideration.

Neither am I able to assent to the proposition that the subcontract with Fenner gave him the right to remove all the rock that might at any time thereafter be blasted by the plaintiffs at the places that were named in the original contract, regardless of the fact that a definite appropriation had been made that was only sufficient, and was evidently only intended, for taking out part of the rock. The quantity of work to be done under the original contract of December, 1895, was limited by the amount of money that the city had set apart for this purpose, and I think that the contract extended no further. That this was the understanding of both parties is clearly shown, as it seems to me, by the fact that a supplemental contract was found necessary, and was executed, in April, 1897, after a second appropriation for continuing the excavation had been made by councils. There is other evidence, also, supporting the same conclusion, but I need not refer to it specifically.

The motion for a new trial is refused.

HANOVER FIRE INS. CO. v. BRADFORD.

(Circuit Court, W. D. Pennsylvania. August 12, 1899.)

1. PRINCIPAL AND AGENT—ACTS OF AGENT BINDING ON PRINCIPAL.

Where a duly-appointed agent of an insurance company employed a clerk, who was habitually permitted by the agent to solicit insurance, collect premiums, and deliver policies, such clerk, in these matters, was thus made by the agent so far the representative of the company that his delivery of a policy in the regular course of business had the same effect to bind the company as if it had been delivered by the agent himself.

2. SAME—LIABILITY OF PRINCIPAL FOR TORTS OF AGENT.

Such clerk, without the consent or knowledge of the agent, countersigned the latter's name to a policy for a prohibited risk, and delivered the same in the regular course of business. A loss having occurred, the company was sued by the insured, and compelled to pay the loss. In an

action by the company against its said agent for reimbursement, *held*, that the defendant was responsible for the act of the clerk, his own sub-agent, in issuing the policy in violation of instructions given by the company to the defendant.

At Law.

In pursuance of a stipulation in writing waiving a jury, this cause was tried by the court without the intervention of a jury on the 28th and 29th days of June, 1899; and now, August 12, 1899, upon due consideration, the court finds the facts to be as follows:

(1) By an instrument dated April 20, 1887, the defendant was appointed and constituted the agent of the plaintiff company, with authority to receive proposals for insurance against loss and damage by fire in New Brighton, Pa., and vicinity, to fix rates of premium, to receive moneys, and to counter-sign, issue, and renew policies of insurance, signed by the president and attested by the secretary of the plaintiff company, subject to the rules and regulations of said company and such instructions as might from time to time be given by its officers. The defendant immediately accepted this appointment, and thereafter acted thereunder as the plaintiff's agent.

(2) The defendant maintained an office at New Brighton, Pa., for the conduct of the insurance business, he being agent for several insurance companies, and in the prosecution of said business the defendant had in his employment one H. N. W. Hoyt, who not only did all the clerical work of said office, but also made daily reports of business to the plaintiff's general agents for the state of Pennsylvania at Wilkesbarre, and further, in the regular course of business and with the defendant's knowledge and by his authority, solicited insurance, collected premiums, and from time to time delivered policies of insurance to the persons insured.

(3) The Mayer pottery works, situate in Beaver Falls, Pa., in the vicinity of New Brighton, had been insured by policies aggregating the sum of \$15,000, issued by companies other than the plaintiff company, and these policies the insured had procured through the defendant as the representative of the companies. Shortly before July 1, 1896, Joseph Mayer, one of the proprietors of those works, addressed a letter to the defendant at New Brighton, calling his attention to the fact that these policies would expire on the last-mentioned date, and desiring information whether he (the defendant) would continue the insurance in companies represented by him. In response to this letter the said H. N. W. Hoyt visited said Mayer, and informed him that the policies would be renewed; and on July 1, 1896, said Hoyt, acting on behalf of the defendant, brought to said Mayer and delivered to him six policies of insurance, amounting together to \$15,000, against loss by fire upon the said pottery works and the contents thereof. One of the policies of insurance so delivered by said Hoyt to said Mayer was policy No. 307,782 of the Hanover Fire Insurance Company (the plaintiff company), dated July 1, 1896, signed by the president and attested by the secretary of the company, and purporting to be countersigned by Thomas Bradford, the defendant, as agent of the company, whereby, in consideration of the premium of \$37.50, that company insured J. & E. Mayer and the Mayer Pottery Company, Limited, for the term of one year from July 1, 1896, against loss by fire to an amount not exceeding \$2,500 to the Mayer pottery works, to wit, the pottery buildings and the contents of the same.

(4) On the 8th day of July, 1896, the insured mailed a check for \$225, the amount of the premiums on said six policies, payable to the order of Thomas Bradford, in a letter addressed to him at New Brighton. On July 11, 1896, this check, indorsed by said Hoyt thus: "For the credit of Thomas Bradford, Agent,"—was deposited by Hoyt in the defendant's bank, to the credit of the defendant as agent, in his bank account as agent. The check was paid by the drawer to the bank.

(5) Such risks as that covered by said policy No. 307,782 on July 1, 1896, were and long had been prohibited by the plaintiff company, and the defendant knew of this prohibition. Long before July 1, 1896, the defendant had received instructions from the plaintiff company, through its proper officers, not to insure potteries.

(6) Said policy No. 307,782 was not countersigned by the defendant personally, but said Hoyt countersigned the policy for and in the name of the defendant, by writing the defendant's name at the proper place. This he did without authority from the defendant, and without the defendant's knowledge. Hoyt delivered said policy to Mayer without the defendant's consent or knowledge. The defendant had no knowledge that this policy had been issued until after the fire and loss hereinafter to be mentioned.

(7) The issuing of said policy No. 307,782 to J. & E. Mayer and the Mayer Pottery Company, Limited, was not reported to the plaintiff company, and the plaintiff had no knowledge whatever of the transaction until after the fire and loss had occurred.

(8) On October 21, 1896, the said insured property of J. & E. Mayer and the Mayer Pottery Company, Limited, was destroyed by fire.

(9) Afterwards suit was brought in the court of common pleas of Beaver county, Pa., at No. 224 of March term, 1897, by J. & E. Mayer and the Mayer Pottery Company, Limited, against the Hanover Fire Insurance Company (the plaintiff here), upon the said policy of insurance No. 307,782. On January 28, 1898, upon trial by jury, a verdict therein was rendered in favor of the plaintiffs in the sum of \$2,529.20, and on February 8, 1898, judgment was entered on the verdict against the defendant therein in the sum of \$2,529.20 and costs, \$43.16. On February 10, 1898, the defendant therein paid to the plaintiffs therein the amount of the judgment and costs, namely \$2,572.36.

(10) Thomas Bradford, the defendant here, was not notified by the Hanover Fire Insurance Company to defend the said suit against the company upon the policy No. 307,782; but at the trial of that action he was called as a witness for the defense, and testified.

Upon these facts the court determines the law of the case to be as expressed in the following opinion.

A. S. & W. S. Moore and Hice & Hice, for plaintiff.

Joseph M. Swearingen and John M. Buchanan, for defendant.

ACHESON, Circuit Judge. As this defendant was not notified to defend the action brought in the court of common pleas against the Hanover Fire Insurance Company on the policy of insurance, he was not concluded by the judgment there, and it was open to him here to show that the insurance company was not liable upon the policy. He has not, however, succeeded in doing this. The evidence establishes that Hoyt was much more than a mere clerk. In fact, he was the defendant's subagent in the prosecution of the business of the Hanover Fire Insurance Company, the defendant's principal. Hoyt was authorized by the defendant to solicit insurance, to collect premiums, and to deliver policies, and these things he habitually did in the regular course of his employment. Thus the defendant made Hoyt the representative of the insurance company in the transaction of July 1, 1896. In delivering the Hanover policy of insurance on the Mayer pottery works, Hoyt was apparently acting with the scope of his authority. Under the circumstances the delivery of the policy by Hoyt had the same effect to bind the company as if it had been done by the defendant himself. These views are well supported by the authorities. *Insurance Co. v. Eshelman*, 30 Ohio St. 647, 657; *Bodine v. Insurance Co.*, 51 N. Y. 117; *Swan v. Insurance Co.*, 96 Pa. St. 37, 41, 42; *McGonigle v. Insurance Co.*, 168 Pa. St. 1, 31 Atl. 875.

The risk was a prohibited one, within the defendant's knowledge. It was taken in violation of the instructions he had received from

his principal. In consequence, his principal has sustained injury. Who shall bear the loss? Now, even if the defendant be blameless personally, his employé is at fault. I cannot see, then, how the defendant can escape responsibility for the hurtful act of his own agent, done within the apparent limits of his employment. I feel constrained to hold that the defendant's case falls within the general rule that the principal is responsible civiliter to third persons for the acts—even the tortious acts—of his agent, if done in the course of the agent's employment, although the principal did not authorize the acts, or, indeed, may have forbidden them. *Railroad Co. v. Derby*, 14 How. 468, 480, 14 L. Ed. 468. The application of this rule to the case in hand may be placed upon the ground that, where one of two innocent persons must suffer from the wrongful act of a third person, the loss should be borne by him who put the wrongdoer in a position of trust and confidence, and thus enabled him to perpetrate the wrong. Accordingly, upon the facts and law of the case as above stated, the court finds in favor of the plaintiff, and assesses its damages at \$2,803.87.

BRADFORD v. HANOVER FIRE INS. CO. OF CITY OF NEW YORK.

(Circuit Court of Appeals, Third Circuit. May 14, 1900.)

No. 25.

1. PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR TORTS OF AGENT.

A principal, authorized to countersign and issue policies of an insurance company, cannot be held responsible for the act of his agent in forging his signature to a policy, and delivering the same without his consent, ratification, or knowledge, unless upon some ground of estoppel.

2. SAME—ESTOPPEL OF PRINCIPAL TO REPUDIATE ACT OF AGENT—APPARENT SCOPE OF AGENCY.

Defendant, who was an insurance agent, and as such intrusted by plaintiff, an insurance company, with policies which he was authorized to countersign and issue, employed a clerk in his office who was authorized by him "to solicit insurance, to collect premiums, and to deliver policies." Such clerk forged defendant's signature to a policy of plaintiff, delivered the same, and collected the premiums thereon, but did not report the fact to defendant, who had no knowledge of it until after the insured property had been destroyed by fire, and the issuance of the policy was not reported to plaintiff. So far as appeared, defendant had no prior cause to distrust the integrity of the clerk. *Held*, that defendant had not clothed the clerk with any apparent authority by which he could be bound by the act of the clerk in signing the policy, or in delivering a forged policy, and that he had been guilty of no act of negligence which estopped him to repudiate the acts of the clerk as his agent, and that such acts were not binding, therefore, either upon him or upon the company.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Joseph M. Swearingen, for plaintiff in error.

Henry Hice, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. The proceeding under review is an action of tort. It was brought by an insurance company, the defendant in error, against the plaintiff in error, to recover "damages resulting from the defendant's negligence and misfeasance in the discharge of his duties as agent of the plaintiff company in the business of insuring the owners of property, real and personal, from loss by fire." The cause of action as more specifically alleged was that, although the defendant had been instructed to insure no potteries, "yet the said defendant, well knowing his instructions and his duty in the premises, and wholly disregarding the same, negligently, wrongfully, and fraudulently issued" a policy of the plaintiff company, insuring the owners of a certain pottery against loss thereof by fire. The plea was "Not guilty." In pursuance of a stipulation in writing, the cause was tried by the court without the intervention of a jury, and the facts were found to be as follows:

"(1) By an instrument dated April 20, 1887, the defendant was appointed and constituted the agent of the plaintiff company, with authority to receive proposals for insurance against loss and damage by fire in New Brighton, Pa., and vicinity, to fix rates of premium, to receive moneys, and to countersign, issue, and renew policies of insurance, signed by the president and attested by the secretary of the plaintiff company, subject to the rules and regulations of said company and such instructions as might from time to time be given by its officers. The defendant immediately accepted this appointment, and thereafter acted thereunder as the plaintiff's agent.

"(2) The defendant maintained an office at New Brighton, Pa., for the conduct of the insurance business, he being agent for several insurance companies, and in the prosecution of said business the defendant had in his employment one H. N. W. Hoyt, who not only did all the clerical work of said office, but also made daily reports of business to the plaintiff's general agents for the state of Pennsylvania at Wilkesbarre, and further, in the regular course of business and with the defendant's knowledge and by his authority, solicited insurance, collected premiums, and from time to time delivered policies of insurance to the persons insured.

"(3) The Mayer pottery works, situate in Beaver Falls, Pa., in the vicinity of New Brighton, had been insured by policies aggregating the sum of \$15,000, issued by companies other than the plaintiff company, and these policies the insured had procured through the defendant as the representative of the companies. Shortly before July 1, 1896, Joseph Mayer, one of the proprietors of those works, addressed a letter to the defendant at New Brighton, calling his attention to the fact that these policies would expire on the last-mentioned date, and desiring information whether he (the defendant) would continue the insurance in companies represented by him. In response to this letter the said H. N. W. Hoyt visited said Mayer, and informed him that the policies would be renewed; and on July 1, 1896, said Hoyt, acting on behalf of the defendant, brought to said Mayer and delivered to him six policies of insurance, amounting together to \$15,000, against loss by fire upon the said pottery works and the contents thereof. One of the policies of insurance so delivered by said Hoyt to said Mayer was policy No. 307,782 of the Hanover Fire Insurance Company (the plaintiff company), dated July 1, 1896, signed by the president and attested by the secretary of the company, and purporting to be countersigned by Thomas Bradford, the defendant, as agent of the company, whereby, in consideration of the premium of \$37.50, that company insured J. & E. Mayer and the Mayer Pottery Company, Limited, for the term of one year from July 1, 1896, against loss by fire to an amount not exceeding \$2,500 to the Mayer pottery works, to wit, the pottery buildings and the contents of the same.

"(4) On the 8th day of July, 1896, the insured mailed a check for \$225, the amount of the premiums on said six policies, payable to the order of Thomas Bradford, in a letter addressed to him at New Brighton. On July

11, 1896, this check, indorsed by said Hoyt thus: 'For the credit of Thomas Bradford, Agent,' was deposited by Hoyt in the defendant's bank, to the credit of the defendant as agent, in his bank account as agent. The check was paid by the drawer to the bank.

"(5) Such risks as that covered by said policy No. 307,782 on July 1, 1896, were and long had been prohibited by the plaintiff company, and the defendant knew of this prohibition. Long before July 1, 1896, the defendant had received instructions from the plaintiff company, through its proper officers, not to insure potteries.

"(6) Said policy No. 307,782 was not countersigned by the defendant personally, but said Hoyt countersigned the policy for and in the name of the defendant, by writing the defendant's name at the proper place. This he did without authority from the defendant, and without the defendant's knowledge. Hoyt delivered said policy to Mayer without the defendant's consent or knowledge. The defendant had no knowledge that this policy had been issued until after the fire and loss hereinafter to be mentioned.

"(7) The issuing of said policy No. 307,782 to J. & E. Mayer and the Mayer Pottery Company, Limited, was not reported to the plaintiff company, and the plaintiff had no knowledge whatever of the transaction until after the fire and loss had occurred.

"(8) On October 21, 1896, the said insured property of J. & E. Mayer and the Mayer Pottery Company, Limited, was destroyed by fire.

"(9) Afterwards suit was brought in the court of common pleas of Beaver county, Pa., at No. 224 of March term, 1897, by J. & E. Mayer and the Mayer Pottery Company, Limited, against the Hanover Fire Insurance Company (the plaintiff here), upon the said policy of insurance No. 307,782. On January 28, 1898, upon trial by jury, a verdict therein was rendered in favor of the plaintiff in the sum of \$2,529.20, and on February 8, 1898, judgment was entered on the verdict against the defendant therein in the sum of \$2,529.20 and costs, \$43.16. On February 10, 1898, the defendant therein paid to the plaintiff therein the amount of the judgment and costs, namely \$2,572.36.

"(10) Thomas Bradford, the defendant here, was not notified by the Hanover Fire Insurance Company to defend the said suit against the company upon the policy No. 307,782; but at the trial of that action he was called as a witness for the defense, and testified."

The court below rightly held that it was open to the defendant to show that the insurance company was not liable upon the policy in question, and therefore no question is presented under the tenth clause of the foregoing findings; but upon the facts stated in the preceding clauses judgment was entered in favor of the plaintiff for \$2,803.87, and we are now to consider whether or not this judgment was well founded in point of law. The learned judge based it upon two grounds, and, as there is no other upon which it could have been rested, we may dispose of the case by examining those grounds separately.

1. The principal is civilly responsible for some, but not for all, acts of his agent. This responsibility extends to the tortious acts of the agent, but only where they are committed for the principal's purposes and by his authority, either actual or apparent, or where he ratifies them, or accepts and retains some benefit from them. *Flower v. Railroad Co.*, 69 Pa. St. 210; *Coal Co. v. Heeman*, 86 Pa. St. 418; *Brunner v. Telegraph Co.*, 151 Pa. St. 447, 25 Atl. 29; *Hower v. Ulrich*, 156 Pa. St. 412, 27 Atl. 37. In England, the principal's liability is, perhaps, somewhat more restricted. In his work on the Law of Torts, Pollock (Webb's Ed. p. 388) defines it thus:

"The necessary and sufficient condition of the master's responsibility is that the act or default of the servant or agent belonged to the class of acts

which he was put in the master's place to do, and was committed for the master's purposes."

But the decisions of the courts of this country have, we think, settled the rule in accordance with our statement of it, and with this in mind we pass to the consideration of the facts of the case.

The declaration alleged that "the defendant negligently, wrongfully, and fraudulently issued the said policy"; and upon the truth of this allegation the existence of the asserted right of recovery was absolutely dependent. Did the facts as found maintain it? Bradford, personally, "did not disregard his instructions, nor did he negligently, wrongfully, or fraudulently issue or cause to be issued the policy of insurance now in controversy." This the court found in its answer to one of the points submitted. Bradford, therefore, did not himself commit the tort which was the basis of the action. Did he do so by another? Hoyt, the actual tortfeasor, was the agent of Bradford, with authority "to solicit insurance, to collect premiums, and to deliver policies." He forged the signature of Bradford to the policy, and he delivered that policy as and for a genuine one. But Bradford was not responsible for these unlawful acts merely because, for lawful purposes, Hoyt happened to be his agent. To make him responsible for them something more was requisite, and none of the conditions necessary to charge him was made to appear. Neither of the wrongful acts was committed for his purposes. The motive, whatever it was, was not his, but Hoyt's. It is also clear that Bradford neither expressly authorized them, nor ratified them, nor consented to profit by them.

But it is insisted that they were perpetrated in the line of Hoyt's employment, and with Bradford's apparent authority, and this contention presents the only serious question which is involved in the point now under consideration. Hoyt was not in fact authorized to sign Bradford's name, and the scope of his actual employment embraced the delivery only of policies which Bradford himself had signed. The signature in question was not so written as to indicate that it was made for Bradford, but as if made by him. It was simply a forgery. There was no assumption nor pretense of authority for it, and it is quite impossible to perceive that such authority apparently existed. The specific offense of Hoyt was one which Bradford himself was incapable of committing, and the act of the agent, therefore, was one which the principal not only could not have been justified in doing, but could not possibly have done. Seeber v. Bank (C. C.) 77 Fed. 957. Nor was Bradford responsible for Hoyt's delivery of this policy. He was authorized to deliver genuine policies,—not spurious ones; and of this particular transaction Bradford had no knowledge until after the fire and loss had occurred. If the forgery had been known by those to whom the policy was delivered, they certainly would not have been warranted in accepting it upon the supposition that its delivery was sanctioned by Bradford, or that, in making it, Hoyt was acting within the apparent scope of his employment. On the contrary, they must inevitably have seen that Bradford had not authorized it, and that Hoyt was grossly transcending the limits of his agency. The imposition which was consummated by the delivery

had its inception in the forgery, and by that alone was the delivery made possible. Bradford did not—manifestly could not—authorize the forging of his own signature; and, this being so, we are unable to discern, in his delegation of power to deliver policies bearing his genuine signature, any apparent authority for the delivery of one falsely and feloniously subscribed. In short, we are of opinion that, as Hoyt's principal, Bradford could be held liable, if at all, only upon the theory that the agency of Hoyt vested in him authority to sign the name of Bradford; and as such authority, either actual or apparent, did not exist, it remains only to consider whether Bradford is precluded from repudiating the transaction which Hoyt fraudulently effected.

2. "When any person, under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business, neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act." Stephen, Ev. art. 102. This statement was intended (see note 38) to properly apply the doctrine of estoppel in pais to the case of a negligent act causing fraud, and we think that it does so. The vital principle of that doctrine is that:

"He who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. Ed. 618.

And, in a case like the present, it is essential to the estoppel that the person sought to be estopped shall be legally chargeable with negligence which in the natural course of things caused the other person to be misled to his prejudice; and negligence in fact is, as to this point, the specific wrong expressly alleged in the declaration. But in what respect was Bradford negligent? The learned judge of the circuit court placed his liability upon the ground that he had "put the wrongdoer in a position of trust and confidence, and thus enabled him to perpetrate the wrong." We cannot assent to this. It was not pretended that Bradford was not duly careful in employing Hoyt or in retaining him in his employment. So far as appears, no ground existed for suspecting that he would abuse any confidence which was or might be reposed in him. Moreover, the signing of Bradford's name was not confided to him, nor had Bradford done anything to make it appear that it was. The policy was not accepted in reliance upon any seeming or supposed authority of Hoyt to sign, but under the belief that Bradford had signed it; and this misleading belief was caused, not by any negligent act or omission of Bradford, but solely by the personal criminal conduct of Hoyt. Bradford, it is true, had made Hoyt his agent; but surely negligence cannot be imputed to him upon that ground alone. Such agencies are by no means uncommon, and the reported cases exhibit many instances of them. There was no more reason for sup-

posing that the agent in this instance would be guilty of forgery than of any other offense, and his principal was under no obligation to prevent his commission of crime. The whole duty of Bradford in the matter was to see to it that no negligence of his own should, through any wrongdoing of Hoyt, occasion injury to another, and this duty does not appear to have been violated.

The true test of liability under this head was correctly applied by the supreme court of Pennsylvania in *Leas v. Walls*, 101 Pa. St. 57. In that case one person had procured another to sign a promissory note, partly printed and partly in writing. In the form used there was a long blank for the insertion of the amount. The person who obtained the note had, before its execution, inserted in this blank the written word "eight" and had filled up the remaining portion of the blank, except a small space immediately after that word, with a scroll terminating with the printed word "dollars"; but, after execution, he added to the word "eight" the letter "y," so that, as thus altered, it read "eighty" dollars. The action was brought by a bona fide purchaser of the note for value and before maturity, and yet the finding of the jury that there was no lack of ordinary care on the part of the maker of the note was expressly approved by the supreme court, and the judgment for defendant, which was entered upon that verdict, was affirmed. In its opinion, after referring to some of its earlier decisions, the court said:

"These cases do not decide that the maker would be bound to a bona fide holder on a note fraudulently altered, however skillful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skillful forgery of his handwriting. * * * In the common experience of men, very few persons write their words so closely together that a single letter cannot be added at the end of one of them without attracting attention."

And common experience, we think, equally supports our belief that no man of ordinary prudence would think of taking any precaution to preclude such a forgery of his signature as that for which the plaintiff in error in this case has been charged with responsibility.

We have examined a number of authorities, including those mentioned in the opinion of the court below and the additional cases cited by counsel; but we do not deem it necessary to further extend this opinion by reviewing them. It is enough to say that we have given them careful consideration, and are entirely satisfied that, as a whole, they show the law to be in accordance with the views we have expressed. The judgment of the circuit court is reversed, and the cause will be remanded to that court, with direction to enter a judgment for the defendant in the action.

ANDRUS v. BRADLEY.

(Circuit Court, E. D. Pennsylvania. May 31, 1900.)

1. **BILLS AND NOTES—RIGHTS OF HOLDER OF CHECK—DELAY IN PRESENTATION.**
A bona fide holder of a check is under no obligation to the drawer to present it for payment within a reasonable time, and is not prejudiced by delay in doing so, except where the fund has been lost by failure of the bank.
2. **ESTOPPEL—NEGLIGENCE WHICH ENABLES ANOTHER TO COMMIT A FRAUD.**
Defendant gave a check, which the payee transferred to plaintiff, who took the same in good faith and for full value, but at the request of the payee did not at once present it for payment. Subsequently defendant had a settlement with the payee, and, accepting his statement that the check had been lost, and his agreement that it would not be presented, again paid him the amount, and notified the bank not to pay the check, if presented. Several months afterwards the check was presented, and solely on account of such notification was refused payment. *Held*, that defendant was estopped to deny the validity of the check as against the plaintiff, having by his negligence placed it within the power of the payee to commit the fraud, by which one of two innocent parties must suffer loss.
3. **INTEREST—ACTION ON DISHONORED CHECK.**
In an action against the drawer on a dishonored check, the defendant is liable for interest only from the time when the check was presented for payment.

At Law. Action on a check drawn by defendant. On motion of defendant for a new trial and for judgment non obstante veredicto.

Henry P. Brown, for plaintiff.

Andrew J. Maloney, for defendant.

DALLAS, Circuit Judge. There is no dispute as to the facts of this case. The defendant, Thomas Bradley, on February 18, 1897, gave to one Francis C. Grable a check for \$12,500 on the Security Trust Company of Philadelphia. Two or three weeks afterwards, when the bank book of Bradley was settled, he found that the check had not been presented for payment. He thereupon made inquiry of Grable, and was told by him that it was still in his possession, and that he would return it. On April 15, 1897, Bradley and Grable had a general settlement, and it then appeared that Bradley owed Grable \$19,416.67. In this last-mentioned amount, however, there was included the sum of \$12,500, for which Bradley's check of February 18, 1897, had been given. At this settlement Bradley was told by Grable that he had lost or mislaid that check, and that he would look for it, and, if found, return it. In addition to this oral assurance, Grable gave to Bradley a statement in writing as follows:

Philadelphia, April 15, 1897.

"I have in my possession check No. 1553, drawn on the Security Trust and Life Insurance Company, dated February 18, 1897, for twelve thousand five hundred dollars, drawn to my order and signed by Thomas Bradley, which I am to return to Mr. Bradley, as settlement has been made, and it will not be presented for payment.

Francis C. Grable.

"Witness: E. I. P. Grubb."

Relying upon this statement, Bradley paid Grable the full amount of \$19,416.67, instead of only \$6,916.67, which latter was the true

amount due by Bradley to Grable, and the only amount which would have been paid if it had been known by Bradley that his check of February 18, 1897, was then outstanding, as presently to be stated. Subsequently, on October 20, 1897, Bradley gave notice to the Security Trust Company not to pay the check, and when it was thereafter presented, as will presently be mentioned, the trust company, in obedience to that notice, refused payment, and the check was protested. The statements made by Grable to Bradley were false and fraudulent. The fact is that Grable had passed the check to John E. Andrus, the plaintiff in this case, upon the day after he (Grable) had obtained it from Bradley. Andrus had no knowledge of any fraud or contemplated fraud on the part of Grable, but took the check innocently, and gave cash for it to the amount of its full face value. At Grable's request, Andrus held the check, instead of presenting it, but subsequently passed it to one William J. Arkell for certain stocks or bonds, and Arkell, in January, 1898, presented it for payment, which, as has been stated, was refused. Arkell thereupon brought suit upon it; but that suit was discontinued, the check was returned to Andrus, and this present action instituted.

It is unfortunately manifest that one or the other of two innocent parties—the plaintiff or the defendant—must suffer a loss in this case. Upon which of them must it fall? The correct answer to this question depends, I think, upon the proper application to the undisputed facts of the principle of estoppel in pais which was discussed by the circuit court of appeals for this circuit, at its present term, in the case of *Bradford v. Insurance Co.*, 102 Fed. 48.

“When any person, under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business, neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act.’ * * * The vital principle of the doctrine is that ‘he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.’ *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. Ed. 618.”

Assuming, what was without doubt the fact, that both parties were innocent of any intentional fault, what unintentional failure in duty caused the loss? Because, unless in this particular transaction, with reference to this defendant, the plaintiff either did something he ought not to have done or did not do something he should have done, there was no neglect. Now, it may be—I think it must be—conceded that the plaintiff's retention of this check for about 11 months without presenting it would have been at his own risk if the institution upon which it was drawn had failed in the meantime. But the authorities which determine this are inapplicable to the present case. The banker upon whom this check was drawn was solvent when it was presented. But for the defendant's notice, it certainly would have been paid, and the giving of that notice, as against a bona fide holder for value, was not warranted. Such a holder is under no obliga-

tion to the drawer to present a check within a reasonable time, and is not prejudiced by delay in doing so, except where the fund has been lost by failure of the bank. *Flemming v. Denny*, 2 Phila. 111; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 647, 19 L. Ed. 1008; *Bull v. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97.

As I view the case, the defendant, by giving the check in question to Grable, not only reposed confidence in him, but actually put it in his power to accomplish the fraud which he perpetrated; and in afterwards settling with Grable as he did, the defendant relied, not, as in *Dickerson v. Colgrove*, *supra*, upon any statement of the plaintiff, for he made none, but upon that of Grable alone. In my opinion, the consequence of this misplaced confidence must be borne by the party from whom it proceeded. Bradley, through his settlement with Grable, voluntarily paid the check in question without requiring its production; and this he was not led to do by any breach of duty which was legally owing to him by the plaintiff, but by his own too ready acceptance of Grable's assurances.

Upon the trial of the case, the following stipulation was noted:

"It is agreed by counsel in open court that a verdict shall be taken for the plaintiff for the sum of \$14,845.81, it being understood and agreed between them that the case shall be placed upon the proper list for argument upon the question reserved as to whether the defense which has been set up and shown by evidence is a valid defense. If the court shall be of opinion that it is a valid defense, judgment to be entered for the defendant notwithstanding the verdict; otherwise, judgment for plaintiff upon the verdict as rendered. The verdict is to be taken with interest from ———, amounting to \$———, subject to the power of the court, upon the argument hereafter to take place, to reduce the verdict by the amount of interest so included, if in the judgment of the court the interest should not have been made a part of the verdict."

The defendant has now moved for a new trial, and also for judgment in his favor upon the point reserved non obstante verdicto. Both of these motions must be denied, but the amount of the verdict must be reduced. As rendered, it includes interest from the date of the check. To this, in my opinion, the plaintiff is not entitled, although I think he should be allowed interest from the date of presentation, namely, from January 27, 1898. With this correction, the amount recoverable is, not \$14,845.81, but \$14,139.56; and accordingly it is now ordered that judgment be entered for the plaintiff in the sum of \$14,139.56, and the defendant's motions for new trial and for judgment non obstante verdicto are denied.

CORNING v. BOARD OF COM'RS OF MEADE CO., KAN.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1900.)

No. 1,307.

1. COUNTIES—BONDS IN AID OF RAILROAD—ASSESSMENT AS LIMITATION OF INDEBTEDNESS.

The limitation of the indebtedness of a county is measured by the last assessed valuation of the property therein before the bonds are issued, and not by the last assessed valuation before they are voted.

2. RAILROAD BONDS—GENERAL POWER NOT LIMITED BY SUBSEQUENT SPECIAL GRANT OF POWER.

The general power to issue bonds, as in Gen. Laws Kan. 1876, c. 107 (1 Gen. St. Kan. 1897, p. 755), is not revoked or limited by a general law authorizing the organization of new counties, in the absence of express revocation or limitation of that power therein.

3. STATUTES—CONSTRUCTION—COMMON MEANING OF WORD.

In the absence of other definition in the legislation of a state, the presumption is that the legislature used, and intended to use, a common word or term in its accustomed sense.

4. SAME.

The word "issued" ordinarily means "emitted" or "sent forth," and, in the absence of other definition, that must be taken to be the sense in which it was used in the legislation of Kansas.

5. COUNTY BONDS—CONSTRUCTION OF STATUTE.

The prohibition contained in Laws Kan. c. 63, § 1, as amended by Laws 1886, c. 90, that "no bonds of any kind shall be issued by any county * * * within one year after the organization of such new county under the provisions of this act," prohibits the issue or sending forth of bonds within the year; but it does not prohibit the presentation of a petition for the submission of a proposition to issue the bonds, or the calling and giving notice of an election thereon, within the year, and bonds based upon such a petition, call, and notice are valid.

In Error to the Circuit Court of the United States for the District of Kansas.

C. F. Hutchings (L. W. Keplinger, on the brief), for plaintiff in error.

S. S. Ashbaugh (F. M. Davis, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action upon coupons cut from railroad aid bonds issued by the board of county commissioners of the county of Meade, in the state of Kansas. The defenses to them are that the county had no power to issue the bonds or the coupons because (1) the aggregate amount of the bonds—\$120,000—exceeded the limitation prescribed by the statutes of Kansas (1 Gen. St. Kan. 1897, p. 755, § 70); and because (2) the petition to the board of county commissioners to submit to a vote the proposition to issue the bonds was presented, and the notice of the election was given, within one year after the organization of the county, although the election was held, the subscription for the stock of the railroad company was made, and the bonds were issued after the expiration of that year. The facts and the statutes which condition these defenses are these: Meade county was organized on November 12, 1885. A petition for an elec-

tion to vote upon the question of issuing these county bonds to the amount of \$120,000 was presented to the board of county commissioners on October 27, 1886. The election was held on November 30, 1886. The board of county commissioners subscribed for the stock of the railroad company, and agreed to issue the bonds to it for this stock on December 3, 1886. The bonds were executed, dated, and delivered to the railroad company on its completion of its railroad in the county on March 15, 1888. The assessed valuation of the property of the county was such that the issue of \$120,000 of bonds was in excess of the statutory limitation in 1886 and in 1887, but within the limitation in 1888.

Chapter 63 of the Laws of Kansas of 1876 provided for the organization of new counties in that state. These are the closing words of the first section of that chapter:

"And from and after the qualification of the officers appointed under this act, the said county shall be deemed duly organized, and the county seat shall be deemed temporarily located: and provided further, that no bonds of any kind shall be issued by any county, township or school district within one year after the organization of such new county under the provisions of this act."

Chapter 90 of the Laws of Kansas of 1886, which took effect on February 23, 1886, amended the closing words of section 1 of chapter 63 of the Laws of 1876 so that they read:

"And from and after the qualification of the officers appointed under this act the said county shall be deemed organized and the county seat shall be deemed temporarily located: provided further, that none of the provisions of this act shall prevent or prohibit the county of Kiowa, or any township or school district therein, from voting bonds at any time after the organization of said county. And provided further, that no bonds of any kind shall be issued by any county, township or school district within one year after the organization of such new county under the provisions of this act."

Chapter 128 of the Laws of 1887, which took effect on March 11, 1887, so amended the last proviso of the section that it reads:

"Provided, that no bonds, except for the erection and furnishing of school houses shall be voted for and issued by any county or township within one year after the organization of such new county under the provisions of this act."

Chapter 107 of the Laws of Kansas of 1876 authorizes any county in the state to issue bonds in limited amounts to aid in the construction of railroads on a favorable vote of its electors, and provides that no such bonds shall be issued until the railroad shall be completed and in operation through the county voting the bonds, or to such point in the county as may be set forth in the petition for the submission of the proposition to issue them to the vote of the electors.

The defense that the bonds are void because their aggregate amount is in excess of the statutory limitation rests upon the proposition that the limitation is to be measured by the assessed valuation of the property of the county in the year in which the bonds were voted (1886), and not in the year in which they were issued (1888). The position is untenable, and the question it seeks to present is no longer open to discussion in this court. The assessed valuation by which the statutory limitation is to be measured is the last assessed valuation of the prop-

erty of the county before the bonds are issued, not the last one before they are voted or directed to be issued. *Dudley v. Board*, 49 U. S. App. 336, 346, 26 C. C. A. 82, 87, 80 Fed. 672, 677; *Rathbone v. Board*, 49 U. S. App. 577, 590, 27 C. C. A. 477, 484, 83 Fed. 125, 132; *Board of Education of City of Huron v. National Life Ins. Co. of Montpelier*, 36 C. C. A. 278, 281, 94 Fed. 324, 328; *Board v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270, 281.

The defense that the county was without power to issue the bonds because the petition for the submission of the question of their issue was presented to the county commissioners, and the notice of the election was given, within one year after the organization of the county, although the vote was taken, the subscription was made, and the bonds were issued after the expiration of the year, is supported by two lines of argument. It is said that the powers of a new county are limited during the first year of its existence, and that it is without authority to take any step towards the issue of bonds, regardless of the prohibition in chapter 63 of the Laws of 1876 and its various amendments. It is also argued that the prohibition of the issue of bonds within the first year of its existence is a prohibition of all preliminary proceedings leading to their issue. Let us consider these contentions in their order.

A county duly organized under chapter 63 of the Laws of Kansas of 1876 has during the first year of its existence all the powers of a county more than one year of age which are necessary to the conduct of the business of the county and of its people. *Speer v. Board*, 60 U. S. App. 38, 32 C. C. A. 101, 88 Fed. 749. The act for the organization of counties does not, it is true, confer upon any county organized under it the power to issue bonds to aid in the construction of railroads during the first year of its existence. Neither does it confer this power upon a county after it has been organized for a year. No county, whatever its age, derives its authority to issue railroad aid bonds from the act for the organization of counties. That power is conferred by the act to enable counties, townships, and cities to aid in the construction of railroads found in chapter 107, Laws Kan. 1876, and 1 Gen. St. Kan. 1897, p. 755. And under that act the same power is given to counties in the first as in any other year of their existence. The conclusion is inevitable that a county has and may exercise every power, and may do every act precedent, or relating to the issue of railroad aid bonds in the first year of its existence that it may in any subsequent year, excepting only the act prohibited by the last proviso to section 1 of the act for the organization of new counties. The result is that the power to receive the petition and to call the election on the issue of these bonds was conferred on the county of Meade during the first year of its existence, unless it was revoked by that inhibition. The prohibition was in these words: "No bonds of any kind shall be issued by any county * * * within one year after the organization of such new county under the provisions of this act." Did this provision revoke the power given to this and every other county to receive the petition and call the election whenever the petition was presented?

This brings us to the consideration of the second contention of the county,—that the word "issued" in this inhibition includes and for-

bids every precedent act requisite to the issue of the bonds. There are several serious objections to the adoption of this broad definition of the term "issued." It is a common, plain word, whose usual significance is well known to persons of ordinary intelligence. In the absence of other definition in the statutes of Kansas, the presumption is strong that the legislature used it, and intended to use it, in its accustomed sense. It was used in laws relative to the sending forth of municipal bonds; laws upon which the officers of the state, of the counties, of townships, and of school districts and the purchasers of the bonds of these quasi municipal bodies must rely, and which they must interpret. These officers and purchasers have interpreted and acted upon these laws without notice from the legislature that they intended that this word should have any strange, broad, and unusual meaning in these statutes. In this state of the case no definition will be found so safe, so just, or so equitable as the ordinary meaning of the word,—the meaning which the word at once conveys to the ordinary apprehension,—and that is to "emit," to "send forth." A good test of the soundness of the contention of the county here is presented by this question: If, on November 12, 1886, when the county was one year old, and when the petition for the election had been made and the election had been called, but no election had been had, no subscription had been made, and no bonds had been executed or delivered, one had declared that these bonds had been issued, would not that statement have been manifestly false? But, if the bonds had not then been issued, the prohibition of the county organization act was not violated, and the bonds are valid. Again, the act for the organization of new counties and the act to enable counties to issue bonds to aid in the construction of railroads are in *pari materia*, and they must be read and construed together. When so read, they constitute a grant of power to all counties at any time to receive the petition, call the election, make the subscription for stock of the railroad company, and issue the county bonds to pay for it, with two limitations upon the time of the issue of the bonds. One of these limitations is in the proviso in section 1 of the act for the organization of counties that no bonds shall be issued within one year after the organization of the county. The other is in section 5 of the act to authorize the issue of the bonds, and it reads:

"No such bonds shall be issued until the railroad to which the subscription or loan is proposed to be made shall be completed and in operation through the county, township or city voting such bonds, or to such point in such county, township or city as may be specified in the proposition set forth in the petition required in the first section of this act."

It is clear that in the latter limitation the word "issued" is used in its ordinary sense of "emitted" or "sent forth," and that this prohibition does not forbid the call of the election, the vote, and the subscription before the railroad is completed. Any other construction would have rendered the act impractical and useless, because it was only in reliance upon a favorable vote already cast, and upon a subscription actually made, that railroad companies could be induced to build their roads into many of the counties of Western

Kansas. No reason occurs to us why the word "issued" in the former limitation should be given a meaning so different, so unique, and so broad as to make it cover the presentation of the petition and the call for the election, while in the latter it retains its ordinary significance. Moreover, if the meaning of this word was ambiguous, the practical construction given to it and to the proviso in which it occurs by the officers of the state and county and the purchasers of the bonds while they were acting and contracting under it is entitled to great consideration, and ought not to be modified or avoided to the destruction of rights resting upon it, unless that construction was clearly and palpably erroneous. *U. S. v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Brown v. U. S.*, 113 U. S. 568, 571, 5 Sup. Ct. 648, 28 L. Ed. 1079; *Insurance Co. v. Hoge*, 21 How. 35, 66, 16 L. Ed. 61; *Stuart v. Laird*, 1 Cranch, 299, 309, 2 L. Ed. 115; *Wright v. Forrestal*, 65 Wis. 341, 349, 27 N. W. 52; *Hoffman v. Commissioners (Okl.)* 41 Pac. 566, 573; *Suth. St. Const.* § 311. In 1887 the attorney general of the state of Kansas rendered an opinion in which he held that the limitation of the proviso was upon the issue of the bonds, and not upon the voting of the bonds, and that bonds might be voted prior to the expiration of one year from the organization of the county, but that they could not be issued until the year had expired. In 1887 the legislature of Kansas amended the proviso by inserting the words "voted for and" before "issued" so that it was made to read: "No bonds * * * shall be voted for and issued by any county * * * within one year after the organization of such new county." Evidently it had not occurred to the attorney general and to the legislature of Kansas in 1887 that the presentation of a petition, and the call of an election, and every other precedent condition was the issue, or a part of the issue, of bonds. If it had, the one could not have held that the voting within the year was not, while the issue was, prohibited; and the other would not have added to its prohibition of the issue a prohibition of the voting within the year.

In the case in hand no decisive act was done within the year. The bonds were not made, or signed, or dated, or delivered. The subscription for the stock of the railroad company—the contract for the issue of the bonds—was not made. The vote on the proposition to make the subscription and issue the bonds was not taken. Nothing was done within the year but to present and receive the petition, and to give notice of a vote upon it on a day subsequent to the expiration of the year. At the end of the year the county and its electors were as free to act as at its beginning. They took all the decisive acts which made the contract and authorized the issue of the bonds after the expiration of the year. They received, and still retain, the consideration for which they issued the bonds. The railroad for whose construction they agreed to issue them was built and put in operation in their county before they were delivered. They were sent forth with every mark of validity. The county paid the coupons for several years. The plaintiff in error bought them without notice of any defect. If they are annulled, she will lose the purchase price she paid for them, and the county will gain the rail-

road and the stock for which it agreed to pay these bonds. If the bonds are sustained, the county will only be required to perform the contract it deliberately made, and the plaintiff in error will receive only that for which she has paid. In this state of facts, equity and justice alike demand that the bonds and coupons shall be sustained, unless there is some insuperable legal objection to their validity. To our minds, there is no such objection to the holding that the term "issued" in the proviso of section 1 of the act for the organization of new counties means "emitted," "sent forth," and does not include all the conditions precedent to the emission. This interpretation of the term adopts the ordinary accepted definition of the word, adopts the meaning which it was used to convey in the act to enable counties to issue bonds to aid in the construction of railroads, and is in accord with the construction given to it by state and county officers and purchasers of the bonds when they were acting and contracting under it. No legal necessity, no sound reason, requires us to search out and give a new and broader significance to the term, and our conclusion is that the proviso in section 1 of chapter 63 of the Laws of Kansas of 1876 as subsequently amended by chapter 90 of the Laws of Kansas of 1886, does not prohibit a new county from receiving a petition for the submission of a proposition to issue bonds to the voters of the county or from calling or giving notice of the election thereon under chapter 107, Laws Kan. 1876, and 1 Gen. St. 1897, p. 755, within one year from the organization of the county. The judgment below is reversed, and the case is remanded to the court below, with directions to render judgment for the plaintiff in error for the amount claimed in her petition.

LOUISVILLE & N. R. CO. v. LANSFORD.

(Circuit Court of Appeals, Fifth Circuit. May 8, 1900.)

No. 896.

1. RAILROADS—NEGLIGENCE—PERSONAL INJURY—EXEMPLARY DAMAGES.

Under Code Ala. 1896, § 27, derived from an act entitled "An act to prevent homicides," and providing that, in an action by a personal representative for negligently causing the death of his intestate, plaintiff may recover "such damages as the jury may assess," the damages recoverable by plaintiff in an action against a railroad company for causing the death of a passenger on one of its trains, by the falling of a bridge, are punitive and exemplary.

2. COURTS—CONSTRUCTION OF STATUTES—RULE OF STATE COURT BINDING.

Code Ala. 1896, § 27, providing that, in actions for negligently causing the death of another, plaintiff may recover "such damages as the jury may assess," having been construed by the supreme court of Alabama as awarding exemplary damages, and been declared by that court to be constitutional, its decisions are binding upon the federal courts.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

W. A. Walker (Mitchell A. Porter and Wm. M. Walker, on the brief), for plaintiff in error.

Frank S. White and A. O. Lane (Felix Blackburn, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. Wiley G. Lansford, as the administrator of the estate of L. W. Martin, deceased, brought this action in the city court of Birmingham, Ala., against the Louisville & Nashville Railroad Company. The defendant, being a Kentucky corporation, removed the suit to the circuit court of the United States for the Southern division of the Northern district of Alabama. The action was for \$40,000, as damages for the alleged wrongful death of the plaintiff's intestate, a passenger on the defendant's passenger train. The evidence tended to show that the defendant company was engaged in operating railroads, as a common carrier of freight and passengers; a part of its line running from Birmingham to Blockton, Ala. On the line was a long bridge, about 110 feet high, commonly called the "Cahawba River Bridge." On the 27th of December, 1896, Martin took passage on one of the defendant's trains as a passenger from Birmingham to Blockton. When the train was passing over the bridge, it collapsed and carried part of the train with it into the bed of the river; falling about 110 feet. The train was demolished, and the plaintiff's intestate was killed. The part of the train which fell was destroyed by fire. The body of the plaintiff's intestate was found in the wreckage and was identified. The defendant offered evidence tending to show that the bridge was strong and in good condition. The plaintiff offered evidence in rebuttal tending to show that the timbers in the bridge at the place where the train went through were in a rotten condition, and that some of the iron of which the bridge was composed had old breaks in it, and that the bridge would sway six inches from one side to the other when trains were passing over it. The question of negligence vel non was left to the jury. The jury found for the plaintiff, and assessed his damages at \$7,662.50. Judgment was entered on the verdict, and this writ of error was sued out to reverse the judgment.

At the request of the plaintiff the court charged the jury that the measure of damages in the case was punitive and exemplary. The court instructed the jury to the same effect in the general charge. To the giving of these instructions the defendant excepted. The question of the correctness of these charges is here raised by several assignments of error.

At common law no action would lie for a wrongful injury causing death. The right of action in this case, therefore, is entirely dependent upon a statute. The following is the statute under which the suit is brought:

"Action for Wrongful Act, Omission, or Negligence Causing Death. A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained

though there has been no prosecution, or conviction, or acquittal of the defendant for such wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate." Code Ala. 1896, § 27.

The question here presented for our consideration is whether the damages to be assessed under this statute are punitive or merely compensatory. As indicating the purpose and meaning of the legislature of Alabama in conferring the right of action for injuries causing death, it should be noted that the titles of the several acts on the subject indicate that its purpose was to prevent homicides. The act authorizing actions for wrongful injuries causing death, approved February 21, 1860, is entitled "An act to prevent homicides." Acts Ala. 1859-60, p. 42. This act was subsequently repealed. The section of the Code under consideration is derived from the act of February 5, 1872, which was also entitled "An act to prevent homicides." Acts Ala. 1871-72, p. 83. The act as originally passed provided that the personal representative of the person whose death was caused by the wrongful act might recover "such sum as the jury deem just." As the act now appears in the Code, it allows a recovery of "such damages as the jury may assess." The change is immaterial. *Railroad Co. v. Freeman*, 97 Ala. 289, 11 South. 800. In 1877 the question came before the supreme court of Alabama as to the proper construction of this statute, on the question of the measure of damages. The action was by the administratrix for the recovery of damages for the killing of her intestate. Judge Stone, delivering the opinion of the court, said:

"Charge 4 fixes an erroneous measure of damages, and was rightly refused on that account, although in other respects it may have asserted correct legal principles. Lacerated feelings of surviving relations, and mere capacity of deceased to make money if permitted to live, do not constitute the measure of recovery under the act of February 5, 1872. Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury 'deem just.' The damages are punitive, and they are none the less so in consequence of the direction the statute gives to the damages when recovered. They are assessed against the railroad 'to prevent homicides.'" *Railroad Co. v. Shearer*, 58 Ala. 672, 680.

The same question was again before the Alabama supreme court at the December term, 1877, and the court held—

"That the purpose and result of the suit therein provided were not a mere solatium to the wounded feelings of surviving relations, nor compensation for the lost earnings of the slain. We think the statute has a wider aim and scope. It is punitive in its purpose,—punitive of the person or corporation by which the wrong is done, to stimulate diligence and to check violence, in order thereby to give greater security to human life; 'to prevent homicides.' And it is none the less punitive because of the direction the statute gives to the damages recovered. The damages, 'tis true, go to the estate of the party slain, and, in effect, are compensatory; but this does not change the great purpose of the statute,—to prevent homicides. Preservation of life—prevention of its destruction by the wrongful acts or omission of another—is the subject of the statute, and all its provisions are but machinery for carrying it into effect." *Railroad Co. v. Sullivan*, 59 Ala. 272, 278.

An examination of these two cases will show that neither of them involves facts which, in the absence of the statute, would have required the assessment of damages punitive in character. The cases

are both distinctly constructions of the statute. In 1892 the question was again before the supreme court of Alabama. Judge McClellan (now chief justice) delivered the opinion of the court. The opinion is without dissent, and cites approvingly the construction theretofore given to the statute. The court said:

"The conception of a recovery of damages as a pecuniary mulct—a punishment of the wrongdoer as a retribution for the wrong, and deterrent of its repetition—is the leading, indeed the sole, idea upon which the conclusion was reached. Compensation is referred to only as a fortuitous result of the imposition of the punishment,—a thing which ensued not because of any intent of the lawmakers that it should ensue, and not because a predicate for it was necessary to the assessment of damages, or exerted any influence in determining the amount of the verdict, but only because, the damages having been assessed alone upon a consideration of the culpability of the defendant's act or omission, wholly regardless of the actual loss or injury suffered thereby, they constituted a fund which the statute distributed to the next of kin of the deceased; and this whether or not his next of kin would have been at all benefited by his continued life, or were to any extent damnified by his untimely death. * * * The damages recoverable being punitive and exemplary in all cases under the statute,—punitive of the act done, and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs, or to incite to diligence in the avoidance of fatal casualties,—the purpose being the preservation of human life, regardless of the pecuniary value of a particular life to the next of kin under statutes of distribution, the admeasurement of recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act, or in the omission to act as required by the dictates of care and prudence, and without any reference to or consideration of the loss or injury the act or omission may occasion to the living." *Railroad Co. v. Freeman*, 97 Ala. 289, 293, 294, 11 South. 800.

In *Railroad Co. v. Sanders*, 98 Ala. 293, 13 South. 57, the court speaks of the "fixed construction" of this statute (the "homicide act"), and incidentally approves of the rule established as to the measure of damages. In 1895, construing this statute, the court held that the damages recoverable are entirely punitive, and that evidence tending to show actual pecuniary loss by reason of the death of the intestate is irrelevant and inadmissible. *Buckalew v. Railroad Co.*, 112 Ala. 146, 148, 20 South. 606.

The last Alabama case on the subject to which our attention is called cites approvingly the preceding cases. The supreme court (Judge Coleman delivering the opinion) held that:

"In an action brought by an administrator, under the statute, to recover for the alleged negligent killing of his intestate, who was a child, the damages recoverable are entirely punitive; and therefore evidence of loss of services, or of mere pecuniary loss, and mental suffering on the part of the parents of the deceased child, is immaterial, irrelevant, and inadmissible." *Railroad Co. v. Burgess*, 116 Ala. 509, 510, 22 South. 913.

In *Matthews v. Warner*, 29 Grat. 570, 26 Am. Rep. 396, the court construes the Virginia statute allowing actions for wrongful injuries causing death. The statute allowed "such damages as to the jury seem fair and just." Exemplary damages were allowed. Similar statutes in other states have received the same construction. But where the statutes use the expression "just compensation," or where the damages are to be assessed for "pecuniary injuries resulting from the death," the damages are compensatory only. *Railroad Co. v.*

Barron, 5 Wall. 90, 18 L. Ed. 591. An examination of the statutes of the several states will usually show the reasons for the apparent conflict in the decisions on the subject. See article on "Death by Wrongful Act," 8 Am. & Eng. Enc. Law (2d Ed.) p. 851; Tiff. Death, Wrongf. Act, §§ 153, 155.

But it is not necessary to pursue this line of investigation. We have before us a statute, enacted in 1872, which has been uniformly construed by the court of last resort in Alabama as awarding exemplary damages. The statute, after it received such construction, has been re-enacted in the Code of Alabama of 1886, and again in the Code of 1896. It has been formerly declared constitutional. *Railroad Co. v. Freeman*, 97 Ala. 289, 11 South. 800. Statutes like this are condemned or applauded according to the bent of the mind of the commentator. The policy or propriety of the legislation is not for us to consider in this case. We have only to deal with the question of the construction of the statute. The opinions already quoted leave no doubt but that the Alabama supreme court construes the statute in question as allowing punitive or exemplary damages. Is this court bound by such construction? We must, to begin with, hold the act valid and constitutional, because the decision of the highest court of a state that an act of a state is not in conflict with the provisions of the constitution is conclusive on the federal courts. *Gut v. Minnesota*, 9 Wall. 35, 19 L. Ed. 573; *Chambers Co. v. Clews*, 21 Wall. 317, 324, 22 L. Ed. 517. The supreme court has uniformly held that, where the construction of a statute given by the highest court of a state is uniform and is settled, it is binding on the courts of the United States as a rule of decision. *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *Sioux City T. R. & W. Co. v. Trust Co. of North America*, 173 U. S. 99, 107, 19 Sup. Ct. 341, 43 L. Ed. 628; 1 Ind. Dig. U. S. Sup. Ct. Rep. p. 530, § 390, and cases there cited. In one of the many cases sustaining this view the court said:

"In all cases where there is a settled construction of the laws of a state by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry." *Pease v. Peck*, 18 How. 595, 598, 15 L. Ed. 518.

It may be true that the question here considered, in the absence of an express statute regulating the subject, would be one not of local law, but of general jurisprudence, upon which this court would exercise its own judgment, uncontrolled by the decisions of the courts of the several states. *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. The case last cited did not involve the construction of a statute. It was a suit for an alleged illegal arrest of a passenger by the conductor of one of the defendant's trains,—an act which the defendant had not authorized or ratified. In the case at bar the right of action itself is conferred by statute, and that statute expressly provides that the plaintiff "may recover such damages as the jury may assess." The injury would be the same in all cases, for the suit is brought only for injuries which have caused death. The statute fixes no minimum or maximum sum. Its purpose, as shown by its title when first enacted, was to prevent homi-

cides. The construction which the supreme court of Alabama has placed on the statute is sustained, as we have seen, by the construction of similar statutes in other states; but if we were inclined to give the statute a different construction, if it were an original question, we would be constrained to follow the Alabama decisions. In *Township of Elmwood v. Marcy*, 92 U. S. 289, 294, 23 L. Ed. 710, Mr. Justice Davis, in delivering the opinion of the court, said:

"We are not called upon to vindicate the decisions of the supreme court of Illinois in these cases, or approve the reasons by which it reached its conclusions. If the questions before us had never been passed upon by it, some of my Brethren who agree to this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void because the laws which authorized their issue were in violation of a peculiar provision of the constitution of Illinois. We have always followed the highest court of the state in its construction of its own constitution and laws."

There are numerous assignments of error (68 in all), relating to the organization of the jury, the admission of evidence, the argument of counsel, and the charge of the court. We have examined them all, and believe that the only material question in the case is the one considered in the opinion. We do not find any error in the record to the injury of the plaintiff in error. The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge (dissenting). As this action was tried in the lower court, and as presented in this court, it is a civil action to enforce a criminal law of the state of Alabama, wherein the guilt of the defendant was determined by the preponderance of evidence, and wherein the rules and presumptions pertaining to contracts for the safe carriage of passengers for hire were applied, and, practically and substantially, the burden of proving innocence thrown on the defendant. The trial judge charged the jury that if they believed from the evidence that the plaintiff's intestate, Martin, was sitting in a seat in defendant's passenger train when the bridge across the Cahawba river collapsed, this raised the presumption that said Martin was a passenger on said train. He then charged the jury that if they believed that Martin was a passenger on the defendant's train at the time of the wreck, and was killed in the wreck, the prima facie presumption was that his death was the result of the defendant's negligence. He further charged the jury that if they believed from the evidence that the plaintiff's intestate, Martin, was a passenger on the defendant's train, and was killed by the falling of the bridge, the burden of proof was upon the defendant to show to the reasonable satisfaction of the jury that it exercised the highest degree of care in and about the construction, erection, and keeping in repair of the bridge, and in and about the operation of the train in which the plaintiff's intestate was riding, and that, if the evidence failed to satisfy the jury in these respects, the jury were bound to find a verdict for the plaintiff. So it seems that, in this quasi criminal case, the jury were first to presume, from the mere fact that Martin was sitting in a seat in defendant's passenger train, that he was a passenger, and, next, from the fact that he was a passenger on the

train and was killed, to presume that he was killed through the defendant's negligence; and thus was thrown upon the defendant the burden of proving that it exercised that high degree of care which is required of the carrier of passengers for hire.

In his general charge to the jury, the trial judge instructed the jury:

"If your verdict is for the plaintiff, you will consider the amount of that verdict, and base it solely, as the decisions of the supreme court of Alabama have said, according to the degree and amount of negligence proven against the defendant, the railroad company. If the negligence was slight, the verdict should be slight. If the negligence was great and culpable, the verdict should be large. If halfway between the two, the verdict should be accordingly."

And then, at the request of the plaintiff, the court specially gave this charge:

"The court charges the jury that the measure of damages in this case is punitive and exemplary, and, if they should find from the evidence that the defendant is liable, it is their duty to impose such damages by way of punishment as will, in their judgment, prevent defendant in future from negligence causing the death of its passengers, or such as will prevent other railroads engaged in like business from being guilty of negligence which would cause the death of their passengers."

If the general charge was correct, the special charge was incorrect, and vice versa, with the inevitable result of misleading the jury. As I understand it, the special charge was incorrect and unwarranted. It asserts that it was the duty of the jury to impose such damages as would, in their judgment, prevent the defendant in future from negligence causing the death of its passengers, or such as would prevent other railroads engaged in like business from negligence which would cause the death of their passengers. It was a direct invitation and instruction to the jury to give excessive damages as a punishment in a case where, of necessity, punishment must be vicarious; for it cannot be ignored that the defendant's liability results entirely from its responsibility for the negligent acts and omissions of its servants, and that, no matter how much the defendants may be mulcted, the punishment does not reach, nor can be made to reach, the really guilty parties; for no punishment imposed upon a railway corporation, no matter how severe, can be effectual to keep its many servants guiltless of negligence for all time,—much less, the servants of all corporations engaged in similar undertakings. In *Railroad Co. v. Freeman*, 97 Ala. 294, 11 South. 801, cited in the opinion of the court to show that the law of Alabama "to prevent homicides" is constitutional, the supreme court of Alabama lays down the rule of damages as follows:

"The admeasurement of the recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act, or in the omission of the act as required by the dictates of care and prudence."

I understand that to mean that the recovery is to be measured by the degree of turpitude involved in the wrongful act. The character of the act is the test, and not the amount required to prevent other parties from committing like acts. In the same case it was held to be within the province of the jury to find only nominal damages. The court said:

"We do not doubt that it would be competent for the jury in actions like this to return a verdict for nominal damages only. The negligence of a defendant, while sufficient to make out a technical cause of action, and plaintiff's right to recover judgment, might yet be so slight, or so characterized by mitigating circumstances, as that the jury would be justified in the imposition of such punishment only as is involved in the assessment of merely nominal damages, since there is no question of compensation or actual damages to be considered."

In the instant case the trial court specially instructed the jury that, if they found the defendant liable, it was their duty to impose such damages by way of punishment as would prevent other railroads from being guilty of negligence. Of course, the courts have little to do with the policy of the laws enacted by the legislature of the state of Alabama, and it may be that we are expected to follow the construction given by the supreme court of the state; but, under a law like the act "to prevent homicides," I do not think that we should go further than the supreme court of Alabama has gone in inflicting vicarious punishment. In my opinion, the judgment of the circuit court should be reversed, and the cause remanded, with instructions to award a venire de novo.

TOMPKINS v. CRAIG.¹

SAME v. ESHLEMAN.

(Circuit Court, E. D. Pennsylvania. May 23, 1900.)

Nos. 43, 44.

ACTION ON FOREIGN JUDGMENT—PLEADING—SUFFICIENCY OF COMPLAINT—AFFIDAVIT OF DEFENSE.

A declaration in assumpsit on a foreign judgment, which sets out some of the orders only of the foreign court, instead of a copy of the full record, is not sufficient to entitle plaintiff to judgment in default of an affidavit of defense.

Charles Chauncey, Andrew T. Jenkins, Swan, Lawrence & Swan, and John S. Goodwin, for plaintiffs.

Theodore F. Jenkins, for defendants.

MCPHERSON, District Judge. A plaintiff's right to take judgment for want of an affidavit of defense, or for want of a sufficient affidavit of defense, in an action of assumpsit in this court, must rest upon the Pennsylvania practice in this district, as determined by statute and by the rulings of the state courts. That such an affidavit must ordinarily be made in an action of assumpsit upon a foreign judgment or decree has been settled by several decisions,—*inter alia*, by *Moore v. Fields*, 42 Pa. St. 467, and *Mink v. Shaffer*, 124 Pa. St. 280, 16 Atl. 805,—but with this important restriction: The plaintiff's statement must be accompanied by a complete copy of the foreign record. Extracts will not be accepted as a substitute, even although they may seem to contain all that is pertinent to the matter immediately in issue. The reason is obvious. Unless the whole record is displayed, the court cannot exercise its own judgment concerning

¹ For opinion on rehearing, see 102 Fed. 668.

the existence of the right of action, but is obliged to accept the plaintiff's choice as determining finally this essential question. The point has been twice decided within a few years by the supreme court of Pennsylvania. *Campbell v. Railway Co.*, 137 Pa. St. 574, 20 Atl. 949; *Finch v. White*, 190 Pa. St. 86, 42 Atl. 457. Following these decisions, it must be held that as the present plaintiff has confessedly filed with his statement a copy of some orders only of the Iowa court, and has not appended a copy of the full record, the motions under consideration should be denied. To avoid misapprehension, I may add that I assume, without deciding, that the Pennsylvania practice requires an affidavit of defense in cases where the additional statutory liability of a shareholder defendant is concerned, and where the foreign record does not show a personal service of process on the party sought to be charged in this jurisdiction, but shows only a service upon the corporation in which such party was the owner of shares of stock.

In each of the foregoing cases the rule for judgment is discharged.

WIGTON v. BOSLE

(Circuit Court, E. D. Pennsylvania. May 28, 1900.)

No. 36.

1. NONSUIT—MOTION TO SET ASIDE—MISTAKE OF PLAINTIFF.

Where, in an action to enforce a liability under a foreign statute, plaintiff rests his case upon a particular statute, to which the attention of the court is called, and the cause is tried upon the theory of defendant's liability thereunder, and results in a nonsuit, plaintiff is not entitled to have the nonsuit set aside for the reason that there is another statute of the foreign state, which, if it had been brought to the attention of the court in due season, would have avoided such judgment.

2. BANKS—STOCKHOLDER'S INDIVIDUAL LIABILITY—RECEIVERS—PLEADING—VARIANCE.

Where, in an action by a receiver to enforce a stockholder's liability under a foreign statute, the declaration alleges that under such statute shareholders are individually and severally liable "to the creditors" of the corporation, the receiver cannot recover, though the statute makes such liability an asset of the corporation, because of the material variance between the pleading and proof.

3. SAME—RIGHT OF ACTION—ASSESSMENT ORDERED BY COURT OF FOREIGN JURISDICTION.

The individual liability of the shareholders of a bank to the creditors of the corporation, being conditioned by the statute of Iowa upon the bank having become insolvent, and upon the insufficiency of its assets to pay its debts, and being limited to the stockholder's share of the deficiency only, the receiver of a bank, appointed under the general powers of a court in Iowa, cannot maintain an action in a foreign jurisdiction against a shareholder, for the amount of an assessment upon stock directed to be made by the court in Iowa, in a proceeding to which the shareholder was not a party, and to which he did not appear, and to which he could not have been required to appear, because of his being beyond the jurisdiction of the court.

4. RECEIVERS—POWERS—CANNOT MAINTAIN ACTION IN FOREIGN JURISDICTION.

The receiver of a corporation appointed by a court of competent jurisdiction in one of the states cannot maintain an action in another state for the recovery of a demand due the estate of which he is receiver.

5. SAME—COMITY.

Even if the rule which permits the receiver of a corporation to sue in a foreign jurisdiction, as an act of comity, be recognized by the federal courts, it will not be extended to a demand for a stockholder's liability, under an assessment ordered by the court in which the receiver was appointed, in proceedings to which the stockholder was not a party.

6. FOREIGN JUDGMENT—EVIDENCE—NONSUIT.

Where, in an action against a shareholder for the amount of an assessment upon the stock of a corporation made pursuant to an order of court in the matter of the receivership of such corporation in a foreign jurisdiction, a complete copy of the proceedings in the case wherein such order was made is not produced upon the trial, plaintiff will be nonsuited.

A. T. Jenkins, Charles Chauncey, and T. F. Bevington, for plaintiff.

Richard C. Dale, for defendant.

DALLAS, Circuit Judge. This action was brought to enforce a liability to which the defendant is alleged to be subject as a stockholder of the Iowa Savings Bank, by virtue of the laws of the state of Iowa. At the outset of the trial the counsel for the plaintiff stated:

"I understand that the court takes judicial notice in such cases as this of the statutes of the state, and I therefore want to call attention to the laws of the state of Iowa (Miller's Code, July 4, 1888, p. 606)," etc.

The learned counsel were unquestionably right in understanding that the courts of the United States take judicial notice of the public laws of each of the several states, when any such law is properly applicable to a case on trial in a federal court; but they were also right in supposing that the trial judge was in fact unacquainted with the statutes of Iowa, and that therefore the burden was upon the plaintiff to supply the needful information. He, however, presented only the one statutory provision above mentioned, and as that provision is, as is now conceded, inapplicable to this action, the judgment of nonsuit was, as the case then appeared, clearly right. Yet I am asked to strike off that judgment, for the reason that there is another Iowa statute which it is contended would, if it had been brought to the attention of the court in due season, have precluded its entry; but I have not been convinced that this additional statute should be considered upon this motion. The action of the court was not founded upon a refusal to take judicial notice of anything which it should have noticed, but upon its compliance with the plaintiff's request that it should notice a certain particular statute, which he asserted to be the pertinent one; and consequently the case, from beginning to end, was tried upon that supposition. Under these circumstances, the plaintiff, if the case had gone to the jury, would not have been entitled to have a verdict against him set aside, and, a fortiori, he is not entitled to be relieved from the requirement, which a nonsuit imposes, of paying the costs of this action, and then bringing a new one, if he shall be so advised. Steph. Dig. Ev. art. 59; Tayl. Ev. § 21, and cases there cited. But, even if the statutory provision which is now relied on had been produced on the trial, I am of opinion that the entry of the nonsuit would have been proper. That provision is as follows:

"Shareholders in banks organized under the provisions of this act shall be individually and severally liable to the creditors of the corporation of which they are shareholders over and above the amount of stock by them held, to an amount equal to their respective shares so held, for all its liabilities accruing while they remain shareholders, and no transfer of stock shall affect such liability for the period of six months thereafter, and should any bank become insolvent and its assets be found insufficient to pay its debts and liabilities, its shareholders may, to that extent, be compelled to pay such deficiency, in proportion to the amount of stock owned by each."

I assume, without deciding, that the effect of this provision, as a whole, is to make the liability which it creates an asset of the corporation. But the plaintiff's declaration is inconsistent with this assumption. It alleges that the laws of the state of Iowa provide "that shareholders are individually and severally liable to the creditors of the corporation," and, if this were really the effect of this statute, the receiver could not, aside from any other objection, maintain this action. *Mechanics' Sav. Bank v. Fidelity Insurance Trust & Safe-Deposit Co. (C. C.)* 87 Fed. 113; *Id.*, 38 C. C. A. 193, 97 Fed. 297; *Whitman v. Bank*, 20 Sup. Ct. 477, Adv. S. U. S. 477, 44 L. Ed. —. Hence there seems to be a variance between the pleading and the proof, which cannot but be material, since it is only by assuming that the proof establishes a right not declared upon that any cause of action can be said to have been shown.

There is, however, more substantial ground for upholding this nonsuit. The plaintiff bases his right to sue as receiver upon his allegation that a court of the state of Iowa appointed him receiver of the Iowa Savings Bank, of that state, "inter alia, to collect and receive all its assets," and thereafter ordered and made an assessment upon the par value of the stock of each shareholder, and authorized and directed him (the receiver) "to proceed at once to use all legal means to collect the assessment by suit or otherwise." The gravamen of the complaint is that "the defendant has failed and refused to pay the amount of the assessment," and the first question is, was he bound by the order which made the assessment and fixed its amount? The liability imposed by the statute is conditional upon the bank having become insolvent, and its having been found that its assets are insufficient to pay its debts and liabilities; and the liability is not for any specified sum, but is for "such deficiency," whatever it may be, and attaches to the several shareholders in proportion to the amount of stock owned by each. Manifestly, therefore, before a common-law action can be maintained for recovery of a specific sum, there must have been some legitimate ascertainment of the insolvency of the bank, of the insufficiency of its assets to pay its debts and liabilities, and also of each shareholder's proportion of such deficiency. In my opinion, none of these matters has been ascertained or determined in any manner which can affect this defendant. The assessment order which is relied upon was made in a suit to which he was not a party, and in which he did not appear, nor could have been required to appear. It was made upon the report of a receiver, who was appointed in the exercise of the general powers of the Iowa court and not in pursuance of any statute of that state vesting in him the legal title to the corporate assets. If such

had been the case, or if the proceeding had been one for the enforcement of unpaid subscriptions to stock, a different question might have been presented; but to hold any man bound by an order such as is now claimed to be conclusive upon this defendant, although he never had his day in court to object to it, would be, as it seems to me, to disregard a plain and fundamental principle of justice. *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.*, 30 C. C. A. 632, 87 Fed. 252.

Furthermore, I am of opinion that this receiver has no right to maintain the present action in this jurisdiction. In *Hale v. Hardon* (C. C.) 89 Fed. 283; *Id.*, 37 C. C. A. 240, 95 Fed. 747,—the cases of *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, and *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, and others, were very carefully reviewed. In the circuit court Judge Putnam decided against the right of such a receiver to sue. In the court of appeals the majority of the court (Judge Colt dissenting) held to the contrary. The result was that Judge Putnam's judgment was reversed, but, under the circumstances, I have thought it proper to give the same consideration to the opinion of Judge Putnam and of Judge Colt as to that of Judge Aldrich, upon which the judgment of the court of appeals was founded; and I am constrained to say that, both upon reason and authority, the opinion which was delivered in the circuit court and the dissenting opinion in the court of appeals accord with my own judgment, and I therefore follow them. The full discussion of the subject presented in the case just mentioned renders it unnecessary for me to enlarge upon it, but I may add that my own independent and careful examination of the point has satisfied me with the correctness of the statement contained in *High*, Rec. §§ 239, 241, viz.:

"Upon the question of the territorial extent of a receiver's jurisdiction and powers, for the purpose of instituting actions connected with his receivership, the prevailing doctrine, established by the supreme court of the United States, and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction or power of official action, and cannot go into a foreign state or jurisdiction and there institute a suit for the recovery of demands due the person or estate subject to his receivership. His functions and powers, for the purposes of litigation, are held to be limited to the courts of the state within which he was appointed, and the principles of comity between nations and states, which recognize the judicial decisions of one tribunal as conclusive in another, do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction. * * * While, as is thus seen, the courts have generally denied the receiver's extraterritorial right of action as a question of strict right, yet it has sometimes been recognized as a matter of comity. Thus, it has been held that receivers of a foreign corporation, appointed in other states, might sue in New York in their official capacity in cases where no detriment would result to citizens of the latter state; the privilege of thus suing being regarded as based rather upon courtesy than upon strict right, and the courts declining to extend their comity so far as to work detriment to citizens of their own state who have been induced to give credit to the foreign corporation."

Whether in any case this courtesy or comity should, in view of the decisions of the supreme court of the United States, be recognized by the federal courts, need not be decided; for I think that the case now under consideration, even if such comity might in any instance be accorded, is not one in which it should be exercised.

While I have deemed it expedient to express my views upon the matters heretofore discussed, I have not overlooked the fact that the copy of the Iowa record which was offered on the trial, and provisionally admitted, was not a "complete copy," and therefore, it would seem, was fatally defective. See opinion of McPherson, J., in *Tompkins v. Craig* (decided at present term of this court) 102 Fed. 69. The plaintiff's motion to strike off the judgment of nonsuit is denied.

HAUG v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1900.)

No. 1,285.

1. JUDGMENTS—COLLATERAL ATTACK—REMOVAL OF CAUSES—JURISDICTION.

Where the record in a cause removed from a state court to the federal court fails to show the facts on which the jurisdiction rests,—as that plaintiff and defendant are citizens of different states,—the judgment therein cannot for such reason be collaterally attacked by one who is a party to the suit, though it may be reversed upon a direct proceeding for that purpose.

2. SAME—DISMISSAL—GROUNDS—EFFECT OF ORDER—COLLATERAL ATTACK.

An order dismissing a cause, upon motion, on the ground that the complaint does not state facts sufficient to constitute a cause of action, is a final judgment, under the practice of North Dakota, and cannot be collaterally attacked, however erroneous it may be.

3. SAME—ESTOPPEL.

Where an action is dismissed upon motion of defendant because the complaint fails to state facts sufficient to constitute a cause of action, plaintiff cannot afterwards maintain an action to enforce the same right, where the legal effect of the complaint in the two cases is identical, and all evidence going to the merits of the action which would have been competent under the one would likewise be competent under the other.

In Error to the Circuit Court of the United States for the District of North Dakota.

In February, 1895, Olea C. Haug, the plaintiff in error, brought an action in the district court of Traill county, N. D., against the Great Northern Railway Company, the defendant in error, to recover damages for the death of her husband, Jacob C. Haug, which it was alleged was occasioned by the wrongful acts and negligence of the defendant. This action was removed by the defendant into the circuit court of the United States for the district of North Dakota on the ground of diverse citizenship of the parties. In that court the defendant filed a general demurrer to the complaint, which was sustained. The plaintiff thereupon filed an amended complaint, and an amendment to the amended complaint, whereupon the defendant filed the following motion:

"Motion to Dismiss and for Judgment.

"Now comes the defendant, the Great Northern Railway Company, by its attorney, and moves the court above entitled to dismiss the plaintiff's amended complaint, and for judgment in favor of the defendant and against the plaintiff in accordance with the previous order of this court sustaining defendant's demurrer to plaintiff's original complaint. This motion is made upon said order of the court, and upon the plaintiff's amended complaint filed by leave of the court, and is predicated upon the following grounds, to wit: (1) That said amended complaint contains no allegation of jurisdictional facts, and does not show affirmatively that this court has jurisdiction to try and determine the same; (2) that said amended complaint does not state facts sufficient to constitute a cause of action. Wherefore defendant prays judgment accordingly."

This motion coming on for hearing on the 9th day of June, 1896, the court entered the following judgment thereon:

"This cause coming on to be heard on motion of the plaintiff for leave to amend his complaint herein, and no objection being made thereto, it is ordered that said motion be, and the same is hereby, granted; and the motion of the defendant that this cause be dismissed for the reason that the amended complaint, as now amended, fails to state facts sufficient to constitute a cause of action, coming on at this time to be heard (W. E. Dodge, Esq., appearing in support of said motion, and B. E. Ingwaldson, Esq., opposed thereto), after hearing the arguments of the respective counsel, and being advised in the premises, it is ordered that said motion to dismiss be, and the same hereby is, granted. Whereupon it is ordered and adjudged that this action be, and same hereby is, dismissed, and that the defendant have and recover of the plaintiff its costs herein, taxed and allowed at the sum of \$——, and that the defendant have execution therefor. Wm. Lochren, Judge."

No further proceedings were ever had in that case, and the judgment therein rendered remains in full force and effect.

In January, 1897, Olea C. Haug, the plaintiff in error, brought the present action in the district court of Traill county, N. D., against the Great Northern Railway Company, for identically the same cause of action counted on in the previous action. The defendant demurred to the complaint. The demurrer was sustained. The plaintiff appealed from the judgment sustaining the demurrer to the supreme court of the state, which reversed the judgment on the demurrer, and directed the trial court to overrule the same. *Haug v. Railway Co.*, 77 N. W. 97, 42 L. R. A. 664. Upon the return of the record into the trial court, the plaintiff filed an amended complaint, the same in substance and legal effect as the previous complaint. This cause was thereupon removed into the circuit court of the United States for the district of North Dakota upon the petition of the defendant. The defendant filed its answer in that court to the complaint and amended complaint, setting up in bar of the action the judgment of the circuit court of the United States on the demurrer and motion to dismiss in the first suit brought by the plaintiff, and which is above set out. The plaintiff filed a reply admitting the institution and prosecution of the action pleaded in bar in the answer, and that it was disposed of as shown by the record quoted, but averred that such record did not operate as a bar to the present suit, for two reasons: First, that the United States circuit court did not have jurisdiction of the case; and, second, that its judgment was "only an order, and not a final judgment, under the laws of the state of North Dakota." The defendant thereupon moved for judgment upon the pleadings, which motion was sustained, and final judgment rendered for the defendant, whereupon the plaintiff sued out this writ of error.

B. E. Ingwaldson, for plaintiff in error.

W. E. Dodge and Charles S. Albert, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The objection to the jurisdiction of the circuit court in the first case is grounded on the alleged fact that the petition for the removal of the cause did not disclose the requisite diverse citizenship of the parties to authorize its removal. Assuming this to be so, the validity of the judgment is not affected thereby. We have twice decided that, if the record fails to show the facts on which the jurisdiction rests (as, for instance, that the plaintiff and the defendant are citizens of different states, or, where the plaintiff sues as assignee, that his assignor might have maintained the suit), the judgment may be reversed for error upon a direct proceeding for that purpose, but it is not void, and cannot be collaterally attacked by one who is a party to the

suit in which it was rendered. *Skirving v. Insurance Co.*, 19 U. S. App. 442, 8 C. C. A. 241, 59 Fed. 742; *Rice v. Commission Co.*, 36 U. S. App. 266, 18 C. C. A. 15, 71 Fed. 151. And to the same effect is the later decision of the supreme court. *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463. The record shows no consent of parties to remand the case, as counsel for the plaintiff in error seems to suppose.

The order of the court in the first case, made on the defendant's motion for judgment on the pleadings, was, under the practice of North Dakota, a final judgment, and cannot be collaterally attacked, however erroneous it may be. A motion for judgment on the pleadings is in fact a demurrer, and if sustained by the court, and final judgment entered thereon, it has the same effect as if the demurrer to the complaint had been sustained, and final judgment entered in favor of the party demurring. *Taylor v. Palmer*, 31 Cal. 241; *Cameron v. Railway Co. (N. D.)* 77 N. W. 1016; 2 Black, Judgm. § 707; *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. 671. When a final judgment is rendered for the defendant on a demurrer to the complaint, or to material pleadings in chief, the plaintiff can never maintain against the same defendant or his privies any similar or concurrent action for the same cause and upon the same grounds as were disclosed in the first complaint. *Gould v. Railway Co.*, 91 U. S. 522, 23 L. Ed. 416; *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411. If a plaintiff fails on demurrer in his first action by reason of the omission of an essential allegation in his declaration, which is supplied in his second suit, the judgment in the first suit is no bar to the second, although the actions were instituted to enforce the same right, for the reason that the merits of the case as disclosed in the second complaint were not heard and decided in the first action. *Gould v. Railway Co.*, *supra*. In this case there is no ground for the contention that the complaint in both cases did not set forth the same cause of action. There is no essential allegation omitted in the first complaint which is included in the second. There are slight variations in narrating immaterial or evidentiary facts, but the legal effect of the complaint of the two cases is identical. All evidence going to the merits of the action, competent under one, would have been competent under the other. It clearly appearing from an inspection of the pleadings and judgment in the first action that a final judgment has been rendered on the merits by a court of competent jurisdiction in a suit between these parties for the very same cause of action for which this suit is brought, the circuit court rightly rendered judgment for the defendant on the pleadings, and its judgment is affirmed.

HOWARD et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. April 9, 1900.)

No. 1,288.

1. CLERKS OF CIRCUIT COURTS—BONDS—PROTECTION OF PRIVATE SUITORS.

The bond of a clerk of the circuit court, required by statute, and conditioned "faithfully to discharge the duties of his office," though given to the United States, is for the protection of private suitors no less than the United States, and the condition embraces every duty and obligation imposed on the clerk by law or the lawful order, usage, and practice of the court.

2. SAME—BREACH OF CONDITION OF BOND—MONEY RECEIVED IN OFFICIAL CAPACITY.

A party to a civil action in a circuit court has the right, on filing a pleading making a tender, to pay the money necessary to make such tender good into court, no order authorizing such payment being required, and it is the duty of the clerk to receive such money in his official capacity; and, being money received by him "in a cause pending in such court," he is required by Rev. St. § 995, to forthwith deposit the same in the registry of the court. A failure on his part to so deposit the money, or to pay it over to the party entitled thereto by the order of the court, is a breach of the condition of his bond, for which his sureties are liable to the person suffering damage thereby.

3. SAME—SUIT ON BOND—RIGHT TO USE NAME OF UNITED STATES.

The statute, having required the giving of a bond by each clerk of a circuit court, intended for the security of all suitors in such court, by implication authorizes any suitor who is injured by reason of the official misconduct of the clerk to put such bond in suit in the name of the United States to his use, for the redress of such injury.

4. APPEAL—FORMAL ERRORS AS TO PARTIES—AMENDMENT.

The fact alone that an action was brought in the name of the wrong party as plaintiff is not ground for reversal, but the appellate court will direct the substitution of the proper party.

In Error to the Circuit Court of the United States for the Western District of Missouri.

By stipulation in writing the parties waived a jury, and tried this action before the court on the following agreed statement of facts:

"It is agreed between the parties hereto that the facts herein are as follows:

"(1) Upon March 3, 1887, Warren Watson was appointed clerk of the United States circuit court for the Western division of the Western district of Missouri, and acted as such from that date until his death, which occurred on the 24th day of March, 1892. Upon March 3, 1887, Warren Watson, with these defendants, executed his bond as such clerk, in words and figures as follows:

" 'Know all men by these presents, that we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the city of Kansas City, in the county of Jackson, state of Missouri, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States, to be paid to the said United States, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands, and sealed with our seals, this 3d day of March, 1887. The condition of the above obligation is such, whereas, the said Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States for the Western division of the Western district of

Missouri, as by order of appointment bearing date the 3d day of March, 1887, and recorded on page 70 of Book "Law D" of the records of said court, will more fully appear: Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments, and determinations of said court, then this obligation to be void; otherwise, to remain in full force and virtue.

"Warren Watson. [Seal.]
 "Frederick Howard. [Seal.]
 "John Cutter Gage. [Seal.]
 "James Lewis Lombard. [Seal.]
 "Witten McDonald. [Seal.]

"Approved: A. Krekel, Judge."

"This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defendants, or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of the said court, who indorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

"(2) Warren Watson was a resident of Jackson county, Missouri, and, while still acting as such clerk, died, on the 24th day of March, 1892, and on the 2d day of April, 1892, Fred W. Perkins was, by the probate court of said county, duly appointed as his administrator, and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate, having been completely administered upon, was closed, and the administrator discharged. At no time did the United States or David D. Stewart, the relator, ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents. The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is \$2,730.91, and on this sum there was paid a dividend of .331 per cent., or, in the aggregate, \$90.41, and no more.

"(3) On February 6, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States circuit court his suit at law against Henry county, Missouri, in which his causes of action were set forth in a petition containing three counts, the first asking a judgment for \$1,010, with interest from the 1st day of September, 1887, on a bond of defendant for \$1,000, dated July 1, 1882, payable at the National Bank of Commerce of New York on July 1, 1892, with six per cent. interest, evidenced by coupons, but at the option of the county the bond was payable at any time after July 1, 1887. The second count was upon a similar bond for \$1,000, and the third was on a like bond for \$500. On March 3, 1891, defendant, Henry county, filed in said cause its answer, said answer as to each of the first and second counts being that on September 6, 1887, there was due on said bond \$1,010, and on that date it deposited that sum in the National Bank of Commerce of New York for the payment of the bond and interest, and on September 6, 1887, tendered that sum to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same, and defendant says it has at all times been ready and willing to pay plaintiff said sum of \$1,010 in full payment of said bond and unpaid interest, and now here again tenders to plaintiff said sum of \$1,010 in full payment of said bond and unpaid interest due thereon on September 6, 1887, and now brings the said sum into court.' The answer to the third count was exactly the same, except that the amount named was \$505, instead of \$1,010. Upon March 3, 1891, there was entered on the records of said court the following: 'This day comes defendant, by its attorney, and files answer, and tenders to the plaintiff, and deposits with the clerk, the sum of \$2,525 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein.' On June 27, 1891, the plaintiff in said suit filed his reply, which was a general denial. On July 2, 1894, there was entered on the records of said court the following: 'This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and, a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the

court. Thereupon evidence is heard, and the case is submitted to the court, and by the court taken under advisement, with leave to the parties to file briefs.' On February 11, 1895, there was entered on the records of said court the following: 'A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and arguments of counsel, and taken under advisement by the court, and the court, being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment on the 1st day of September, 1887, and that after the plaintiff instituted this action in this court, and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of \$1,010. [The findings as to the second and third counts are precisely similar, except as to the amounts; the second count being \$1,010, and the third \$503.] It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars (\$2,525), the aggregate amount found to be owing to him under the three counts of the petition, and that plaintiff pay the costs of this action, and that execution issue therefor. And it further appearing to the court that the said sum of \$2,525 so paid into court as aforesaid was paid and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid.' No appeal was taken from this judgment, and the same has become final, and remains in full force and effect, and unpaid.

"(4) On March 3, 1891, Henry county did hand to Warren Watson the sum of \$2,525 as in said entry of that date recited. No order or direction of the court as to this money was ever made, had, or obtained, and no entry in reference to the same was ever made, except as set out in paragraph 3. When the \$2,525 was so paid to said Warren Watson, he, on the same day, deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry county or David Stewart, and never during the pendency of the suit of Stewart v. Henry County did either party take any steps towards having any order made in relation to the said money, other than was actually made, nor make any objection to the method in which said money was received. David D. Stewart had no knowledge of said acts of Warren Watson.

"(5) At no time was demand made on these defendants or Warren Watson for said money, other than is to be inferred from the institution of the suit.

"(6) A jury is waived, and the answer of defendants shall be regarded as verified.

"The above and foregoing are all the facts in the case, and are to be taken subject to objections by either party as to their relevancy and competency."

On consideration of the agreed statement of facts the circuit court found the issues for the relator, and rendered a judgment against the defendants for the amount claimed. The opinion of the learned trial judge is reported in 93 Fed. 719. The defendants sued out this writ of error.

Frank Hagerman (Sanford B. Ladd and Willard P. Hall, on the brief), for plaintiffs in error.

Edwin A. Krauthoff (J. V. C. Karnes, Alexander New, and David D. Stewart, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts as above). The first contention of the plaintiff in error is that the bond required to be given by a clerk of the United States circuit court is intended "solely for the protection of the United States, and not at all for the protection of private suitors." From the organization of the judicial system of the United States the condition of the clerk's bond has been the same. The judiciary act of 1789 required the clerk to "give bond with sufficient sureties to the United States in the sum of \$2,000 faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court of which he is clerk." As the business in these courts increased, provision was made by which the penalty of the bond could be correspondingly increased. By section 795 of the Revised Statutes of the United States the penalty of the bond was "to be fixed by the court," and by the later act of February 22, 1875 (18 Stat. 333, c. 95, § 1), the penalty of the bond is fixed at "not less than \$5,000 and not more than \$20,000, to be determined and regulated by the attorney general of the United States." Very curiously, section 795 of the Revised Statutes omitted to name any obligee in the bond. This omission, however, in no manner affected the validity of the bond, for with or without a named obligee the bond was a valid security to any one injured by a breach of its conditions. *Carnegie, Phipps & Co. v. Hulbert*, 36 U. S. App. 81, 16 C. C. A. 498, 70 Fed. 209. This omission was remedied by the act of 1875, which requires the bond to be given "to the United States," as did the judiciary act of 1789, but the condition of the bond has remained the same under all the acts. If the contention of the plaintiff in error is sound that the bond is intended "solely for the protection of the United States, and not at all for the protection of private suitors," then no act on the part of the clerk in the discharge of his official duties which results in loss or injury to a private suitor in the court would render him liable therefor in his official capacity. He might with impunity refuse "to record the decrees, judgments, and determinations of the court" in favor of private suitors without incurring official responsibility on himself, or imposing liability on his sureties for such neglect of duty. If the statute was made to express the construction contended for, the condition would read, "faithfully to discharge the duties of his office so far forth as they concern the United States only, and seasonably to record the decrees, judgments, and determinations of the court in cases in which the United States only is interested." Obviously, the court cannot ingraft any such limitations on the conditions of the bond. The United States is named as the obligee in the clerk's bond, as is done in the case of the marshal's bond and the bonds of other officers of the United States; but the bond is given for the indemnity of any one (the United States no more than any private suitor) who suffers loss through his official misconduct or delinquency,—any one suffering loss by the breach of the covenant of his bond "faithfully to discharge the duties of his office." This comprehensive condition embraces every duty and obligation imposed on him by law or the lawful order, usage, and practice of the court. *Grady v. U. S.*, 39 C. C. A. 42, 98 Fed. 238. Section 995 of the Revised Statutes of the United States provides:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court, provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

When a clerk receives money in his official capacity he does not "faithfully discharge his duty" in respect to such money unless he "forthwith" deposits it in conformity with the requirements of this section. And much less does he comply with the obligation of the bond when he not only fails to deposit it as required by law, but fails to produce and pay it over to the party entitled to it under the order of the court. The section quoted has been the law since 1817 (Act March 3, 1817 [3 Stat. 379]), save in the name of the depositories. The statutes of the United States plainly contemplate that the clerk will receive in his official capacity moneys belonging to private suitors. Provision is made for loaning out moneys in the registry of the court "according to the agreement of the parties," and the parties here meant are private suitors, as the government does not loan her money in this way. The moneys belonging to the United States arising under the internal revenue laws of the United States which come into the hands of the clerk are required to be paid to the collector of internal revenue for the district (section 3216, Rev. St.; Instructions of Attorney General, 133), and all other moneys coming into the hands of the clerk belonging to the United States are required to be "promptly covered into the treasury" (Id.). Section 798, Id., provides:

"At each regular session of any court of the United States, the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court."

This section is a re-enactment of a similar section of the act of 1817. It is apparent from the provisions of this section that congress was cognizant of the fact that clerks were constantly receiving and disbursing in their official capacity moneys in causes pending in court between private suitors. This is still more plainly shown by the provisions of the act of February 19, 1897 (29 Stat. 578, c. 265, § 3), which requires moneys which have remained in the registry of the court unclaimed for 10 years or longer to be deposited to the credit of the United States; and a similar provision is found in section 4545, Rev. St. U. S. It is obvious that the moneys here referred to are not the moneys of the United States. Moneys paid to the clerk in his individual capacity become a mere private trust, and are no more subject to congressional control, or the control of the court, than if he were not clerk. For more than a century the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner, and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such clerks. Under the provision of section 828 the

clerk is allowed "for receiving, keeping and paying out money in pursuance of any statute or the order of the court, one per centum on the amount so received, kept and paid," and this poundage has always been allowed to them on moneys received and paid out by them. Nothing short of legislation can change the law as established by more than 100 years of uniform and constant practice of the courts. The money sued for in this action was paid into court and received by the clerk in a "cause pending in said court," and it was the duty of the clerk to "forthwith" deposit the same as required by section 995. His failure to do so was a breach of the condition of his bond, for which the sureties are liable to the person suffering damage thereby.

A further contention of the plaintiff in error is that the money was not received by the clerk by virtue of his office. The answer set up a tender, before suit was brought, of the amount due on the bonds, and concluded in these words: "And now brings the said sum into court." The answer was filed with the clerk, and the money tendered therein deposited with the clerk, at the time the answer was filed. The defendant had an undoubted right to set up this defense, and to set it up in a manner to make it effectual. A plea of tender, not accompanied with the money tendered, is bad; and a tender of the money without a plea setting it up goes for nothing. To make its plea good, it was necessary, therefore, for the defendant to file its written answer setting up the tender, and to bring the money tendered into court, as was done. The defendant did not have to apply to the court for leave to bring the money into court any more than it had to apply to the court for leave to file its answer. The answer and the money were parts of one whole. Together they constituted a good plea of tender, which was the county's defense to the action. Neither was a defense without the other. The law gave the defendant the absolute right to do precisely what was done. If it was the duty of the clerk, acting in his official capacity, to file the written part of the answer, it was equally his official duty to receive and safely keep the money tendered with the answer, and which was an essential part of it. When a tender is pleaded, no previous leave of the court is necessary before bringing the money tendered into court. This has been the law from the earliest times. In 6 Bac. Abr. tit. "Tender and Bringing Money into Court," *444, it is said:

"Wherever a tender of money pleaded, and the debt is not discharged by the tender and a refusal, money may be brought into court without leave of the court; nay, the money tendered must, as hereafter will be shown, in such case be brought into court."

2 Rolle, Abr. 524; 12 Mod. 354; Ld. Raym. 83, 254, 643; 1 Barnard, 181.

It is clear, then, that the money was rightly paid into court, and that it was the duty of some officer of the court to receive and safely keep the same. Who was that officer? It certainly was not the judge, and it is equally clear that it was not the marshal. Under the law and practice of all the courts, state and federal, it was the official duty of the clerk to receive and safely keep this money. The

proposition is too plain to require any argument or authority, but we quote from a few cases on the subject.

In *McDonald v. Atkins*, 13 Neb. 568, 14 N. W. 532, suit was instituted on the bond of the clerk for money paid to him by the sheriff, collected on an execution issued in favor of the plaintiff, and which he had failed to account for. The court said:

"The point made by the defendant's counsel is that the money was not received by Vedder in his official capacity; in other words, that he had no authority as clerk to receive it. And so the court below held. No one can doubt, we think, that this ruling was in direct conflict with the general understanding of the legal profession of this state as to the duty of court clerks in the receipt and disbursement of money paid upon judgments from the first organization of our judicial system, through all its changes, down to the present time. Indeed, we doubt exceedingly that any one, especially a practicing lawyer, has ever supposed that upon the rendition of a money judgment the defendant could not prevent a further accumulation of costs and interest, and have a satisfaction legally entered of record, by at once paying to the clerk of the court the amount which it calls for. If he could not,—if clerks are really without authority to receive money on judgments in their custody,—then to whom, in the absence of the plaintiff and his attorney, could payment be legally made? While it is true that we have no statute which in express terms declares that the clerks of the several courts shall accept payment of judgments in their custody, it is very evident that the legislature contemplated and intended that they should do so. And, even in the absence of such provision, can it be doubted that a party against whom a money judgment is sought by action may, upon being summoned, pay the amount demanded 'into court,' and thereby prevent the making of any further costs? But how is it to be effected? In the case of inferior courts—those not of record, and unprovided with clerks—the payment can, of course, only be made to the judge or magistrate in person; but in courts of record, where all the steps taken in the progress of the case, from the commencement to the satisfaction of final judgment, are recorded and preserved, and where a clerk for the performance of this duty is specially provided, it is otherwise. In these courts payments of money are never made to the judge, but the uniform practice in this state has always been to make them to his clerk, to whose custody and care the files, records, and whatsoever else relates to cases in courts are confided. And this practice, so universal, although not positively directed by any act of the legislature, conflicts with none, and, as we have shown, is recognized by and in perfect harmony with several."

In *State v. Morrison*, 63 N. C. 508, the clerk of the court was appointed as special commissioner to sell a slave. The clerk, after making the sale and collecting the money, failed to pay it over, and suit was instituted on his bond as clerk, and the plea was set up that he received the money as commissioner, and not in his official capacity as clerk; but the court said:

"The statute authorizes the court to appoint the clerk or some other fit person to make sales, etc. When the person who is clerk is appointed, it is to be taken that he is appointed in his official capacity. Especially is this so when, in the order appointing him, he is designated as clerk. The clerk, then, and his sureties, are liable upon his official bond."

To the same effect is *State v. Blair*, 76 N. C. 78.

In *Railroad Co. v. Gault*, 165 Ill. 233, 46 N. E. 256, it was contended that "the interlocutory decree did not designate the clerk as depository, nor order him to receive the money; and the argument is that he was, therefore, a mere depository of the parties." But the court said, "That decree provided for the payment of the money into court, and it was paid by complainant and received by the clerk as

a fund of the court under that decree," and the clerk was held liable for the money in his official character as clerk.

In *Re Finks* (D. C.) 41 Fed. 383, the court, in answer to a contention similar to that made in this case, said:

"The payment of money into the registry of the court through the clerk as the servant and agent of the court, where there is a fund under the control of the court, and where there is no hand designated to receive it, has been in existence from the foundation of the courts, and is too firmly fixed to be successfully assailed as not being authorized by any act of congress, or rule of court prescribed in pursuance of an act of congress."

In *Connole v. People*, 46 Ill. App. 72, the court said:

"By the act relating to tender it is expressly provided that costs tendered may be brought into court, and, of course, in such cases the clerk would receive the same."

See *Walters-Cates v. Wilkinson*, 92 Iowa, 129, 60 N. W. 514; *Billings v. Teeling*, 40 Iowa, 607.

In *State v. Watson*, 38 Ark. 96, 101, the court said:

"It often happens in the progress of suits that money is brought into court, and placed in the custody of the clerk until disposed of by order of the court, and it would be unsafe to hold that the clerk and sureties are not responsible on his official bond for such moneys."

The contention that the relator has no right to maintain this action in the name of the United States upon his relation is without merit. Under the reformed procedure, which prescribes that the real party in interest must be plaintiff, it has been held that a suit on a bond given for the security of the public generally, and in which the state or other public corporation is the obligee, may be brought in the name of the person beneficially interested in the particular suit. *Morgan v. Long*, 29 Iowa, 434; *Strunk v. Ocheltree*, 11 Iowa, 158; *State v. Fredericks*, 8 Iowa, 553; *Bessinger v. Dickerson*, 20 Iowa, 260; *Latham v. Brown*, 16 Iowa, 118. Whether this is the rule under the Missouri Code we need not stop to inquire. In *Murfree*, Off. Bonds, § 323, it is said:

"It is usually provided in statutes authorizing official bonds to be required of state, county, or municipal officers that suits may be brought upon them in the name of the official obligee 'upon the relation' or 'to the use' of the party injured by the breach of the bond or interested in its enforcement. Whenever, however, this express provision is omitted by the statute itself, the deficiency is supplied by the construction given to such statute by the courts whenever a proper case for such a ruling is presented."

On this question we fully concur with the views of Judge Adams, who tried the case at the circuit. He said:

"It is held in the case of *Corporation of Washington v. Young*, 10 Wheat. 406, 6 L. Ed. 352, that no person can be authorized to use the name of another without his assent, given in fact or by legal intentment. It is my opinion that in imposing upon clerks of the circuit court the duties above alluded to, which so necessarily and vitally affect the interest of suitors in its courts, and in requiring from such clerk a bond for the faithful discharge of such duties, the United States, by necessary legal intentment, thereby consents to the use of its name by suitors wronged by official misconduct of the clerk, in a suit against the clerk or his sureties on his official bond. This implied authority or necessary legal intentment becomes the more apparent when it is considered that the clerk's office is an agency of the United States government, ordained and established for the use and convenience of its people.

The money intrusted to its clerk is, in a large sense, money which the government has undertaken to keep for its people. When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even though perhaps the government may not be subjected to a suit for its recovery, it clearly owes a highly moral and meritorious obligation to the loser in the nature of a responsibility for the act of misconduct of its agent, and one which the national congress might regard as sufficient to move it to a private act for his relief." 93 Fed. 719.

Moreover, if there was a technical error in stating the name of the plaintiff, this court would not reverse the case for that reason, but would direct the substitution of the name of the proper plaintiff. *McDonald v. Nebraska* (at present term) 101 Fed. 171, and cases cited.

The judgment of the circuit court is affirmed.

CHICAGO G. W. RY. CO. v. FIRST METHODIST EPISCOPAL CHURCH
OF LEAVENWORTH CITY, KAN.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1900.)

No. 1258.

1. APPEAL—FORMAL ERROR AS TO PARTIES—AMENDMENT.

The fact alone that an action was brought in the name of the wrong party as plaintiff is not ground for reversal, but the appellate court will direct the substitution of the proper party.

2. PRIVATE NUISANCE—USE OF STREET BY RAILROADS—LEGISLATIVE AUTHORITY.

Neither by legislative enactment nor by ordinance of a city can the use of a public street be granted to a private corporation for uses which constitute a private nuisance, and result in special injury to the owners of property abutting on the street, except upon making compensation for such injury.

3. RAILROADS—GRANT OF RIGHT TO USE STREET—CONSTRUCTION.

A grant to a railroad company of the right to "operate and maintain a railroad" on a public street does not carry by implication the right to erect and maintain a water tank in the street.

4. PRIVATE NUISANCE—USE OF PROPERTY BY RAILROAD COMPANY.

A railroad company has no more right than an individual to so use its property as to unreasonably interfere with the peaceable and comfortable enjoyment by others of their property, or to cause special injury to particular property, without making compensation for the injury.

5. SAME—LOCATION OF RAILROAD STATION ADJACENT TO CHURCH—LIABILITY FOR DAMAGES.

The erection by a railroad company of a water hydrant in a street immediately opposite the center of a church, and only 35 feet distant, and of a station on property on the opposite side of the street, so that the noises and odors and the dust and smoke incident to the stopping and starting of trains at both station and hydrant interfere with services in the church, and render the building unfit for the uses for which it was built, constitutes a private nuisance, which amounts, in legal effect, to a taking of the church property to the extent of the injury done thereto, for which the company may be required to make compensation; and it is no defense to an action for the recovery of such compensation that the structures built by the company are necessary for the operation of its road, or that its trains are operated in a careful and proper manner.

In Error to the Circuit Court of the United States for the District of Kansas.

The First Methodist Episcopal Church of Leavenworth, Kan., is a religious corporation incorporated by special act of the legislature of the territory of Kansas, February 21, 1860, under the name of the First Methodist Episcopal Church, Leavenworth City, Kansas; the act of incorporation declaring "that said corporation by that name shall be capable of making contracts, of suing and being sued, of pleading and being impleaded in all matters whatsoever in all courts of law and equity," and generally it was endowed with all the corporate powers commonly conferred on religious corporations. Shortly after its incorporation, it acquired the title to three lots situated on the north-west corner of Fifth and Choctaw streets, in the central part of the city of Leavenworth, and erected thereon a commodious and valuable church building, which has been used continuously from that time to the present as a house of public worship and religious exercises by the members of the church, and all others who chose to attend the religious exercises held there. The services, including a Sunday school, were numerously attended, and were held on the Lord's day, and as frequently on other days as is common with Christian churches. The location was a desirable one for a house of worship, the surroundings pleasant and agreeable, and the air in and about the church pure, wholesome, and uncontaminated. These were the conditions surrounding the plaintiff's church building when, in the month of September, 1895, the defendant established a passenger station on the southwest corner of Fifth and Choctaw streets, about 60 feet from the church building, and erected a railroad water hydrant for the purpose of supplying its engines with water, in the center of Choctaw street, about 35 feet from the center of the south wall of the church. The complaint alleges, in substance, that by reason of the erection and use of these structures by the defendant the plaintiff's church building has been rendered of little or no value as a place of worship and religious exercises; that the ringing of bells, the sounding of whistles, the blowing off of steam, and the loud puffing of the defendant's locomotive engines, combined with the smoke, cinders, soot, dust, and foul, noxious, and offensive odors emitted from its engines, and which enter the church, and the noise and rattle of its trains as a result of stopping them at its station and at the water hydrant for the engines to take water, and starting them again, are such as constantly disturb religious exercises in the church, and often compel their cessation for some time; that the smoke, grime, and cinders from the engines which enter the church soil and damage its interior and furniture and the garments of the worshippers; that the odors, noise, smoke, and cinders emitted from the defendant's engines render the church so uncomfortable and undesirable as a place of worship that it has resulted in driving away and diminishing the attendance at church and the Sunday school, and greatly diminishing the income and revenues of the church, and rendered it practically valueless for church purposes, or for any other use. The answer of the defendant was a general denial, and also avers "that all that has been done by the defendant in the matter of running and operating its trains along and over Choctaw street in Leavenworth city, and past the premises alleged to belong to the plaintiff, including the stopping of trains at its passenger depot on Fifth and Choctaw streets, has been done according to law, and under and by virtue of ordinances of the city of Leavenworth, duly passed, approved, and published"; and it was averred that other railroads ran their trains past the plaintiff's church, and that by reason thereof and by reason of the changed conditions in that part of the city, which were fully set forth, the plaintiff's property had become valueless for church purposes. The plaintiff filed a reply denying the allegations of the answer. There was a jury trial, and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error.

Frank Hagerman (Daniel W. Lawler, John H. Atwood, and Willard P. Hall, on the brief), for plaintiff in error.

William Dill (D. Kelso, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first contention of the plaintiff in error is that the action should have been brought in the name of the trustees of the church, and not in its corporate name. This contention is founded on section 3, art. 12, of the constitution of the state of Kansas, which provides: "The title to all property of religious corporations shall vest in trustees, whose election shall be by the members of such corporations." But by express provision of the special act of incorporation the corporation is authorized to sue on all causes of action in its corporate name. Moreover, if the contention of the plaintiff in error was well founded, no benefit would accrue to it, and no harm come to the plaintiff, on account of the mistake in the name of the plaintiff, but this court would merely direct the substitution of the trustees of the church as plaintiffs in the action. *McDonald v. Nebraska* (decided present term; C. C. A.) 101 Fed. 171; *Howard v. U. S.* (decided present term; C. C. A.) 102 Fed. 77. It is not common that two cases occur so exactly alike as the case at bar and the case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739. That was an action brought by the Fifth Baptist Church of Washington City against the railroad company to recover damages resulting to the church building by reason of the erection and maintenance by the railroad company of an engine house and machine shop on a parcel of land adjoining that on which the church stood. The petition in this case was evidently modeled after the complaint in that case, and is the same in substance and legal effect. The alleged source of damage to the church building is the same in both cases, namely, the ringing of bells, sounding of whistles, and other noises, which interrupted religious service, and the smoke, cinders, and dust thrown off by the engines, which entered the church, damaging its interior and furniture, and soiling the garments of the congregation, and the disagreeable and offensive odors proceeding from the engines, which found their way into the church. The facts and the evidence in the two cases are, in substance and legal effect, the same, and the entire charge of the court was taken almost literally from the opinion of the supreme court in that case. In view of these facts, it would be a work of supererogation for this court to enter upon a discussion of questions fully considered and decided by the supreme court in that case, and which are conclusive of the case at bar. The only distinguishing feature in the two cases is one that weakens, rather than strengthens, the case of the plaintiff in error. In that case the rights of the railroad company under its charter and the act of congress were in terms more extensive than are the rights of the defendant in this case. In that case the railroad company had authority conferred upon it by an act of congress "to exercise the same powers, rights, and privileges in the construction of a road in the District of Columbia * * * which it could exercise under its charter in the construction of a road in Maryland"; and "by its charter it was empowered to make and construct in that state all works whatever

which might 'be necessary and expedient' in order to the proper completion and maintenance of the road." Based on this grant of power, the defendant in that case requested the court to instruct the jury:

That "the company possessed the right to select the location in question, and to construct, maintain, and use upon it such engine house and other works as were necessary and expedient for the construction, maintenance, and repair of its road and engines, and to occupy the premises for that purpose; and that, if the jury found that the inconveniences complained of were no more nor greater than the natural or probable result of maintaining such engine house and repair shop, or found that in the occupation and use of the property and management of its business the company exercised such reasonable care as a person of ordinary prudence and caution would exercise under the circumstances, it was not liable for any damages."

The court refused to give this instruction and the supreme court affirmed the ruling, saying:

"Plainly, the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and Sunday school which assembled there on the Sabbath and on different evenings of the week. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and, when the cause of the annoyance and discomfort is continuous, courts of equity will interfere, and restrain the nuisance. *Crump v. Lambert*, L. R. 3 Eq. 409. The right of the plaintiff to recover for the annoyance and discomfort to its members in the use of its property, and the liability of the defendant to respond in damages for causing them, are not affected by their corporate character. Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comfortable use of their property for the purposes of their formation is as much the subject of complaint as though the members were united by some other than a corporate tie. Here the plaintiff, the Fifth Baptist Church, was incorporated that it might hold and use an edifice, erected by it, as a place of public worship for its members and those of similar faith meeting with them. Whatever prevents the comfortable use of the property for that purpose by the members of the corporation, or those who, by its permission, unite with them in the church, is a disturbance and annoyance, as much so as if access by them to the church was impeded, and rendered inconvenient and difficult. The purpose of the organization is thus thwarted. It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purposes to which it was devoted. The liability of the defendant for the annoyance and discomfort caused is the same, also, as that of individuals for a similar wrong. The doctrine which formerly was sometimes asserted, that an action will not lie against a corporation for a tort, is exploded. The same rule, in that respect, now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is so well settled as not to require the citation of any authorities in its support. It is no answer to the action of the plaintiff that the railroad company was authorized by act of congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skillfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city; and that as little smoke and noise are caused as the nature of the business in them will permit. In the first place, the authority of the company to construct

such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the president's house, or of the Capitol, or in the most densely populated locality. Indeed, the corporation does not assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification: that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. Undoubtedly, a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

The defendant in the case at bar neither alleged in its answer nor proved on the trial that it had authority from the city of Leavenworth, or from any other source, to locate its station where it did, or its water hydrant in Choctaw street, or elsewhere in the city. All that is disclosed on the subject of the right of the defendant to operate its trains in the city at all is contained in this statement found in the record:

"The defendant offered in evidence its contract with the terminal railway, which gives it the right to carry on its business over the tracks of the terminal railway, and the ordinance of Leavenworth granting the right to the terminal railway and its assigns to operate and maintain the railroad upon Choctaw street."

It will be observed that, according to this statement, the ordinance did not purport to do more than to grant to the defendant's assignor or lessor the right "to operate and maintain the railroad upon Choctaw street." The right to erect and maintain stations and water tanks or hydrants on or in the street is not granted, unless it is to be implied from the grant to operate and maintain a railroad upon the street; but certainly no such implication arises as to the water hydrant erected in the street from the mere license "to operate and maintain the railroad" on the street. A witness testified that "the disturbance to the church came from the trains which were using the water station." This nuisance was intensified by the circumstance that going in one direction from the water hydrant was a steep grade, and, in order to start the trains, that stopped to take water, up that grade, the puffing of the engines was louder and continued longer, and the volume of smoke and cinders given off much greater, than in starting a train on a level grade, and greater still than that resulting from keeping a moving train in motion. This stopping and starting trains at the hydrant in the middle of the street opposite the center of the

church constituted a private nuisance of a very aggravated character, for which the law will afford relief to the extent of the damages sustained. Whatever the fact may be, no complaint is made in the petition in this case on account of the mere movement of trains over the defendant's track in the street. It is the consequences flowing from the use of the street and its track for other purposes than merely moving its trains that is complained of. The gravamen of the complaint against the defendant, as stated in the petition, is:

"That, by reason of the close proximity of the said depot and watering station to the property of said plaintiff, many trains and engines stop immediately under and within a few feet of the windows and doors on the south side of plaintiff's church building on the Sabbath day and other days during the hours when religious services are being held in said church and while the Sabbath school is being held therein, and the said defendant's trains and engines make loud and incessant noises during said services by blowing off steam from said engines, ringing the bells of said engines, blowing the whistles thereof, backing and jamming together the cars of said trains in getting the engines in position for said depot, and to take water from said watering station, and by the puffing of said engines, the blowing of the whistles thereof, and the rattle and noise of said engines and trains running over the tracks of said roads and the action of the pumps on said engines; all to the discomfort and annoyance and damage of said plaintiff, as hereinafter more specifically set out and alleged."

Granting, therefore, that the defendant had a right to run its trains over the track on Choctaw street, and that it was not liable for any damages unavoidably resulting therefrom, this concession falls far short of supporting the defense in this action. It did more than run its trains over its track. It erected a station, at which its passenger trains stopped, and a water hydrant in the middle of the street, under the very windows of the church, at which all its trains, freight and passenger, stopped to take water. It must be accepted as settled in the jurisprudence of this country that neither by legislative enactment nor by ordinance of the city can the use of a public street be granted to a private corporation for uses which constitute a private nuisance, and result in special injury to the abutting owners of property on the street, except upon making compensation for such injury. The erection, maintenance, and use of a station on, and a water hydrant in, Choctaw street in such close proximity to the plaintiff's church, which had the effect to envelope the church in smoke, and fill the edifice with offensive odors, and introduce into it more or less smoke and cinders, constituted a private nuisance for which the law will afford redress. It was not competent for the city to make a grant to the railroad company which would exempt it from liability to the abutting owner for maintaining such a private nuisance. But the city made no such grant, either expressly or by implication.

The rule that no one will be heard to complain of the proper exercise of a lawful authority cannot be invoked to shield the defendant in this case. The railroad company had no authority to erect its water hydrant where it did, and, conceding that it had a right to operate its trains over the track on Choctaw street, and assuming, but not deciding, that it had the right to erect and use a passenger station on the street, yet if, in the use of its station, the

smoke, cinders, and smells from its engines which stopped there constituted a private nuisance, and resulted in special damages to the adjoining church property, the company is liable. Conceding that the noise, vibrations, and inconveniences and annoyances which are unavoidable in the lawful running of trains over a railroad track, and which are common to the whole public and to all the abutting owners of property on the street, are not actionable injuries, the plaintiff's right of action is not affected thereby. The smoke, cinders, and offensive smells, and loud and protracted noises which constitute the nuisance to the plaintiff are not the usual and unavoidable result of the mere operation of the defendant's trains over its track laid in the street, but they result from other uses by the defendant of the street and its track in the immediate vicinity of the plaintiff's property, which do not affect in a like injurious manner the public generally, or other abutting owners of property on the street. The smoke, cinders, offensive smells, and loud and protracted noises which are a nuisance to the plaintiff are not the consequential and unavoidable damages due from a lawful running of the defendant's trains over its track in the street, but result from the erection and use by the defendant of its water hydrant and station, the one in and the other on the street, in close proximity to the plaintiff's church, and which do not affect in a like injurious manner the public generally, or other property situated elsewhere on Choctaw street. In legal effect, the nuisance resulting from the use made of these structures by the defendant constitutes a partial taking of the plaintiff's property, for which compensation must be made. *Stevens v. Railroad Co.* (Super. N. Y.) 8 N. Y. Supp. 313; *Lahr v. Railroad Co.*, 104 N. Y. 295, 10 N. E. 528; *Kane v. Railroad Co.*, 125 N. Y. 186, 26 N. E. 278, 11 L. R. A. 640; *Drucker v. Railway Co.*, 106 N. Y. 157, 12 N. E. 568; *Duyckinck v. Railroad Co.*, 125 N. Y. 710, 26 N. E. 755; *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537; *Peyser v. Railroad Co.*, 13 Daly, 122; *Smith v. Railroad Co.* (Com. Pl.) 18 N. Y. Supp. 132; *Bohm v. Railway Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. Ed. 344. If two private citizens own adjacent lots, one of them cannot establish and maintain on his own lot a nuisance which has the effect of depriving his neighbor of any beneficial use of his lot without making compensation for the injury; and no more can a private corporation erect and maintain a nuisance on its own premises, or in a public street, which has the effect to deprive an adjacent or abutting owner of the beneficial use of his property, without making compensation for the injury. There is no such thing as a natural person or a private corporation having a "lawful right" to invade the premises of an abutting owner, and appropriate his property; and there is no difference in principle between an actual physical invasion of one's property and the creation and maintenance of a nuisance which has the effect to deprive him of his beneficial use. The abutting owners of property on a public street have as good right to the free enjoyment of the easements of light and air as they have of their property itself. Without the free enjoyment of these easements, they could have no beneficial use of their property. And it is well settled that filling the air with smoke, cinders,

and offensive odors materially injures the easements of light and air, to the free enjoyment of which the abutting owners of property upon a street have a legal right, and constitutes, in legal effect, a taking of property. Cases cited *supra*. The defendant can no more escape making compensation for such damages than it could appropriate the plaintiff's church to its own use without making compensation therefor. The defendant did not claim or show that different and more suitable locations for these structures could not be found. It was shown that its freight station was two blocks west of the church, notwithstanding which it located its water hydrant, where all its trains stopped to take water, in the middle of the street, and within 35 feet of the church. If it does not desire to make compensation for the nuisance thus created, it must remove it. In this connection the remarks of the supreme court in *Baltimore & P. R. Co. v. Fifth Baptist Church*, *supra*, are appropriate:

"If, as asserted by the defendant, the noise, smoke, and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and, if that be not possible, they should be removed to some other place, where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes. There are many lawful and necessary occupations which, by the odors they engender, or the noise they create, are nuisances when carried on in the heart of a city,—such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence near one's dwelling house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits. Slaughter houses, lime kilns, and tallow furnaces are, therefore, generally removed from the occupied parts of a city, or located beyond its limits. No permission given to conduct an occupation within the limits of a city would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business. *Fish v. Dodge*, 4 Denio, 311."

The judgment of the circuit court is affirmed.

CRUM v. MURRAY.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,253.

PRINCIPAL AND AGENT—CONTRACT OF EMPLOYMENT—COMMISSIONS.

Under a contract appointing an agent to solicit applications for shares in a corporation, within stated territory, and to collect the monthly dues thereon, for the period of three years, for which service the agent is to receive 80 per cent. of the first month's dues collected, and 5 per cent. of the succeeding months' "dues collected," he cannot recover the stipulated commissions on dues which he might have collected if the contract had been continued after the three years, where there is no claim that the contract has been renewed, or that the agent is entitled to have it renewed, or that he has been illegally discharged, or any other breach committed by the corporation.

In Error to the Circuit Court of the United States for the District of Colorado.

The Granite State Provident Association and O. B. Crum, the plaintiff in error, entered into the following contract:

"This agreement, made in duplicate this 17th day of February, 1892, between the Granite State Provident Association of Manchester, New Hampshire, and O. B. Crum, of Denver, Colorado, witnesseth: First. That the said Granite State Provident Association hereby appoints the said O. B. Crum as its general solicitor in and for the states of Colorado, Wyoming, and Utah for the period of three years, and authorizes him to solicit applications for shares, and collect the monthly dues thereon, in said territory, and for said association, as hereinafter provided, except that shares shall not be written in Utah by him until the association shall decide to commence business in that territory, and shall so empower him in writing. That the said solicitor shall receive in full pay for such services and for all expenses of procuring, collecting, and remitting the monthly dues the following rates of commission: Eighty (80) per cent. of the first month's dues collected, five (5) per cent. of the succeeding months' dues collected, \$7.50 per share flat for fully-paid stock, one (1) per cent. of all dues collected after the first month. Second. That said solicitor hereby agrees to furnish a good and sufficient bond, with two sureties, for the sum of \$2,000.00, for his faithful performance of this contract, and to increase the same as his work increases; and that this contract shall not be in force any longer than said bonds are made and increased as agreed. Third. A failure or neglect to make reports, or to pay over moneys belonging to the association according to the conditions of this contract, shall be considered sufficient reason on the part of the association for canceling the same at any time without notice. Fourth. The solicitor agrees to indemnify and save harmless the association from all damages and expenses of suits growing out of his unauthorized transactions; and, in case the association shall be made a party to any such suit, the solicitor shall take upon himself the defense thereof without request from the association. Fifth. On joint work secured by the assistance of special agents the said solicitor shall be entitled to one-half of the rates of commission hereinbefore provided for, but no such special agent shall assist said solicitor in any such work without the consent of said solicitor. Sixth. The said solicitor agrees to furnish at least \$500,000 of new shares during each year of the continuance of this contract. Seventh. The said solicitor shall, on the 20th day of each month, remit to said association all funds belonging to it in his possession at that time. Eighth. The said association on its part, in addition to the commissions aforesaid, agrees to answer promptly all communications from said solicitor relating to the business of said association in the above-mentioned territory. Ninth. The said association agrees to assist said solicitor in his work by reporting to him its approval or rejection of each application for a loan within fifteen (15) days of its reception at the home office, but it is understood that said approval need not include the appropriation of money at the time of approval. Tenth. The said association agrees at the expiration of this contract to renew the same for another period of three (3) years, provided all its conditions have been fulfilled by said solicitor. Eleventh. In consideration aforesaid, the said solicitor agrees to devote his time and attention to said business of soliciting applications for shares, and collecting the dues thereon, and to make reports of each month's business on the 20th day of the month, with remittances to balance his reports, and that he will not do business for any similar association so long as he holds this contract, and that a failure to carry out this agreement in any particular shall be considered sufficient reason for allowing the association to close this appointment at any time without notice. Twelfth. Upon discontinuance of this contract all interest of said solicitor hereunder in commissions, dues, renewals, or otherwise shall revert to the said association.

"In witness whereof, we have hereunto set our hands and seals in duplicate this 17th day of February, 1892.

"Granite State Provident Association,

"By H. F. Morse, Secretary.

"O. B. Crum. [L. S.]"

The parties entered into a second contract on the 6th day of January, 1893, by which Crum's agency was extended to the state of Kansas. This last contract, like the first, expired, by its terms, on the 17th of February, 1895, and its tenor and effect were identical with the first contract so far as relates to the question in controversy in this case. On the 18th of March, 1896, Albert L. Murray, the defendant in error, was duly appointed receiver of the Granite State Provident Association to wind up its affairs, and as such receiver brought this action against O. B. Crum, the plaintiff in error, to recover certain moneys alleged to be due from him to the Granite State Provident Association. The defendant admitted the justice of the plaintiff's demand, but set up a counter-claim for \$12,222.57 for commissions which he alleged he was entitled to under the contract. The court told the jury: "What I have to say to you in this connection is that Mr. Crum cannot have commissions upon moneys which were not paid to the company. He is entitled to commissions upon all moneys received by the company from its shareholders within the territory for which he was agent, which was the states of Colorado, Utah, Wyoming, and Kansas, I believe. Now if, in the accounts which were put before you, if he is allowed commissions upon all moneys received from shareholders within his jurisdiction, those accounts are correct. He cannot claim, as he did before you on the stand, that he is entitled to a commission of five per cent. upon the uncollected amounts of those dues." Exception was taken to so much of this charge as told the jury the defendant was not entitled to commissions on dues not collected, and this is the only error assigned.

Henry B. Babb, for plaintiff in error.

Charles E. Gast, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendant's claim for commissions depends on the construction of the contract. It will be observed that by the express terms of the contract the defendant was to receive "in full pay for such services and for all expenses of procuring, collecting, and remitting the monthly dues the" commissions specified in the contract. It will be further observed that he was to receive these commissions on "dues collected" only, and that he was employed as agent for three years only, with a right of renewal, which seems not to have been exercised. Under this contract he was to be compensated for his services by the commissions specified in the contract on the moneys actually collected by him, and, as he admits that he has received these commissions for the full term of the contract, and for any collections made thereafter, he has no further claims for commissions or other compensation. The witness on behalf of the plaintiff produced the books of the association, and testified there was due from the defendant for money collected, and not remitted, up to January 1, 1896, the sum of \$6,852.29; and that, in addition to this amount, he was indebted for excess of commissions retained in the sum of \$275.98, and at the conclusion of this testimony is the following record entry:

"For the purpose of the review by the court of appeals sought by defendant, and for no other purpose, he admits that the foregoing evidence was sufficient to establish his liability to plaintiff on account for the amounts therein mentioned and as stated by the witness."

It is thus conclusively established by the defendant's admission of record that he has been overpaid his commissions on all moneys collected by him. He cannot claim commissions on moneys he never

collected, but which he might have collected if he had been retained in the service of the company indefinitely. By the explicit terms of the contract, his commissions are made to depend on his collection of the money; and when his agency ceased, and he ceased to collect the dues, his commissions ceased.

The defendant did not in his answer, nor on the stand as a witness, claim that at the expiration of the three years the contract had been renewed for another period of three years, or for any other length of time, or that he had sought to have it renewed, or that under the terms of the contract he was entitled to have it renewed; nor did he set up or claim an illegal violation thereof by the association. His admission of record shows that he was not entitled to a renewal of the contract, and that, if it had been renewed, the company would have had the right to cancel it under the clause of the contract which declares:

"A failure or neglect to make reports, or to pay over moneys belonging to the association according to the conditions of this contract, shall be considered sufficient reason on the part of the association for canceling the same at any time without notice."

A different question would be presented if the company had committed a breach of the contract on its part, and discharged the defendant, without sufficient cause, before the expiration of the term of his contract, or had done any other act inconsistent with the duty it owed him under the contract; but nothing of the kind is alleged or occurred. The defendant continued to serve as agent of the company for the full term of the contract, and for some time afterwards, and has been overpaid the stipulated commissions on all moneys collected by him for the whole time during which he acted as agent. The contract and facts in this case are totally unlike the contract and facts in the case of *Newcomb v. Insurance Co.*, 19 U. S. App. 669, 10 C. C. A. 288, 62 Fed. 97; *Id.* (C. C.) 51 Fed. 725; and the contract and facts in *Wells v. Association*, 39 C. C. A. 476, 99 Fed. 222. The case last cited is an extremely instructive one on the contract there in suit, but the contract in that and the other case cited bears no resemblance to the contract here in suit. Moreover, in the cases cited the plaintiffs relied on a breach of the contracts by the insurance companies, who, it was alleged, had illegally deprived the agents of their business and commissions; but in this case there is no claim that the company committed any breach of the terms of the contract, express or implied. No contract for an agency extending beyond the three years mentioned in the agreement is set up, and under that agreement the basis of compensation is the commissions specified on the "dues collected" during the continuance of the contract. There is no provision of the agreement, express or implied, giving to the defendant any interest in the business or the commissions on moneys collected by others after the discontinuance of his agency; on the contrary, by the twelfth stipulation of the contract it is provided that "upon discontinuance of this contract all interest of said solicitor hereunder in commissions, dues, renewals, or otherwise shall revert to the said association." The judgment of the circuit court is affirmed.

MISSOURI, K. & T. RY. CO. v. ELLIOTT et al.

(Circuit Court of Appeals, Eighth Circuit. April 9, 1900.)

No. 1,286.

1. APPEAL—REVIEW—DISCRETIONARY ORDERS.

An order denying an application for a continuance cannot be reviewed on a writ of error in the federal courts.

2. SAME—RULING ON CHALLENGE TO JURORS.

A finding of the competency of a juror on a challenge for cause will not be set aside by a reviewing court unless error is manifest.

3. EVIDENCE—REFUSAL OF PARTY TO PRODUCE BOOKS—COMPETENCY OF SECONDARY EVIDENCE.

In an action against a railroad company, in which it is charged with liability because of the giving by its train dispatcher of orders for the movement of trains which brought them in collision, where defendant has been notified to produce the order books, train sheets, and orders concerning the movement of such trains, which are in its possession, but out of the jurisdiction of the court, and it refuses or fails to do so, secondary evidence of their contents is admissible on behalf of plaintiff.

4. SAME—PRESUMPTIONS—FAILURE TO PRODUCE EVIDENCE.

Secondary evidence introduced by a plaintiff of the contents of books in the possession of defendant, relating to a material matter, will be presumed to be correct, where the defendant, with full opportunity after the knowledge of such evidence, fails to produce the originals.

5. SAME—COMPETENCY.

A schedule showing the wages paid by a railroad company to its trainmen, produced by a terminal agent to whom it had been officially furnished by the company, is competent evidence against the company to establish the wages earned by a fireman in its service, in an action to recover for his death.

6. APPEAL—ESTOPPEL—ERRONEOUS EXCLUSION OF EVIDENCE INDUCED BY APPELLANT.

When a plaintiff offers competent evidence to prove a material fact in issue, which is erroneously excluded by the court on objection of defendant, the defendant will not be permitted to urge on appeal, as a ground for reversal, that the plaintiff failed to prove the fact which such evidence would have established.

7. WRONGFUL DEATH—DAMAGES—EVIDENCE OF EARNINGS OF DECEASED.

In an action to recover for the death of a railroad fireman, showed to have been paid on a mileage basis, it is not essential that his individual earnings should be proved, but the jury are authorized to take notice of the fact that such employes are paid in accordance with the general schedule of wages, and of any other facts within the common knowledge of intelligent men, and, in the estimation of damages, to exercise their good sense and judgment.

8. APPEAL—HARMLESS ERROR.

The admission of incompetent evidence of a material fact is an error without prejudice, where the fact is proved by other competent evidence, or the party complaining of the error was instrumental in excluding competent evidence to prove the fact, or where the fact is one of common knowledge.

9. SAME—ADMISSION OF EVIDENCE—SUFFICIENCY OF OBJECTION.

A general objection to the admission of evidence, which states no ground therefor, raises no question which can be considered by an appellate court.

10. MASTER AND SERVANT—FELLOW SERVANTS—TRAIN DISPATCHERS AND TRAINMEN.

A railroad train dispatcher, in giving orders for the movement of trains, is not a fellow servant with the employes operating such trains, but is performing a duty of the master, and for the proper and careful performance

of which the master is responsible to its employés who are required to obey such orders.

11. **WRONGFUL DEATH—ACTION FOR DAMAGES—STATUTE OF INDIAN TERRITORY.**
Mansf. Dig. Ark. § 5225, which gives a right of action for wrongful death, is in force in the Indian Territory, and a right of action thereunder is not affected by the fact that the deceased was instantaneously killed.

12. **APPEAL—AFFIRMANCE—STATUTORY DAMAGES.**

The provision of Mansf. Dig. Ark. § 1311, adopted and in force in the Indian Territory, which requires an appellate court, upon the affirmance of a judgment for the payment of money which has been superseded, to award against the appellant 10 per cent. damages on the amount superseded, is obligatory upon the United States court of appeals for the Indian Territory.

13. **FELLOW SERVANTS.**

All who enter the employment of a common master to accomplish a common undertaking are prima facie fellow servants. Per Sanborn, Circuit Judge, dissenting.

14. **SAME—ASSUMPTION OF THE RISK OF NEGLIGENCE OF SUPERIOR SERVANTS.**

The danger from the negligence of superior servants, who are engaged in the common employment, in giving the orders and directions which their subordinates must obey, is one of the common dangers of the service, which all servants assume when they enter the common employment. Per Sanborn, Circuit Judge, dissenting.

15. **SAME—SUPERIOR RANK DOES NOT AFFECT THE RELATION.**

Neither the fact that one servant is superior in rank or higher in grade than others in the common employment, nor the fact that his duty is to discharge and direct their movements, while their duty is to obey his orders, will abrogate or affect their relation as fellow servants. Per Sanborn, Circuit Judge, dissenting.

16. **SAME—TEST OF RELATION IS DUTY DISCHARGED.**

It is the nature of the duty which a servant is performing, and not his rank or authority, that determines the question whether he is a fellow servant or a vice principal. If he is discharging one of the absolute duties of the master, the duty of selecting co-employés, the duty of constructing and maintaining the railroad and its equipment, and perhaps the duty of establishing reasonable rules for its operation, he is a vice principal. But if he is not engaged in the discharge of one of these duties, and is merely employed in the operation of a railroad properly constructed, repaired, and equipped, in a position inferior to that of the superintendent of the operating department, he is a fellow servant with all, except the superintendent, and is not a vice principal. Per Sanborn, Circuit Judge, dissenting.

17. **TRAIN DISPATCHER IS FELLOW SERVANT.**

A train dispatcher of one of several divisions of a great railroad system, who is engaged, under the superintendent of the system, in giving orders for the movement of trains on that division, is a fellow servant of all his co-employés who are engaged in the operating department of the railroad on that division, and the company is not liable for any injury to one of the servants under him which results from his negligence in the discharge of this duty, because he and the servants under him are the employés of a common master, engaged in the common undertaking of operating the railroad. Per Sanborn, Circuit Judge, dissenting.

Millsaps v. Railway Co., 13 South. 696, 69 Miss. 423; Railroad Co. v. Hoover, 29 Atl. 994, 79 Md. 253, 25 L. R. A. 710; Blessing v. Railway Co., 77 Mo. 410; Bailey, Pers. Inj. §§ 2061, 2190; Railroad Co. v. Baugh, 13 Sup. Ct. 914, 149 U. S. 368, 37 L. Ed. 772; Railroad Co. v. Peterson, 16 Sup. Ct. 1204, 162 U. S. 346, 40 L. Ed. 944; Railroad Co. v. Poirier, 17 Sup. Ct. 741, 167 U. S. 48, 42 L. Ed. 72; Railroad Co. v. Conroy, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —; City of Minneapolis v. Lundin, 58 Fed. 525, 7 C. C. A. 344; Balch v. Haas, 73 Fed. 974, 20 C. C. A. 151; Railway Co. v. Waters, 70 Fed. 28, 16 C. C. A. 609.

In Error to the United States Court of Appeals in the Indian Territory.

The Missouri, Kansas & Texas Railway Company owns and operates a line of railroad extending from the state of Missouri, through Kansas and the Indian Territory, into the state of Texas. The railway company had a train dispatcher at McAlester, in the Indian Territory, for the purpose of ordering and directing the movement of its trains on the division of its road between McAlester and Muskogee, in the Indian Territory. On the 11th day of June, 1892, the company, through its train dispatcher, ordered one of its freight trains to move southward over its track between McAlester and Muskogee, and at the same time ordered another freight train to move northward over the same track. These two trains were ordered to move in opposite directions over the same part of a single track at the same time, with the result that a head-end collision of the trains ensued without any fault on the part of the conductor or engineer of either train; the collision being due solely to the erroneous orders of the train dispatcher. In the wreck of the trains produced by the collision, William H. Elliott, a fireman on one of the trains, was killed. This action was brought by Lydia J. Elliott, the widow, and Georgia C. Elliott and Nannie F. Elliott, the children, of the dead fireman, against the railway company, to recover damages for his death. The act of negligence charged against the railway company was the issuing by the railway company of the conflicting orders which resulted in the collision and wreck of the trains. The answer was a general denial. There was a trial to a jury, which resulted in a verdict and judgment for the plaintiffs, whereupon the defendant appealed the case to the United States court of appeals in the Indian Territory, which court affirmed the judgment of the trial court, and thereupon the defendant removed the case by writ of error into this court.

Clifford L. Jackson, for plaintiff in error.

William T. Hutchings, Preston C. West, and Wolfe & Hare, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The protests of this court against multiplied and frivolous assignments of error seem to be of no avail. There are 103 assignments of error in this case, of which not more than 4 or 5 are of sufficient gravity to challenge or justify our attention. It was apparent from the inception of this case that, if the railway company was responsible for the results of the conflicting orders it issued for the movement of its trains, it had no defense to the merits of this action, and that the only question to be litigated was the amount of the plaintiffs' damages. It is obvious from an inspection of the record that the defendant realized this fact, and, to compensate for the lack of merits, resorted to the tactics and methods not unusual in such cases, but which it pursued with more zeal and pertinacity and carried to greater heights than common.

On the 27th day of November, 1897, the defendant filed an application for a continuance of the cause, which was overruled, and this ruling of the court is one of the principal errors assigned and insisted on. Nearly a century ago the supreme court of the United States said, "It may be very hard not to grant a new trial or not to continue a cause, but in neither case can the party be relieved by a

writ of error." *Insurance Co. v. Hodgson*, 6 Cranch, 206, 218, 3 L. Ed. 200. And this rule has been firmly adhered to from the time it was first promulgated, in *Woods v. Young*, 4 Cranch, 237, 2 L. Ed. 607, to the present day, and is obligatory upon all the appellate courts of the United States. *McFaul v. Ramsey*, 20 How. 523, 15 L. Ed. 1010; *Davis v. Patrick*, 12 U. S. App. 629, 635, 6 C. C. A. 632, 57 Fed. 909; *Manufacturing Co. v. Hess*, 98 Fed. 56, 38 C. C. A. 647; *Drexel v. True*, 36 U. S. App. 611, 20 C. C. A. 265, 74 Fed. 12; *Electric Co. v. Dick*, 8 U. S. App. 99, 3 C. C. A. 149, 52 Fed. 379; *Railway Co. v. Nelson*, 2 U. S. App. 213, 1 C. C. A. 688, 50 Fed. 814. Moreover, the affidavit for a continuance made by the defendant's counsel did not comply in any respect with the requirements of the statute governing such applications, and was, from every point of view, wholly without merit. This clearly appears from the facts disclosed by the record, some of which we refer to here on account of their bearing on other assignments of error to be hereafter considered.

The collision which resulted in the death of the fireman, Elliott, occurred on the 11th day of June, 1892; this suit was begun on the 9th day of March, 1893; the answer was filed October 9, 1893; the defendant applied for and obtained the change of venue from one judicial division to another February 1, 1894; and the affidavit for a continuance was filed November 27, 1897. Soon after the commencement of the action, the plaintiffs, upon due notice to the defendant, took the depositions of J. F. Andrews, the conductor, and O. E. Thoman, the locomotive engineer, on the train going south, and of John Smythe, the conductor on the train going north, at the time of the collision. Engineer Thoman produced, and made it part of his deposition, the manifold copy of the train dispatcher's order under and in accordance with which he and his conductor were running the south-bound train; and Conductor Smythe, having given to one of the defendant's employes, on a promise to return it, which was not done, the manifold copy of the train dispatcher's order under and in pursuance of which he and his engineer were running the north-bound train, testified to its contents. The plaintiffs also took the deposition of John Sullivan, the defendant's train dispatcher at Denison, Tex., whose division extended from Denison to Muskogee, in the Indian Territory; the train dispatcher's office at McAlester having been removed from that place to Denison after the collision. Mr. Sullivan testified that he, as chief train dispatcher for the defendant over the division mentioned, had possession of the train sheets and order book of the company kept by the train dispatcher in the train dispatcher's office in McAlester at the time of the collision, and prior to the removal of the office to Denison; and he produced a sworn and compared copy of the train dispatcher's order to Conductor Smythe, taken from the original order book in his possession. He also testified to the movements of the colliding trains, as shown by the train sheet, up to the stations on either side of the point of collision, when there was "no further news of same." All of these witnesses were in the employ of the defendant, in the same

capacity, continuously from the time of the collision down to and at the time of the trial. At the taking of these depositions the defendant appeared by counsel and cross-examined the witnesses, and the depositions were returned to the court, and from the time they were taken until the day of trial they were open to the inspection of the parties. It appears from the statements in the application for a continuance that the company took no steps to prepare for the trial of the case until about the 1st of October, 1897,—more than five years after the collision, and more than four years after suit was brought. It is averred in the affidavit that about the 1st of October, 1897, the defendant's counsel notified the claim department of the defendant company to find out and report all about the family of W. H. Elliott, to the end that it might be known whether the plaintiffs were the only proper parties entitled to sue, and the affidavit further stated "that said Mrs. Lydya J. Elliott claimed that she was still unmarried, but defendant believes, if it were given full opportunity to investigate this case, it would be able to show that she has remarried since the death of her husband, William H. Elliott, and is now well provided for, and no longer dependent upon recovering a judgment in this case," and that, if further time was given it to investigate the facts, the defendant believed it could show that W. H. Elliott was a "profligate man," and would not have expended on his minor children a "proper portion of his earnings." Another alleged ground for continuance was that the widow had consented in writing to a continuance, so far as she was concerned, on account of the death of her counsel; but it is nowhere pointed out how this action of the widow, which was brought about by the defendant's claim agent, operated to hinder or delay defendant in the preparation of its case for trial, nor is it pointed out by the specific statement of any fact wherein the defendant would have been any better prepared for trial if the widow had never consented to a continuance. The counsel for the defendant, who, in his affidavit for a continuance, declared he believed he could show, if the case was continued, that the statement of Mrs. Elliott that she was still a widow was false, and that she had remarried, seems to have changed his views of the lady; and he now appears deeply solicitous for her rights, and complains that "the trial court overruled this application for a continuance, and forced the case to trial in the absence of the widow, who was not represented either in person or by counsel; * * * and she had a right to be represented, and to have an opportunity to secure an attorney to take the place of the one who had died." The widow is not here making any such complaint, and the defendant's counsel cannot be heard to make it for her.

Referring to the conductors and locomotive engineers on the colliding trains, whose depositions the plaintiff had taken, the statement is made in the affidavit "that, if such reasonable time is given him in which to secure the attendance of such last-named witnesses, it will be able to show by said witnesses such a state of facts as will require the court to hold that the man Barton, whom it is claimed by the plaintiff was the train dispatcher, was a fellow servant of said W. H. Elliott."

The witnesses here referred to were still in the employ of the defendant, and although they resided in Denison, Tex., they were subject to the defendant's orders, and could have been summoned by telegraph and reached Muskogee, the place of trial, over defendant's road, in less than half a day, at any time. Indeed, in the face of the affidavit for a continuance on the ground of the absence of these witnesses, the defendant's attorney, on the same day the affidavit was filed, objected vehemently (the objections extending over two pages of the record) to the plaintiffs reading the deposition of one of these witnesses, on the ground that "he is a witness who is as often or oftener within the jurisdiction of this court than he is out of it, and he is running on the line of the Missouri, Kansas & Texas Railway, between Denison, Texas, and Muskogee, Indian Territory, and could be reached at any time with an ordinary subpoena of this court"; and the same contention was made with reference to the two other witnesses. No one reading the affidavit for a continuance can escape the conclusion that whatever diligence was displayed by the defendant was not to prepare for the trial of the case, but to manufacture extremely flimsy and groundless pretexts for its continuance.

It is assigned for error that the court overruled the defendant's challenge for cause to three jurors. There are several sufficient answers to this assignment. It does not appear that these jurors stood in any relation to the parties that disqualified them from serving as jurors in the case, or that they had any actual bias or prejudice for or against either party to the suit; and they declared on oath that they could try the case impartially, and the court so found. "The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence." *Reynolds v. U. S.*, 98 U. S. 145, 156, 25 L. Ed. 244. For some reason not disclosed by the record before us, the names of two of the jurors challenged for cause do not appear in the panel of jurors that tried the case, and, as they "did not sit on the jury, no harm was done to defendant." *Burt v. Panjaud*, 99 U. S. 180, 25 L. Ed. 451. And, while the name of the third juror does appear in the panel, it nowhere appears in the record that the defendant exercised a single one of its peremptory challenges, so that, upon the face of the record, the defendant could have removed the juror from the panel if it desired to do so. But, as there was no valid ground of objection to the juror, it is immaterial whether the defendant had or had not exercised its right of peremptory challenge.

It is said the evidence to prove the conflicting orders issued from the train dispatcher's office for the movement of these trains was incompetent and insufficient to prove that fact. We have heretofore set out the substance of the testimony on this subject. It was not only competent, but abundantly sufficient. The original order book and train sheets were in the defendant's possession, but beyond the jurisdiction of the trial court. In apt time before the trial, the plaintiffs served on the defendant the following notice:

"In the United States Court for the Indian Territory, Northern Judicial Division, Sitting at Muskogee.

"Lydia J. Elliott, et al., Plaintiff, v. Missouri, Kansas & Texas Railway Co., Defendant. No. 2,175.

"To Missouri, Kansas & Texas Railway Company, Above-Named Defendant: You are hereby notified to produce at the trial of the above-entitled cause the original train dispatcher's books, train sheets, and train orders concerning movements of all trains over the line of the Missouri, Kansas & Texas Railway between Muskogee, Ind. Ter., and South McAlester, Ind. Ter., on the 11th day of June, 1892, and particularly all train dispatcher's books, train sheets, and train orders specially relating to trains 1st 103 and 4th 58, alleged in the complaint to have met with a collision between South Canadian and Reams on said 11th day of June, 1892. Given this 24th day of Sept., A. D. 1897.

"Lydia J. Elliott,

"By Hutchings & West, Attys.

"Service of the above notice accepted this 24th day of Sept., A. D. 1897.

"Clifford L. Jackson, Atty. for Deft."

The defendant having these records in its possession, and being able to produce them, but refusing to do so after due notice, the plaintiffs had a right to introduce secondary evidence of their contents. 1 Greenl. Ev. § 560. The operators at the stations where the train dispatcher's orders were delivered to the conductors and locomotive engineers of trains retain one of the manifold copies of all orders delivered, and it is highly probable the company had possession of the retained copy of the manifold orders issued to the conductors and engineers on these trains; but, whether it had these copies or not, it did have what was more important,—the original order book containing them, and the original train sheets showing the movements of the trains until they departed from the stations between which they were wrecked by the head-end collision and were heard of no more. Moreover, if there was any doubt or uncertainty as to the absolute correctness of the evidence relating to the orders of the train dispatcher and the train sheet, the defendant had it in its power to show that fact by the production of the originals. It had had notice for years, by the depositions on file, just what the plaintiffs' evidence on the subject would be. It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary. "It is certainly a maxim," said Lord Mansfield, "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." *Blatch v. Archer*, Cowp. 63, 65. It is said by Mr. Starkie in his work on Evidence (volume 1, page 54):

"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

McDonough v. O'Niel, 113 Mass. 92; *Kirby v. Tallmadge*, 160 U. S. 379, 383, 16 Sup. Ct. 349, 40 L. Ed. 463; *Railway Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, 456, 54 Fed. 481.

This rule is applied in criminal cases. *Com. v. Webster*, 5 Cush. 295, 316; *People v. McWhorter*, 4 Barb. 438. A case cannot well be imagined where this rule could have a more cogent application. The conclusion is irresistible that the company's refusal to produce the train order book and train sheet, which were in its possession, was because they would have conclusively convicted it of the alleged act of negligence.

It is assigned for error that a witness was allowed to state that the deceased fireman told the witness that he earned \$40 per month when he first commenced to work for the defendant company in its switch yards, and that after he got to be a fireman his wages ran from \$75 to \$90 per month. There are several sufficient answers to this assignment. This question is treated in the brief of the counsel for the plaintiff in error as though the compensation of a fireman on a locomotive engine was regulated by an independent personal contract between each individual fireman and the railroad company, the contents of which were unknown to any one else. But it has come to be common knowledge that the compensation, hours of labor, etc., of firemen is fixed and regulated by contract between the railway company and the officers of the labor union known as the "Brotherhood of Locomotive Firemen," who contract for and on behalf of all firemen in the service of the company. The wage schedule is uniform for all firemen in the service, and is based on the number of miles run by the engine on which the fireman is serving, and is uniform, or substantially so, on all of the railroads in the West and South. The distance between train terminals to and from which train crews run is commonly about 150 miles, except in mountainous regions, and the average compensation of the firemen under the uniform wage schedule is from \$75 to \$90 per month. When the service is on the largest engines, or when extra hours are served, the compensation is slightly increased. All this is common knowledge, and, as we shall see, was also proven in this case.

The plaintiffs offered in evidence the "schedule showing the rate of wages to all classes" of the company's employés. This schedule was in the possession of Mr. E. M. Morton, the freight and ticket agent of the company at Muskogee, one of the terminal points of the Choctaw Division of the company's road, who testified that it was issued by the general manager of the company, and that it was furnished all terminal agents who had charge of yards, or anything of that kind; that a terminal was a point where train crews run from and to; and that Muskogee and Denison were the terminal points of the Choctaw Division. The witness was a terminal agent, and, as such, had been officially furnished with, and had possession of, this official schedule of wages paid employés. But the defendant objected to its introduction, and the court sustained the objection. This schedule of wages was clearly competent for the purpose of showing the wages the company paid the firemen in its employ. The rule is well settled that when the plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court erroneously rejects it on the objection of the defendant,

the defendant will not afterwards be heard to say that the plaintiff failed to prove the fact which the rejected evidence would have established. The defendant will not be allowed to take advantage of his own wrong, or the errors of the court induced on his own motion, and compel the plaintiff to suffer the consequences. To allow him to do so would be a travesty on justice. It would encourage unfounded, groundless, and captious objections to evidence, and reward sharp practice and chicanery. The law of estoppel may be successfully invoked to prevent such results. *Bigelow, Estop.* (5th Ed.) 720; *Thompson v. McKay*, 41 Cal. 221; *Jobbins v. Gray*, 34 Ill. App. 208, 218, 219; *Insurance Co. v. O'Connell*, 34 Ill. App. 357, 362; *Elliott*, App. Proc. (1892) § 630; *Railway Co. v. Harris*, 27 U. S. App. 450, 457, 12 C. C. A. 598, 63 Fed. 800. Moreover, there was competent evidence to show about what the earnings of a fireman were on the company's road, if it was material to prove the fact. *Elliott* was a fireman on the Choctaw Division, of which Muskogee and Denison were the terminal points. The question was asked Mr. Morton, how far it was from Muskogee to Denison, but the question was either not answered, or, if answered, the answer is not contained in the record before us; but that is quite immaterial, as the distance between the two cities is a matter of common knowledge, of which the jury and the court could take notice. There was not a man in Muskogee, on or off the jury, who did not know the distance from that place to Denison, Tex., the terminal points on the Choctaw Division of the company's road, independent of the company's folder which shows it to be 157 miles. *Insurance Co. v. Robison*, 19 U. S. App. 266, 7 C. C. A. 444, 470, 58 Fed. 723. It was proven that firemen on the company's road were paid 2½ cents per mile on the small engines, and "on the large engines a little more than that," and that they were paid at the same rate for extra runs. Allowing for the usual runs on freight trains on a division like this, and not counting any extra runs, or work on large engines, would give a fireman an average monthly compensation of \$75 to \$90. This is known to all railroad men, and to all men of common intelligence living in the vicinity of railroads. The case of *Railway Co. v. Needham*, 10 U. S. App. 339, 349, 3 C. C. A. 129, 52 Fed. 371, was an action by the heirs of one who was killed while in the service of the railway company as a fireman; and the court, speaking by Judge Sanborn, said, "He was a fireman earning \$75 or \$80 a month;" and it was also said, "In the measure of damages in such an action as this, the constant factor is the practical knowledge, varied experience, and sound judgment of twelve men, and to these very much must be left;" and, speaking of the assessment of damages by the jury, it was further said, "Indeed, if, after considering all of the evidence, they found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss according to their own good sense and judgment." Assuming the witness' statement as to what the deceased fireman told him what wages he was getting as fireman was not competent, it was merely cumulative evidence of a fact abundantly proved by com-

petent evidence, and which, besides, may fairly be said to be a matter of common knowledge.

But another and conclusive answer to the objection of this assignment of error is that there was no sufficient objection interposed to the hearsay evidence at the time it was introduced. After testifying that the deceased first commenced to work for the company in the switch yard, the record shows the following proceedings took place:

"Q. What wages did he get at that time? (Which question is objected to by the counsel for the defendant, which objection is overruled by the court, to which action of the court in so overruling defendant's objection defendant, by its counsel, then and there at the time duly excepted, and still excepts.) A. He told me he got \$40 a month. (Whereupon counsel for defendant objected to the answer to the last question, which objection is overruled by the court, to which action of the court in so overruling defendant's objection defendant, by its counsel, then and there at the time duly excepted, and still excepts.)"

It will be observed that no ground for the objection is stated. The defendant simply "objected," which, for any legal purpose, is exactly equivalent to silence. *Insurance Co. v. Miller*, 19 U. S. App. 588, 8 C. C. A. 612, 614, 60 Fed. 254; *Railway Co. v. Hall*, 32 U. S. App. 60, 14 C. C. A. 153, 60 Fed. 868; *Mining Co. v. Berberich*, 36 C. C. A. 364, 94 Fed. 329.

The case of *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472, was an action for a personal injury, and the court said (page 461, 136 U. S., page 994, 10 Sup. Ct., and page 476, 34 L. Ed.):

"At this point of the witness' testimony in chief he was asked 'whether the book shows that this thing was received on the 29th of November.' The question was objected to, and the objection overruled. The witness answered, 'It was.' To this ruling of the court as to the question and answer the defendant excepted."

The supreme court disregarded this general exception, saying (page 462, 136 U. S., page 994, 10 Sup. Ct., and page 476, 34 L. Ed.):

"In *Camden v. Doremus*, 3 How. 515, 530, 11 L. Ed. 705, this court declined to consider objections made to the admission of evidence which did not state the grounds upon which they were made, and did not obviously cover the competency of such evidence, nor point to some definite and specific defect in its character. 'We must,' the court said, 'consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court.' To the same effect are *Burton v. Driggs*, 20 Wall. 125, 133, 22 L. Ed. 299; *Patrick v. Graham*, 132 U. S. 627, 629, 10 Sup. Ct. 194, 33 L. Ed. 460. This rule is especially applicable in actions like the present one, in which no fixed rule can be prescribed for measuring the amount of damages, and in which the result must, of necessity, depend upon the good sense and sound discretion of the jury, as controlled by the special circumstances of the case."

And while there were objections interposed to some introductory and collateral questions propounded to the witness upon the ground that they called for hearsay, there was no objection at all interposed to the question and answer now objected to, namely:

"Q. What did he get after he got to be a fireman? A. He told me his wages run from \$75 to \$90 per month."

To this question and answer no objection whatever was made. It is always allowable to interpose stringent and rigid rules to set off hypercritical and technical objections to the admission of evidence

which it is extremely improbable had the slightest influence on the verdict. In *Mining Co. v. Berberich*, supra, this court said:

"If every slight defect or slip which a microscopic eye can detect in a question or answer or the charge of the court is to be counted prejudicial error, litigation will become interminable over subtle refinements and quibbles which were not seen or regarded by the judge or jury at the trial, and which had no bearing whatever on the decision of the case on its merits. Such an administration of the law would be intolerable. 'But there is nothing,' said Judge [now Mr. Justice] Brown, of the supreme court of the United States, 'which tends to belittle the authority of the courts, or to impair the confidence of the public in the certainty of justice, as much as the habit of reversing cases for slight errors in admitting testimony, or trifling slips in the charge. * * * Better by far the practice of the English courts and the federal supreme court, where every intendment is made in favor of the action of the lower court, and cases are rarely reversed except for errors going to the very merits,—errors which usually obviate the necessity of a second trial.' Report Am. Bar. Ass'n 1889, p. —. Though these remarks of the learned justice were not uttered from the bench, they express the rule upon the subject by which appellate courts should be guided, and they have our approval."

We reaffirm what was there said, and apply it to this case. The admission of incompetent evidence of a material fact is an error without prejudice, where the fact is proved by other competent evidence (*Cooper v. Coates*, 21 Wall. 105, 22 L. Ed. 481), or the party complaining of the error was instrumental in excluding competent evidence to prove the fact (see authorities supra), or where the fact is one of common knowledge.

It is assigned as an error that the court refused to instruct the jury that the train dispatcher was a fellow servant of the fireman. But this was not error. That the train dispatcher is not a fellow servant of the trainmen in discharging the duties of the train dispatcher for the railroad company is now as firmly settled as any rule of law can be by judicial decisions. A railroad track is of no use to its owner or the public unless cars are run upon it. The railroad is built for that purpose. It is the movement of the trains upon the track that constitutes it a railroad. That is the consummation of the whole business. Trains will not move of their own volition. They have to be set in motion and kept moving by orders from some source. The conductors and engineers on the different trains have no authority over each other. They are required to obey orders for the movement of their trains, but can give none. The company itself can alone tell when and how its trains shall be run. That is its business, and, in the last analysis, its only business. In the orderly and safe conduct of this business, it must make a printed time-table, which is but another name for orders governing and regulating the movement of its trains under normal conditions. The making of this time-table is a legal duty of the railroad company, and, no matter upon whom the company may devolve this duty, the time-table, when made, and whether well or ill made, is the work of the railroad company, and the company is responsible for its results. It is not the work of the man who put it up, no matter what relation he sustains to the company. In contemplation of law, it must necessarily emanate from the supreme head or authority of the company, without regard to the hand used to promulgate or publish it. But printed time-

tables alone are not adequate to meet all the requirements for the speedy, orderly, and safe movements of its trains; and for this reason the company is compelled to have recourse to the telegraph, through whose agency it makes special time-tables to meet the exigencies and requirements of the business, which are not, and cannot be, provided for in the printed time-table. Of these facts, as well as of the general duties of the train dispatcher, the courts take judicial notice. *State v. Indiana & I. S. R. Co.*, 133 Ind. 77, 81, 82, 32 N. E. 817, 18 L. R. A. 502; *Railway Co. v. Heck*, 151 Ind. 292, 312, 50 N. E. 988; *Slater v. Jewett*, 85 N. Y. 61, 68. But, whether the time-table is general or special, in print or sent by telegraph, it emanates from the railroad company (from the master), and is a duty the performance of which cannot be delegated to any servant of the company, of whatever rank, without making that servant the alter ego of the company, and the company liable for his negligence in the performance of that duty. The alter ego of the company in directing the movement of its trains by telegraph is the train dispatcher, and his orders are the orders of the company, and must be obeyed by all to whom they are addressed. The authority of the company in the premises is necessarily supreme, and its order, through its train dispatcher, must be obeyed; otherwise, inextricable confusion and destruction to life and property would be the result. It is a duty which admits of no divided authority. The train dispatcher is supreme in his sphere. No one, not even the directory itself, would presume to order the movement of a train, except through the train dispatcher, who alone, through his train dispatch book and train sheet, can issue an order for the safe movement of a train over the track. The law on this subject is well and succinctly stated in the case of *Darrigan v. Railroad Co.*, 52 Conn. 285. The court said:

"It is the duty of the railroad company to prepare a time-table and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was with these trains, controlled by one who knew the position and movement of every train on the road liable to be affected by that,—a train dispatcher acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and a locomotive engineer? The duty of the former pertains to management and direction; that of the latter to obedience. It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. * * * The train dispatcher, then, in respect to the matter of moving the trains, is supreme. The whole power of the corporation, whose duty it was to move them safely, was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name, by its authority, and in its stead. The engineer was bound to obey his orders. Disobedience or deviation would have been subversive of order and discipline, destructive in its consequences, and just cause for immediate dismissal. * * * Reason, justice, and law require that the company shall be held responsible."

In *Hankins v. Railroad Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, Judge (now Mr. Justice) Peckham, speaking for the court of appeals, said:

"Nor is the holding that a train dispatcher, in the dispatch of trains, performs for the master a duty which it owes as such, a new departure in the branch of the law under discussion. While the cases cited below do not necessarily proceed upon that basis, yet it is plain that it was in all of them regarded as an indisputable proposition, so far as a train dispatcher acted in ordering the movement of trains."

In *Railway Co. v. Heck*, supra, the supreme court of Indiana, after an exhaustive discussion of the question and review of the authorities, say (page 314, 151 Ind., and page 995, 50 N. E.):

"The contrary is held to be the law in Mississippi and in Maryland, in a qualified form, so that we are safe in saying that the overwhelming weight of judicial opinion is that a train dispatcher, charged with the duties and clothed with the powers that the one now in question was, is not a fellow servant with trainmen in the employ of the railroad company, but is a vice principal, for whose negligence the company is liable."

An examination of the cases confirms this statement of the court. We cite the cases: *Hankins v. Railway Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396; *Dana v. Railway Co.*, 92 N. Y. 639; *Sheehan v. Railway Co.*, 91 N. Y. 332; *Slater v. Jewett*, 85 N. Y. 61; *Darrigan v. Railroad Co.*, 52 Conn. 285; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; *Railroad Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097; *Railroad Co. v. McLallen*, 84 Ill. 109; *Smith v. Railway Co.*, 92 Mo. 359, 4 S. W. 129; *Washburn v. Railroad Co.*, 3 Head, 638; *Railway Co. v. Arispe*, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33; *Railway Co. v. Camp*, 31 U. S. App. 213, 229, 13 C. C. A. 233, 65 Fed. 952; *Clyde v. Railroad Co.* (C. C.) 69 Fed. 673; *Railway Co. v. Frost's Adm'x*, 44 U. S. App. 606, 21 C. C. A. 186, 74 Fed. 965; *Railway Co. v. Heck*, 151 Ind. 293, 306-315, 50 N. E. 988; *McKune v. Railroad Co.*, 66 Cal. 302, 5 Pac. 482; *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. 544; *Flannegan v. Railway Co.*, 40 W. Va. 436, 21 S. E. 1028; *Railway Co. v. De Armond*, 86 Tenn. 75, 5 S. W. 600; *McKinney*, Fel. Serv. (1890) § 143.

The counsel for the plaintiff in error in their brief cite and rely on *Robertson v. Railroad Co.*, 78 Ind. 77, as establishing a different doctrine; but that case was expressly overruled by the case of *Railway Co. v. Heck*, 151 Ind. 292, 50 N. E. 988.

It is said that, as "Elliott suffered instantaneous death in the collision in question, any right of action for damages on account of negligence on the part of the railway company died with Elliott, and did not survive to these defendants in error." This contention was put at rest by the decision of this court in *Coal Co. v. Bevil*, 27 U. S. App. 96, 10 C. C. A. 41, 61 Fed. 757; *Broughel v. Telephone Co.* (Conn.) 45 Atl. 435.

Exception is taken to the assessment of 10 per cent. damages, upon the affirmance of the judgment appealed from, by the United States court of appeals in the Indian Territory. The Arkansas statute (section 1311, Mansf. Dig.) adopted and in force in that territory, and obligatory upon the United States court of appeals, provides:

"Upon the affirmance of a judgment, order or decree for the payment of money, the collection of which, in whole or in part, has been superseded, as provided in this chapter, 10 per centum damages on the amount superseded shall be awarded against the appellant."

It will be observed that the statute is mandatory, but, if it were otherwise, and the damages had been assessed by the court, in the exercise of its discretion, for delay, we should not disturb the order on this record. The judgment of the United States court of appeals in the Indian Territory and the judgment of the United States court for the Northern district of the Indian Territory are affirmed.

SANBORN, Circuit Judge (dissenting). The nature and kind of service rendered and of control and direction exercised by a train dispatcher on a division of a railroad differ in no respect from the nature and kind of service rendered and of control and direction exercised by a conductor of a train between stations (*Railroad Co. v. Conroy*, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —); by the foreman of a gang of laborers, engaged in repairing sections of a railroad, who has power to hire and discharge the hands who compose the gang, and exclusive charge of their direction and management in all matters connected with their employment (*Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 944); of an engineer who is regarded as conductor, and has the direction and control of his engine and fireman (*Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772); of a foreman who has the power to hire and discharge men under him, and to direct them when, where, and how to work in the construction of a sewer in a city street (*City of Minneapolis v. Lundin*, 19 U. S. App. 245, 58 Fed. 525, 7 C. C. A. 344); of a foreman who has the power to hire and discharge the men at work under him, and to control and direct their acts in grading a street in a city (*Balch v. Haas*, 36 U. S. App. 393, 20 C. C. A. 151, 73 Fed. 974); and of a section foreman who directs and controls the action of the section men who work under his charge (*Railway Co. v. Waters*, 36 U. S. App. 31, 16 C. C. A. 609, 70 Fed. 28); and as these various superior servants are fellow servants with their subordinates, under the decisions cited, so is a train dispatcher upon a division of a great railroad, in my opinion. There is no difference in the nature of the relation of a train dispatcher of a division of a great railroad to the trainmen, whose movements he directs, and that of the relation of a conductor to the trainmen on his train; of an engineer, who is regarded as conductor, to his fireman; of a section boss to the men of his gang; or of a foreman of a force of laborers, whose action he has the power to direct and control, to the men in his charge. In each case the subordinate servants are required to render implicit obedience to their superior. In each case the superior servant is himself a subordinate, who works under the direction of a superintendent or general manager. In each case the superior servant and his subordinates are "all co-workers to the same end," regardless of their rank; and in neither case does the superior servant discharge any absolute duty of the master, or have the entire management of all his business, or of a separate and distinct department of his business. In the last analysis, the proposition that the train dispatcher is not a fellow servant of his subordinates rests upon nothing but the superior servant doctrine,—upon nothing but the fact that he has the right to give directions for the operation of the trains which are moved by his co-workers on the particular division of the railroad

upon which they all happen to be at work. The train dispatcher of a division of a great railroad is not discharging any absolute duty of the master. Those duties are to use reasonable care to employ competent servants, to exercise ordinary care to furnish and maintain a reasonably safe railroad and equipment, and perhaps to exercise ordinary care to adopt and promulgate reasonable written or printed rules for the operation of the railroad. The train dispatcher of a division discharges neither of these duties. He does not make rules for the operation of the road. He and the trainmen on his division operate the road in accordance with the rules established by others. He is not charged with the duty of selecting other servants. He does not discharge the master's duty of using ordinary care to furnish or to maintain a reasonably safe railroad and equipment. He is not engaged in his master's duty of furnishing and maintaining the railroad and equipment, but in discharging his own duty of assisting his co-workers to operate the railroad and equipment which the master furnishes and maintains upon the particular division to which he is attached. The railroad and equipment constitute the great machine which the master furnishes for his employes to operate. His duty of furnishing and maintaining a safe machine extends only to its construction, preparation, and repair. It stops at the line of operation. The duty of careful and safe operation is the duty of the servants to whom he intrusts that function. The test of liability for an accident here is the nature of the negligence that caused it. If it was negligence in the construction and repair of the great machine, it was the negligence of the master. If it was negligence in the operation of the railroad,—in the running of its trains,—it was the negligence of the servant. The fact is unquestioned in this case that the negligence which caused the accident was not in the construction, preparation, or maintenance of the railroad or equipment, but it was the negligence of a servant in the operation of that equipment. It was not, therefore, the negligence of the master in the discharge of his duty of construction, preparation, or maintenance. *Railway Co. v. Needham*, 27 U. S. App. 227, 232, 11 C. C. A. 56, 59, 63 Fed. 107, 110, and cases cited. The train dispatcher in this case therefore was not engaged in the discharge of any absolute duty of the master. Nor was he intrusted with the entire management and supervision of all the business of this railroad company, or with the entire management and supervision of a distinct and separate department of its business. He was nothing but one of the subordinates of the superintendent or manager of the railroad company, engaged with all his co-workers in the operating department of the company in assisting to move its trains. He was under the same obligation and duty to obey the directions of the superintendent or general manager of the operating department of this railroad that the conductors in his division were to obey his orders, and that the firemen and engineers were to obey the directions of their conductors. Thus, it may be seen that the only basis for the conclusion that this train dispatcher was not a fellow servant of the trainmen at work on the same division with him is that he was superior to them in rank, and that his service, while it was that of obedience to his superior, the superintendent or manager, was that of control and direction of

the trainmen who were moving the trains on the division he was assisting them to operate.

It is true that authorities almost without number can be cited from the decisions of the courts in support of the position that an employé who has the direction and control of those working with or under him is the alter ego of his master, and not the fellow servant of his subordinates, and that the master is liable for his negligence. This is what is termed the "superior servant doctrine," and it has been the favorite theory of many courts, and at one time received the favorable consideration of the supreme court of the United States. *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787. The later decisions of that court, however, and of the federal courts that follow its rulings, have utterly repudiated this doctrine, and have firmly established the following rules of law: All who enter the employment of a common master to accomplish a common undertaking are *prima facie* fellow servants. Those to whom the master intrusts the entire supervision and control of all his business, or of a distinct and separate department of a large and diversified business, and those to whom the master intrusts the discharge of his absolute duties of selecting employés, of furnishing a place for them to work and materials for them to work with, and perhaps of making rules for the conduct of his business, are not, while they are discharging these specific duties, the fellow servants of the other employés of the common master. But these servants, when they are discharging other than these specific duties, and other servants at all times, are the fellow servants of all others engaged in the common undertaking for the common master. Neither the fact that one servant is superior in rank or higher in grade than others, nor the fact that the duty of one is to order and direct the movements of others, while the duty of the others is to obey the orders and directions of their superior, will abrogate or affect their relation of fellow servants, or constitute the superior a vice principal, unless he is intrusted with the entire management of all his master's business, or of a distinct and separate department of a large and diversified business. Every servant who enters the employment of the common master assumes the risk of the negligence of his co-workers in the common undertaking, whose duty it is to direct his work and to order him when, where, and how to do it, just as much as he does that of those servants whose duty it is to work by his side and to obey the orders of the superior servants. *Railroad Co. v. Conroy*, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 944; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *City of Minneapolis v. Lundin*, 19 U. S. App. 245, 7 C. C. A. 344, 58 Fed. 525; *Balch v. Haas*, 36 U. S. App. 393, 20 C. C. A. 151, 73 Fed. 974; *Railway Co. v. Waters*, 36 U. S. App. 31, 16 C. C. A. 609, 70 Fed. 28; *Millsaps v. Railway Co.*, 69 Miss. 423, 13 South. 696; *Railroad Co. v. Hoover*, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710; *Blessing v. Railway Co.*, 77 Mo. 410; 2 Bailey, Pers. Inj. §§ 2061, 2190; *Railroad Co. v. Poirier*, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; *Oakes v. Mase*, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746; *Railroad Co. v. Keegan*, 160 U. S. 259,

16 Sup. Ct. 269, 40 L. Ed. 418; Railroad Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; Farwell v. Railroad Co., 4 Metc. (Mass.) 49; Holden v. Railroad Co., 129 Mass. 268; Clifford v. Railroad Co., 141 Mass. 564, 6 N. E. 751; Sherman v. Railroad Co., 17 N. Y. 153; Besel v. Railroad Co., 70 N. Y. 173; De Forest v. Jewett, 88 N. Y. 264; Weger v. Railroad Co., 55 Pa. St. 460; Coal Co. v. Jones, 86 Pa. St. 432.

Under the above rules, which seem to me to be sustained by the foregoing authorities, and to be now firmly established by the later decisions of the supreme court, the train dispatcher in this case, whose duty it was to direct the movement of trains on one of several divisions of this railroad, was, in my opinion, a fellow servant of all his co-workers in the operating department of the plaintiff in error below its superintendent or general manager; and for that reason the railroad company was not liable for his negligence. The deceased assumed the risk of that negligence when he entered the employment of the common master for the purpose of carrying on, in conjunction with this train dispatcher, the common undertaking of operating the railroad of the plaintiff in error. The trial court refused to declare this to be the law, and the court of appeals in the Indian Territory sustained that ruling. For this reason it seems to me that the judgments below should be reversed.

The ruling to which reference has been made is not, in my opinion, the only error in the trial of this case. There were several errors,—notably, the refusal of the trial court to instruct the jury that they should not consider the testimony of Broyles, which was mere hearsay, in assessing the damages. But the fundamental error has already been discussed, and no good purpose would be subserved by prolonging this opinion to consider less important mistakes.

GALVESTON, H. & N. RY. CO. v. HOUSE et al.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1900.)

No. 900.

1. APPEAL—NECESSARY PARTIES—PARTIES HAVING NO SUBSTANTIAL INTEREST.

A railroad company which is hopelessly insolvent, and practically defunct, and all of whose property, rights, and franchises have been transferred to a purchaser at foreclosure sale, is not a necessary party to an appeal by such purchaser from a decree distributing the proceeds of the sale.

2. SAME—REPRESENTATION BY RECEIVER.

Holders of receiver's certificates, among whom the proceeds of a railroad sold under foreclosure have been distributed, are sufficiently represented by the receiver on an appeal by another creditor from the decree making such distribution, and compliance by the appellant with an order requiring citation on the appeal to be served on all the distributees who had counsel of record, or to whom the receiver was indebted in any considerable sum, is sufficient to sustain the appeal.

3. SAME—PERSONS NOT PARTIES TO RECORD.

Persons who may be interested in a decree, but who are not parties to the suit, are not necessary parties to an appeal from such decree.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

Walter Gresham and D. F. Rowe, for appellant.

F. C. Dillard, J. W. Terry, and T. W. Ford, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. A motion has been submitted to dismiss this appeal for the following reasons: (1) The appeal was not seasonably perfected, because it was allowed by the court on the 28th day of November, 1899, assignment of errors having been previously filed on the 25th day of November, 1899, but appeal bond was not approved until the 12th day of December, 1899, and citation signed on this same day, which was returnable in 30 days, and the record was not filed in this court until January 19, 1900. (2) There are a large number of parties whose interests are sought to be affected by this appeal as to whom no summons or severance has been made or sought, who have not been cited herein, and upon whom no service of citation has been sought, and who have not waived such service. (3) The Galveston, Laporte & Houston Railway Company, the defendant in the suit, and the mortgagor in the mortgages which were foreclosed in the final decree, has not been cited herein, nor is it in any way made a party to the appeal bond.

The main suit was originally commenced by A. J. Tullock against the Galveston, Laporte & Houston Railway Company, and a receiver was appointed. Subsequently the Union Trust Company and the Continental Trust Company, trustees in two several mortgages granted by the Galveston, Laporte & Houston Railway Company, intervened in the suit, and filed cross bills seeking the foreclosure of their respective mortgages. Thereafter, other parties having intervened in the meantime, the court rendered a final decree of foreclosure of the two mortgages, and ordered a sale of all the railroad property to satisfy the decree. After some delay and several offerings, a sale was effected under this decree to L. J. Smith, who assigned to Charles Broadhead, who assigned to the Galveston, Houston & Northern Railway Company, the appellant herein. The sale was duly confirmed, and by operation of law said Galveston, Houston & Northern Railway Company became the successor of all the rights, privileges, and franchises of the sold-out company. Pending the proceedings of foreclosure and sale, the administration by the receiver was so far unfortunate as to result in largely increasing the privileged indebtedness resting on the property. The proceeds realized from the sale were insufficient to meet all the receiver's obligations, much less to afford any sum to be applied upon the mortgage indebtedness; whereupon, after a master's report showing all the obligations and indebtedness of the receiver, and upon interventions theretofore and thereafter filed, the court proceeded to render a decree for the distri-

bution of the proceeds of sale. From this decree this appeal is prosecuted.

The record shows that all the formal parties in the case, including those who filed petitions of intervention, are made parties to this appeal, except the Galveston, Laporte & Houston Railway Company, the original defendant in the main suit; and that all the distributees named in the decree appealed from who had counsel of record, or to whom the receiver was indebted in any considerable sum, are made parties, in compliance with an order of the circuit court as follows:

"It is further ordered, and for the reasons set forth in the above application, and in accordance with the prayer thereof, citation of said appeal shall not be required to be had on, or waiver thereof procured from, any of the persons named as the distributees in this said decree appealed from, except such as are represented by counsel or attorney of record in said cause."

The record further shows that the citation of appeal has been served on, or waiver of citation obtained from, all the parties to the appeal who are or were represented by counsel of record. The irregularities assigned in the first reason are not insisted upon, the record of this court showing that the proper order extending the return day was granted and filed. We understand the rule to be, with regard to appeals, that all parties to the record who appear to have an interest in the decree appealed from should be made parties to the appeal. *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563. We do not understand that persons who may be interested in the decree, yet are not parties to the suit, are necessary parties to an appeal. As to the distributees named in the decree who are holders of receiver's certificates, or simply creditors of the receiver, we are of opinion that, so far as they are not made parties, they are represented as to any interests they may have in the decree by the receiver; and that in respect to such distributees the appellant has done all that could be expected, and much more than absolutely required, in giving them full notice of this appeal. It is difficult to see that the Galveston, Laporte & Houston Railway Company has any interest whatever in the present appeal. Its property has been all sold out; it is insolvent beyond redemption; it is practically defunct; and as to its rights, privileges, and franchises has a lawful successor, and that successor is the appellant herein. The motion to dismiss is overruled.

In re BRICE.

(District Court, S. D. Iowa. June 19, 1900.)

1. **BANKRUPTCY—OPPOSITION TO DISCHARGE—KEEPING BOOKS OF ACCOUNT.**

To sustain specifications in opposition to a bankrupt's application for discharge, on the ground of his failure to keep proper books of account, it is not sufficient to show that the true state of his affairs could not be ascertained from the books as kept, but the evidence must fairly prove that his mode of keeping them was with a fraudulent intent to conceal his financial condition, and in contemplation of bankruptcy.

2. **SAME—MUTILATION OF BOOKS.**

The fact that a bankrupt's ledger is presented in a mutilated condition, certain of its pages having been torn out, is not sufficient ground for re-

fusing his discharge, when the evidence does not prove that the mutilation was done by the bankrupt himself, or with his knowledge, and where there is testimony to show that the entries on the missing pages are to be found repeated in other parts of the ledger.

In Bankruptcy. On bankrupt's application for discharge, and opposition thereto by creditors.

J. W. Willett and W. S. Kenworthy, for bankrupt.

Dudley & Coffin and H. H. Sheriff, for opposing creditors.

SHIRAS, District Judge. From a consideration of the evidence in this case, I have reached the conclusion that the referee ruled correctly in holding that Thomas Brice, the father of the bankrupt, had a provable claim against the estate, and in overruling the objections thereto. The evidence, considered as a whole, does not sustain the contentions of the opposing creditors that Thomas Brice was in fact the owner of the business conducted at Oskaloosa, or that he had not in fact loaned the money to the bankrupt evidenced by the notes executed by the latter, or that by any representations by him made he had estopped himself from proving up his claim as a creditor.

Upon the question of the right of the bankrupt to a discharge, the only matter of doubt is with respect to the objection that the bankrupt had failed to keep proper books of account, or records from which his true condition might be ascertained. The evidence shows that the books kept did not contain a list or statement of the debts due from the bankrupt, and it is therefore true that from the books the true financial condition of the bankrupt could not be ascertained, but it is not shown that this was done with any fraudulent intent to conceal his financial condition, and in contemplation of bankruptcy; and the same is true with respect to the charge that two pages of the ledger have been torn out, thus leaving this book in a mutilated condition. It is not proven that this act was done by the bankrupt himself, or with his knowledge, and it is not made clear that the destruction of these pages of the ledger prevents the true condition of the bankrupt from being ascertained, as the testimony of the bookkeeper tends to show that the items entered on the pages torn out appear in other parts of the ledger. The bankrupt in this case never had, in fact, the actual management of the business at Oskaloosa, it being in the hands of his brother-in-law, as manager for him, and the evidence wholly fails to show that the bankrupt has been personally guilty of any wrongful and fraudulent practices that should debar him from his discharge; and, therefore, to defeat the discharge on the ground that the books had not been properly kept, the evidence should be such as to fairly prove that the mode of keeping the books was with a fraudulent intent to conceal the bankrupt's condition, and in contemplation of bankruptcy, and this the evidence does not show in any satisfactory manner. The objections to the petition of discharge must therefore be overruled, and an order granting the discharge must be entered, as prayed for.

In re SLOAN.

(District Court, S. D. Iowa. May Term, 1900.)

1. BANKRUPTCY—PREFERENCES—PAYMENT OF MONEY.

Payment of a debt in money is a transfer of property, within the meaning of Bankr. Act 1898, § 60a, providing that a debtor shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class.

2. SAME—PROOF AND ALLOWANCE OF CLAIMS—PREFERRED CREDITORS.

Under section 57g, providing that the claims of creditors of a bankrupt who have received preferences shall not be allowed unless they surrender their preferences, a creditor who has actually received a preference, by a partial payment of his debt, within four months before the bankruptcy of the debtor, and at a time when the latter was insolvent, cannot have his claim allowed against the estate of the bankrupt without surrendering to the trustee the money so received, notwithstanding the fact that, when he received the payment, he had no knowledge or cause to believe that the debtor was insolvent or that a preference was intended.

In Bankruptcy. On review of decision of referee in bankruptcy.

George F. Heindel, for trustee.

Work & Work, for Keith Bros. and other creditors.

SHIRAS, District Judge. From the record in this case it appears that on the 5th day of January, 1900, Frank Sloan was duly adjudged a bankrupt upon his own petition, and George Earheart was appointed trustee for his estate. On the 26th of March, 1900, the bankrupt and the trustee united in a petition filed before the referee asking that the allowance of certain claims be expunged and set aside, and that certain other claims pending for allowance be disallowed, for the reason that within four months next preceding the adjudication in bankruptcy the claimants had received payments from the bankrupt, and had not repaid the amounts to the trustee. In this petition it is averred that for a long time prior to the filing of the petition in bankruptcy the bankrupt was largely indebted to many persons; that when making the payments in question he supposed he was in fact solvent, and so believed up to about the time when he filed his petition in bankruptcy, but it now appears that in fact he was insolvent during the period of four months next preceding the commencement of the bankruptcy proceedings, and that his estate will not pay his debts in full; and therefore it is asked that the creditors to whom these payments were made shall not be allowed to prove up their claims or participate in the dividend to be paid, unless they shall first repay to the trustee the amounts paid them within the period of four months next preceding the filing of the petition in bankruptcy. According to the averments of the petition, the payments to the creditors were made in cash upon account, and it is not charged that when these payments were received the creditors knew of the actual insolvency of the debtor, or had reason to believe that thereby they were in fact being preferred over the other creditors of the bankrupt. To this petition a demurrer was interposed on behalf of the creditors named in the petition, and

thereby was presented the question whether, under the provisions of the bankrupt act, the fact that these creditors had been paid within four months preceding the filing of the petition in bankruptcy certain sums of money to apply on the debts due them, the debtor being at the time the payments were made actually insolvent, bars the creditors from proving up the balance of their claims, unless they first repay to the trustee the sums paid them; it being admitted that when the payments were made the creditors did not know that the debtor was insolvent, and had no reason to believe that it was the intent of the bankrupt to give them a preference by the payments made them. Upon the hearing before the referee the demurrer was sustained, to which ruling exception was taken, and the question has been certified for consideration by the court.

In the case of *In re Ft. Wayne Electric Corp.*, 39 C. C. A. 582, 99 Fed. 400, the circuit court of appeals for the Seventh circuit considered all the questions involved in the present case, and reached the conclusion that a payment of money is a transfer of property, within the meaning of section 60 of the bankrupt act, and that a creditor to whom a payment in money has been made by an insolvent debtor cannot prove his claim until he has paid back the sum received, even though when he received it he did not know, or have cause to believe, that the debtor was insolvent or intended to prefer him over his other creditors. The same conclusion was reached by Judge Hanford in the case of *In re Conhaim* (D. C.) 97 Fed. 923. The grounds upon which these decisions are based seem well taken, and are decisive of this case. The ruling of the referee upon the demurrer is therefore set aside, and the record is returned to the referee for further proceedings.

In re SCHLESINGER.

(Circuit Court of Appeals, Second Circuit. May 28, 1900.)

No. 135.

1. BANKRUPTCY—REQUIRING BANKRUPT TO SURRENDER PROPERTY—CONTEMPT.

A court of bankruptcy has power and jurisdiction to make an order, after due hearing of the parties, requiring the bankrupt to pay or deliver to his trustee in bankruptcy a sum of money found to be in his possession or control, and constituting assets of his estate in bankruptcy, and which he has not surrendered or accounted for, and to enforce his obedience to such order by commitment as for contempt.

2. SAME—IMPRISONMENT FOR DEBT.

Such an order is not a judgment or order for the payment of a debt, and commitment of the party to compel his obedience thereto is not imprisonment for debt, within the meaning of Rev. St. § 990, providing that no person shall be imprisoned for debt on process issuing from a court of the United States in any state where, by the local law, imprisonment for debt has been or shall be abolished.

(Syllabus by the Court.)

On Petition to Review an Order of the District Court of the United States for the Southern District of New York, in Bankruptcy.

Samuel Strasbourger, for petitioner.

H. C. Messimer, opposed.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Samuel Schlesinger was, upon his voluntary petition, adjudged a bankrupt on April 20, 1899, by the district court for the Southern district of New York, and on May 9, 1899, Benjamin Barker was appointed his trustee in bankruptcy, who thereafter brought a petition before said court alleging that the bankrupt had in his possession, or under his control, sums of money belonging to his estate amounting to \$12,682.91, and praying for an order directing him to pay these assets to the trustee. The referee, upon reference, was of opinion that he could not find that any particular sum was in the hands or the control of the bankrupt, except the sum of \$25.50, which was set forth in the schedules as being in his hands, which was ordered to be paid to the trustee. This order was obeyed. Upon motion to the district court for an order reversing the order of the referee, and directing the bankrupt to pay the sum of \$12,682.91, the court found that the testimony satisfied him that upwards of \$10,000 had been concealed by the bankrupt, and was in his possession or control; but, to be entirely within the limits of any possible doubt, the district judge fixed the amount required to be paid over at \$6,500,—an amount extending back but a few weeks prior to the petition in bankruptcy,—and ordered the payment of that sum forthwith to the trustee, in default of which the bankrupt should be in contempt of court. 97 Fed. 930. The validity of this order is the subject of this petition for review. The bankrupt failed to comply with the order, and pending this petition the district court has suspended action under proceedings for contempt.

The power of a district court to punish a bankrupt for contempt of court, as manifested by his refusal to obey an order of court, made after due hearing of the parties, directing him to deliver or to pay the assets of the bankrupt estate to the trustee in bankruptcy, is the matter in controversy. If we had power to review the correctness of the finding that the testimony was such as to satisfy one beyond a reasonable doubt that the money was in the possession or under the control of the bankrupt, and mindful of the importance of observing caution in the investigation, we should have no hesitation in affirming the finding of fact. It is not denied that clause 13 of section 2 of the bankrupt act authorizes the court of bankruptcy to "enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment," and that disobedience of a lawful order of a referee is punishable by the judge as for a contempt committed before the court of bankruptcy; but it is contended that disobedience of an order to the bankrupt to pay or deliver a sum of money in his possession to his trustee cannot be punished by proceedings in contempt, because the order is for the payment of a debt, and imprisonment for debt has been abolished in the state of New York, and by section 990 of the Revised Statutes no person can be imprisoned for debt by process issuing from the courts of the United States in a state where by its laws imprisonment for debt has been abolished. The Blanche

Page, 16 Blatchf. 1, Fed. Cas. No. 1,524; *Manufacturing Co. v. Fox* (C. C.) 20 Fed. 409. The answer to this objection is that the order was not for the payment of a debt, but for the delivery by the bankrupt of the assets of his estate to his trustee in bankruptcy. He was not indebted to the trustee. The money was a part of his assets and estate, which had, by operation of law, become vested in the trustee; and, while the order in this class of cases is for the delivery of the bankrupt's property to the trustee, it is in no proper sense a judgment or decree for the payment of a debt. If the enforcement of an order for the delivery to the trustee in bankruptcy of the assets of an estate which had been converted into money could not be had except by an execution, the power of a bankruptcy court would be minimized, and the assets of estates in bankruptcy would be subject to great reduction. To this class of cases section 990 has no application. The decision of the majority of the circuit court of appeals of the Fifth circuit sustains the power of the district court to commit for contempt in a like case. *In re Purvine*, 37 C. C. A. 446, 96 Fed. 192.

In the bankrupt act of 1867 the district courts, as courts of bankruptcy, had express authority "to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that circuit courts now have in any suit pending therein in equity." Rev. St. § 4975. The power to punish the bankrupt's contempt shown in disobedience to orders in regard to the delivery of money to his assignee in bankruptcy was fully sustained during the life of that statute. *In re Salkey*, 11 N. B. R. 423, Fed. Cas. No. 12,253. The petition to review is denied, and the order of the district court is affirmed.

In re MENDELSON.

(District Court, S. D. New York. May 16, 1900.)

BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF ASSETS.

Where a comparison of the bankrupt's assets and liabilities, as scheduled in the bankruptcy proceedings, with an itemized statement of his affairs made a few months before, and admitted to be correct, showed a large shrinkage or disappearance of assets, of which he failed entirely to give any satisfactory explanation, and his books of account, shown to have been in his possession at the time of his failure, were not produced, except a ledger, out of which many leaves had been torn, the evidence tending to show that the mutilation had been done by the bankrupt himself, *held*, that the evidence justified a finding that he had concealed property from his trustee, and intentionally suppressed his books, and that his application for discharge should be denied on that ground.

(Syllabus by the Court.)

In Bankruptcy. On bankrupt's application for discharge and opposition thereto by creditors.

Arthur Furber, for bankrupt.
Epstein Bros., for creditors.

BROWN, District Judge. The discharge of the bankrupt is opposed on the ground of the concealment of property and of a fraudulent suppression and mutilation of his books of account. I have carefully read all the evidence bearing on these questions and am of opinion that a jury of merchants would unhesitatingly find the objections sustained by the evidence.

The bankrupt's petition was filed on September 24, 1898. In February previous he bought out his former partner and continued the business of manufacturing and selling clothing at 7 Lafayette Place, and thereafter continued the business until the middle of July, when he sold out his stock and fixtures for \$3,800. He settled the debts of the old firm by giving his own notes to the extent of 87½ cents on the dollar, payable at four, six and eight months. The first installment of notes was paid; but before the others became due, he sold out as above stated. In March and April he gave an itemized statement of his assets and liabilities, which he now testifies was correct, as representing his condition on March 1, 1899, and showing assets amounting to \$65,000, obligations, \$28,000, and a surplus of \$37,662.18. Of this amount about \$12,300 is an estimated equity in real estate which was mortgaged to secure certain bonds included in his indebtedness. Excluding these items on both sides, the apparent surplus in his business was about \$25,500. His verified schedules filed in September following, show no assets except two outstanding accounts amounting to \$2,700 assigned as collateral security; while his outstanding unsecured business debts amount to about \$15,500. This shows an apparent loss of assets in about six months of \$41,000, to which should be added \$1,000 in cash, loaned him by the State Bank, and for which the collateral above mentioned was pledged; a loss in all, therefore, of about \$42,000.

In his statement his annual sales were put down as \$65,000. He had two stores. One was at No. 7 Lafayette Place, in which the merchandise was stated at value to be \$26,000, accounts and notes considered good at \$4,000, cash on hand and in bank \$3,500, and machinery and fixtures \$1,000; and a retail store at Hackensack in which the stock was stated at \$6,000. His unsecured liabilities were stated to be \$13,756. From March until he sold out in the middle of July, his purchases of goods he says were about \$6,000. He states no special causes of loss other than poor business, involving a loss of about 10 per cent., and a few bad debts apparently of little account. About the middle of July his stock at Hackensack, which he says was kept up to about the same value of \$6,000, was sold to his sister for \$1,000 in consideration of a debt owing to her to that amount; and about the same time his stock at Lafayette Place was sold upon a day's notice to a Mr. Miller, previously a stranger, for \$3,800 cash, at 70 per cent. of an appraisalment made by Mr. Miller himself. The bankrupt's bookkeeper testifies that an appraisalment was made by him and the bankrupt and another a few days before, and that the stock was then estimated at \$11,000. The bankrupt says this was a cursory and inaccurate inventory. Of the \$3,800 received for the stock, the bankrupt states payments to the amount of about \$2,500, including \$1,000 paid to his counsel to take him

through his troubles, no bill of which, however, has been rendered, or any further account given.

It scarcely seems credible that a debtor having any honest intention towards his creditors could without consultation with them sell goods worth \$11,000 for \$3,800; or a store worth \$6,000 for \$1,000. Assuming, however, that this apparent waste of assets was real, it accounts only for a loss of about \$12,000 out of \$42,000. All other losses suggested by him do not amount to over \$7,000, leaving at least \$23,000 wholly unaccounted for.

Again, between March 1st and July 14th he bought about \$6,000 of goods, making in all \$32,000, of which by the inventory in July, there remained only \$11,000,—a difference of \$21,000; while the sale at \$3,000 on July 14th on a 70 per cent. basis, would make the stock at that time worth only \$5,430 instead of \$11,000, a further diminution of over \$5,000, making a diminution in stock of \$26,000 to be accounted for by sales; and yet the outstanding accounts and cash on hand as scheduled are \$5,000 less than appeared in the statement of March 1st, and his debts considerably greater. It is impossible to believe that assets to such an extent were either lost or wasted by a man of the defendant's experience in business; or that if they were lost he could not give some intelligible account of it.

It is evident that in order to obtain any understanding of the course of the bankrupt's business, or explanation of the disappearance of his assets, his books of account are indispensable. Proper books were kept by his bookkeeper and were balanced within a few days of the time when he sold out in July. None of these books, however, are produced except a ledger, which has been mutilated by many leaves being torn out, only a part of which have been produced. The most important leaves, containing the bankrupt's personal account, the expense account and the sales, are missing. All his books, consisting of ledger, cash book, check book and tailor's book were taken to the bankrupt's house about the time he sold out. The bankrupt testifies that they were given to his bookkeeper to enable him to make up some disputed accounts with the tailor, and that only the ledger was returned to him by the bookkeeper with the leaves torn out, a portion missing and in the same condition as they were produced before the referee. Not only were leaves torn from the book, but in the alphabetical index the names were cut out from the index pages. The bookkeeper testifies that he took the tailor's book alone from the bankrupt's house, for the purpose of correcting his account; and that he saw the bankrupt himself tear the pages from the ledger, and that he never had the ledger or the other books at his own house.

The explanation given for the mutilation is, that the ledger had not been much used and was good for future use, and was so used in the subsequent business of the bankrupt's wife from and after August, 1899. One of the leaves cut out and returned, has upon it the account of one of the wife's customers, showing that that leaf was removed after the time when the bankrupt states that his book was returned to him by the bookkeeper, and that that leaf could not have been cut out by the bookkeeper. Some circumstances appear

that tend to impair entire confidence in the bookkeeper's testimony. I place no confidence, however, in Deutsch's testimony against him; his positive statements as to the material points about the check for \$83 were in the end withdrawn, and confirmed the bookkeeper's general account of the matter. So far as it appears, the bookkeeper had no interest in the mutilation of the book, while the condition of the assets shows that presumptively the bankrupt had a very great interest in it. Had the leaves been cut out by the bookkeeper in consequence of his knowledge or participation in any business irregularities, he would not naturally have omitted to remove a page which still remains and which shows an irregularity in an entry made by him which the bookkeeper himself states was untrue, though made by the bankrupt's order, that the account of Deutsch was closed by a return of goods instead of by a payment of cash; neither does it appear that the bookkeeper could have had any interest in cutting out the leaves concerning the bankrupt's personal account, or expenses, or sales, or in not producing them if they were removed by him. I find nothing either in the evidence or in the circumstances or in the probable motives to confirm the bankrupt's testimony, and his endeavor to shift from himself to the bookkeeper the responsibility for the mutilation and nonproduction of his books.

In order to secure any effective administration of the law in bankruptcy, it is indispensable to hold bankrupts to the performance of the duties imposed upon them by the act, and to deny them a discharge where the only reasonable inference from the testimony and exhibits made, is a concealment of assets and intentional nonproduction of books, which might otherwise account for their disappearance.

Discharge denied.

In re GOLDMAN.

(District Court, S. D. New York. May 15, 1900.)

EXECUTION SALES—TIME FOR REDEMPTION—BANKRUPTCY OF DEBTOR—STAY.

Where a creditor, holding a judgment which constituted a valid legal lien on real estate of his debtor, caused the same to be sold on execution and bid in the property, and, pending the period allowed by the state law for redemption, the debtor was adjudged bankrupt, but his trustee was not appointed until after the expiration of such period, and thereafter the sheriff made a deed of the property in question to the purchaser, *held*, that the time for redemption was not enlarged by the intervening bankruptcy proceedings, and that the purchaser's title under the sheriff's deed was valid as against the trustee in bankruptcy. Stay of proceedings continued sufficient to give trustee opportunity to bring plenary suit to set aside fraudulent conveyance.

(Syllabus by the Court.)

In Bankruptcy.

Horwitz & Samuels, for bankrupt.

Kurzman & Frankenheimer, for creditor and trustee.

Edward V. Thornall, for judgment creditor.

BROWN, District Judge. The trustee in bankruptcy moves to enjoin the collection of the rents and profits of No. 314 East Houston on the ground that the sheriff's deed of the premises, being made after the appointment of the trustee, is void as against him.

One Beckstein obtained a judgment against the bankrupt, the former owner of the premises, which by the state law became a legal lien upon the bankrupt's real estate. On execution issued upon that judgment, the sheriff sold the premises in question to Beckstein on March 11, 1898.

By the state law, the judgment debtor upon such sales has one year thereafter in which to redeem, and any other judgment creditor has three months' further time to redeem from the sale, on payment of the amount bid with interest and charges; and until the lapse of that period the judgment debtor's title is not divested. After fifteen months from the sale, if there is no redemption, the purchaser has a right to a deed of the premises, and it is by statute the duty of the sheriff to execute such a deed to the purchaser.

In the present case there was no redemption, so that on June 12, 1899, after the lapse of fifteen months from the sale, Beckstein became entitled to a deed from the sheriff, unless the intervening bankruptcy proceedings suspended that right.

Goldman on December 30, 1898, was adjudicated a bankrupt on his petition filed that day; nearly a year afterwards, on December 8, 1899, a trustee in bankruptcy was appointed, and on December 14, 1899, the sheriff executed the deed to Beckstein.

I do not find anything in the bankrupt act of 1898 to invalidate either the lien of Beckstein acquired much more than four months prior to the bankruptcy proceedings, or the sheriff's deed given after the appointment of the trustee. No doubt the trustee, had he been earlier appointed, might have redeemed from the sale as representative of the bankrupt, or of his creditors, prior to the lapse of fifteen months, i. e. up to June 12, 1899. But this was not done, and there is nothing in the state law that enlarges the time for redemption in cases of bankruptcy, and as I have said, there is no express provision in the bankrupt act having that effect. The state courts cannot enlarge the time. *Weed v. Weed*, 94 N. Y. 243. See, also, *In re Eldridge*, 12 N. B. R. 540, Fed. Cas. No. 4,331, and cases there cited; *Norton v. De La Villebeuve*, 13 N. B. R. 304, Fed. Cas. No. 10,350.

Until the sheriff's deed is actually given, the title of the judgment debtor, it is true, is not divested; and, therefore, on the appointment of the trustee on December 8, 1899, the trustee took whatever right, title or interest the bankrupt then had in the land sold. But all his beneficial interest in it was then gone by the lapse of more than fifteen months, during which redemption might have been made by any one; so that inasmuch as only beneficial interests pass to the trustee, in effect no interest of any value vested in the trustee.

Section 70 provides, indeed, that the trustee shall be vested with the bankrupt's title as of the date of adjudication, and this no doubt operates to defeat any new adverse proceedings, or the acquisition of any rights prejudicial to creditors in the interim. But this provision cannot enlarge the bankrupt's rights of property, or prolong his estate.

If when his petition was filed on December 30, 1898, he had held a valuable leasehold which expired in June following, no one would contend that the trustee appointed in December following would then take any then existing leasehold estate; and though he might recover for the rents and profits up to the expiration of the lease, the lease itself would expire at the appointed period by its own limitation. And it is so with the debtor's title here. By the sale under execution more than four months before the petition was filed, the creditor acquired not only a specific lien which the bankruptcy law protects, since it contains nothing to avoid it; but the creditor acquired thereby something more than a mere lien, viz. an absolute right to the property sold unless it was redeemed within fifteen months thereafter. From the moment of sale, therefore, the bankrupt had nothing remaining but a defeasible title certain to expire under the limitations of the statute unless redeemed within the statutory period. Had the trustee been appointed at once, he could have taken no better or different title than the defeasible one which the bankrupt himself held; and all the beneficial interest of the bankrupt expired by force of the statute on June 12, 1899. The purchaser's right to a deed was then complete, and the sheriff's delivery of the deed to him in December following was no legal wrong to the bankrupt's estate. The nominal title which in the meantime remained in the bankrupt was only for Beckstein's benefit.

Under a somewhat similar section (44) of the English bankruptcy act of 1883, though powers and a right to call for a renewal of a term vest in the trustee (Williams, Bankr. Prac. [7th Ed.] 209); yet it has been held that such a beneficial power cannot be exercised by the trustee after the bankrupt's death, though it might have been exercised before his death (*Nichols v. Nixey*, 29 Ch. Div. 1005). It was there held that the power being for a limited time, viz. during the bankrupt's life, that it could not be exercised by the trustee afterwards. And here was a similar time limit upon the possible right of redemption, which could not be extended.

The question turns upon the nature of the lien acquired more than four months prior to the bankruptcy petition. Here the lien was an absolute lien, ripening into a statutory title unless redeemed within the statutory period. In the case of *In re Lesser* (D. C.) 100 Fed. 433, to which reference has been made, the so-called lien had no existence prior to the suit; and the suit was only to secure a preference by means of a future judgment to appropriate certain equitable assets to pay the debt, without any prior lien. There the only lien was an inchoate and contingent one, held to be dependent upon the subsequent judgment. This case is wholly different, and the purchaser's title is I think valid.

I have treated this case as though the judgment debtor had held the legal title during all the periods referred to. In fact, he had conveyed this and other property to different persons prior to the recovery of Beckstein's original judgment. The creditor treated these conveyances, however, as fraudulent and void, and as he had a right to do, disregarded them. Upon a subsequent judgment creditors' bill these conveyances were adjudged to be fraudulent and void, so

that they do not affect the result. If the still subsequent arrangements by which Beckstein's rights have been transferred in the bankrupt's interest are, as alleged, fraudulent as to creditors, the trustee's rights must be asserted by plenary suit.

The stay will be limited to opportunity for such suit, and thereafter dissolved.

UNITED STATES v. CHEVALLIER.

(Circuit Court, D. Oregon. May 12, 1900.)

No. 2,603.

INTERNAL REVENUE—TAX ON WHOLESALE LIQUOR DEALERS—PLACE OF MAKING SALES.

A wholesale and retail liquor dealer who pays special tax as such at his place of business cannot be subjected to the payment of a second tax in another district because he there maintains an office in his own name, in charge of an agent who is authorized to, and does, take orders for liquors, where such orders are forwarded to his principal for acceptance, and, if accepted, the liquors are shipped thereon by the principal direct to the purchaser; the agent having no authority to bind his principal by sales, and no liquors in his possession. In such case the sales are made at the place of business of the principal.

On Demurrer to Answer.

John H. Hall, U. S. Dist. Atty.

Ed. Mendenhall and John H. Mitchell, for defendant.

BELLINGER, District Judge. This is an action at law to recover the special tax claimed to be due to the United States from the defendant for selling, or offering to sell, in the city of Portland, in this district, domestic distilled spirits and wines, both as a wholesale and retail dealer.

Section 3244 of the Revised Statutes provides as follows:

"Wholesale liquor dealers shall pay one hundred dollars. Every person who sells or offers for sale foreign or domestic distilled spirits or wines in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor dealer. Retail dealers in malt liquors shall pay twenty dollars. Every person who sells or offers for sale malt liquors in quantities of five gallons or less at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer of malt liquors."

The question for decision arises upon the demurrer to the further and separate answer of the defendant, by which it is alleged that the defendant, under the name of Chevallier & Co., was, during the whole of the time covered by the complaint, doing business as a wholesale and retail liquor dealer in the city of San Francisco, Cal., and during all of said period there paid regularly the wholesale and retail special tax provided by law, and that during the whole of said period he has not sold, or offered to sell, any wines or liquors at any other place than within said district of California. He admits that during the period covered by the complaint, for the purpose of extending his business by securing orders from customers in the states of Oregon, Washington, Idaho, and Montana, for the sale by him of wines and

liquors in the city of San Francisco, he did during the several periods mentioned in the complaint have a manager and agent authorized to travel over said states from time to time, and solicit conditional orders for the sale in San Francisco of wines and liquors; that this agent's name is W. H. Fisk, who resided during the period aforesaid in the city of Portland, state of Oregon, and who has during such period had an office on the second floor of the building No. 242 Washington street, Portland, Or., over the door of which is painted a sign, "F. Chevallier & Co., W. H. Fisk, Manager," and that at this office, when said manager and agent was in the city of Portland, which was only part of each of the periods mentioned in the complaint, and at other points in the states of Oregon, Washington, Idaho, and Montana, when traveling as the commercial agent of the defendant, as was his custom and his duty as such agent, and which he did do under his agreement with the defendant, for the purpose of soliciting conditional orders for the sale by defendant in San Francisco of wines and liquors at defendant's wholesale and retail liquor house in the city of San Francisco, the said defendant's agent and manager, W. H. Fisk, received from time to time conditional orders for the purchase in San Francisco of wines and liquors from defendant, at defendant's house aforesaid, in the city of San Francisco, district of California, which conditional orders said agent and manager, W. H. Fisk, had no authority to, and never did during any of the period aforesaid, accept or fill in the city of Portland or elsewhere, but the same were from time to time, during the period aforesaid, by him, defendant's manager and agent, under instructions from defendant, forwarded from time to time to the defendant in San Francisco, district of California aforesaid, for defendant's consideration there, and for his approval or rejection there; that all such conditional orders were subject to such approval or rejection by defendant at his place of business in the city of San Francisco; that said W. H. Fisk had no power or authority from the defendant whatever, at any time, to make any sale of, or to offer for sale, any wines or liquors of any kind or character whatever, either at wholesale or retail, in the city of Portland, Or., or any other place in the district of Oregon. It is further averred that, when the defendant accepted the orders forwarded by Fisk, the goods were shipped by the defendant from San Francisco direct to the purchaser; that there were never any wines or liquors kept in this district for sale, or offered for sale. It is admitted that Fisk received commissions on the amount of sales made as aforesaid, and that the defendant forwarded to Fisk the necessary money to meet his traveling and other expenses. The answer further admits that for the purpose of a record in Portland, Or., for the convenience of said agent and the defendant, said agent was allowed to and did keep an account of all moneys so received and disbursed, and also a duplicate copy of the records of such sales made by the defendant in San Francisco, and to aid in such purpose the defendant during said periods mentioned in the complaint, or most of them, employed a clerk to aid said manager and agent at his office in Portland, Or.

These facts do not constitute the defendant a dealer or merchant in this district, within the meaning of the statute. The fact that the

sign, "F. Chevallier & Co., W. H. Fisk, Manager," was painted over the door of the office occupied by Fisk in this city, is unimportant. The character of the business transacted is determined by the authority that the agent exercised in this district, and by what was done in pursuance of that authority. The defendant did not keep goods at the place in question, nor were sales made here. The so-called "manager" merely took orders, which were sent to San Francisco to be filled. These orders were subject to the approval of the defendant at San Francisco. The goods were not shipped to Fisk here, and were never in his hands. He neither bought them nor sold them. He had no authority to bind the defendant by any order he sent him. It was open to the defendant to refuse to fill the orders so sent. And when these orders were filled, and the goods forwarded, they were forwarded to the purchasers, not to Fisk, into whose possession they never came. These facts constitute a sale at San Francisco, upon the receipt and acceptance of the order there, and the shipment of the goods from that point. As stated in *Quinn v. Dimond*, 19 C. C. A. 336, 72 Fed. 993, it is unimportant that the agent's profit was received in the form of a percentage or commission upon the goods sold. The demurrer is overruled.

WARWICK v. BETTMAN, Collector of Internal Revenue.

(Circuit Court, S. D. Ohio, W. D. May 5, 1900.)

No. 5,291.

WAR REVENUE ACT—STAMP TAXES—NOTARY'S BOND—EXEMPTION.

War Revenue Act June 13, 1898, declares that bonds for indemnifying any person, etc., as surety for the payment of money or the execution of official duties, and all other bonds, except such as are required in legal proceedings, shall pay a tax of 50 cents; and section 17 provides that it is the intent of the act to exempt from the stamp taxes state, county, town, and other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity. *Held*, that a notary public appointed by a state is a state officer employed in the exercise of functions belonging to it in its governmental capacity, and hence the bond required of such notary as part of his qualification for office is not subject to the revenue tax.

This was an action against the defendant, as collector of internal revenue, to recover a tax exacted from plaintiff. On demurrer to petition.

W. W. Warwick, pro se.

Wm. E. Bundy, U. S. Atty., for defendant.

THOMPSON, District Judge. This action was commenced before William F. Gass, a justice of the peace in and for Cincinnati township, Hamilton county, Ohio, and was removed to this court. The defendant demurs to the bill of particulars or petition of the plaintiff for the reason that the facts therein stated do not constitute a cause of action, and the case is now submitted to the court upon this demurrer.

The petition shows that the defendant was on the 25th day of November, 1898, and has since been, collector of internal revenue for the First collection district of Ohio; that the plaintiff is a citizen of the state of Ohio, and a resident of Hamilton county, in that state; that on the 28th day of November, 1898, he was appointed a notary public by the governor of Ohio; that he gave bond to the said state of Ohio in the sum of \$1,500, conditioned as required by the laws of Ohio, for the faithful performance of the duties of the said office of notary public; that afterwards he was notified and required by the defendant, acting as collector of internal revenue, to pay a tax of 50 cents on said bond, by affixing thereto a United States internal revenue stamp of the denomination of 50 cents, or that in default of such payment the defendant would institute proceedings against him for the collection of the tax, with a penalty for non-payment; that thereupon, in order to avoid such proceedings, he paid, under protest, to the defendant, as collector of internal revenue, the said sum of 50 cents, receiving therefor an internal revenue stamp of the denomination of 50 cents, which he affixed to said bond; and that afterwards he made application to the commissioner of internal revenue to have said sum refunded, but said commissioner rejected his claim and refused to direct the repayment thereof; and he claims that the bond was not subject to the tax, and that the collection thereof was illegal.

In support of the demurrer it is claimed that the collection of the tax was expressly authorized by the following paragraph of the act of congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," to wit:

"Bond. For indemnifying any person or persons, firm, or corporation who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, fifty cents."

In opposition to the demurrer it is claimed that bonds of this character were exempted from the tax by the following provision of section 17 of said act, to wit:

"Provided, that it is the intent hereby to exempt from the stamp taxes imposed by this act such state, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity."

Now, what is meant by the statute when it speaks of the exercise of the functions belonging to a state in its ordinary governmental capacity? The officers and agents of the state, employed in making, interpreting, and executing its laws, exercise functions belonging to it in its ordinary governmental capacity. A state may, in its corporate, as distinguished from its sovereign, capacity, exercise functions not strictly governmental, and these would not come within the operation of the exemption clause of the war revenue act just quoted. In Ohio notaries public are appointed and commissioned by the governor for a term of three years. Before entering upon the duties of their office, they are required to give bond

to the state in the sum of \$1,500, with sureties to be approved by the governor, conditioned for the faithful discharge of the duties of the office. They must also file their commissions, with the oath of office indorsed thereon, with the clerk of the court of common pleas in the county in which they reside, for the purpose of being recorded; and they must also provide themselves with an official seal, as prescribed by law, and an official register, in which shall be recorded a copy of every certificate of protest and copy of note. They are given power, within the county in which they reside, to administer all oaths required or authorized by law to be administered in the state, to take and certify depositions, to take and certify to all acknowledgments of deeds, mortgages, liens, powers of attorney, and other instruments of writing, and to receive, make, and record notarial protests; and in taking depositions they have the same power to compel the attendance of witnesses, and to punish them for refusing to testify, which is by law invested in justices of the peace, and all sheriffs and constables in the state are required to serve and return all processes issued by such notaries in the taking of depositions. They are officers of the state, charged with the performance of important duties, and invested with the powers necessary for such performance. They are officers and agents of the state who render services in aid of the administration of justice, and are employed by the state in the exercise of the functions belonging to it in its ordinary governmental capacity. The tax collected from the plaintiff was a tax on his right to qualify, in conformity with the law of Ohio, for the office to which he had been appointed, and was a restraint upon his duty to qualify, which might be made practically prohibitive, and was a restraint upon the state in the exercise of its function in the appointment and qualification of its officers and agents for ordinary governmental purposes, and was therefore illegal. The exemption clause of section 17 of the war revenue act of 1898 is in harmony with that line of decisions by the supreme court of the United States beginning with *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, and including *Collector v. Day*, 11 Wall. 113, 20 L. Ed. 122, which define the relation of the state to the general government, and hold that "each is sovereign in its sphere of action, and exempt from the interference or control of the other either in the means employed or the function exercised" (*People v. Commissioners of Taxes for the City and County of New York*, 2 Black, 620, 17 L. Ed. 451), and was undoubtedly inserted in the law in order to conform to those decisions. The demurrer to the petition of the plaintiff will be overruled.

DE BARY et al. v. CARTER.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1900.)

No. 860.

COSTS—RECOVERY ON APPEAL—UNITED STATES REAL PARTY IN INTEREST.

Where suit is commenced in a state court to recover, from a collector of internal revenue, taxes illegally assessed and collected, and the same is removed by certiorari to the circuit court of the United States, and on appeal to the circuit court of appeals the judgment of the circuit court for defendant is reversed, and the cause remanded for new trial, plaintiff is entitled to recover his costs on the appeal, if under the practice of the state courts costs are allowed to the prevailing party, although rule 31, § 4 (31 C. C. A. clxix., 90 Fed. clxix.), provides that no costs shall be allowed in the circuit court of appeals for or against the United States.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

John D. Rouse and Wm. Grant, for plaintiff in error.

J. Ward Gurley, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge. This suit was commenced in the state court to recover from the collector of internal revenue for taxes alleged to have been illegally assessed and collected from the plaintiff as a wholesale liquor dealer. The case was removed by certiorari to the circuit court for the Eastern district of Louisiana, and there tried, resulting in a verdict for the defendant. On writ of error this court reversed the judgment of the circuit court, and remanded the cause for a new trial. 101 Fed. 1006. The district attorney of the United States now comes and moves the court to vacate so much of the judgment and reversal as awarded costs to the plaintiff in error, on the grounds that the United States are the real party in interest in this case, and have undertaken the management and defense of the action, and whatever is collected from the defendant in the way of damages and costs will eventually be paid by the United States; and upon the further ground that, according to section 4 of rule 31 of this court (31 C. C. A. clxix., 90 Fed. clxix.), no costs shall be allowed in this court for or against the United States. The third section of our rule 31 provides that in cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant unless otherwise ordered by the court, and the fourth section of the same rule is to the effect that the foregoing section shall not apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.

We are unable to see the applicability of section 4 of our rule 31 in the present case. The United States are not a party to the record. The general rule and practice is to allow costs to the prevailing party, and section 3 of our rule 31 is in accord with this general practice.

We are aware of no statute of the United States which regulates the allowance of costs in cases similar to the present one, but we understand that cases wherein a similar question has been raised have been ruled upon the ground that the state law with regard to costs is the proper one to follow. *Howard v. Commercial Co.*, Fed. Cas. No. 6,753; *Scripps v. Campbell*, Fed. Cas. No. 12,562. In *Field v. Schell*, Fed. Cas. No. 4,771, the question was raised in an action to recover customs duties illegally exacted, and Circuit Justice Nelson, in the circuit court for the Southern district of New York, held that in a suit brought in a state court to recover back an excess of duties paid to a collector and removed to the United States circuit court, and the case is one in which the plaintiff would have recovered costs in the state court if the suit had not been removed, he is entitled to recover in the circuit court costs in that court, although if the suit had been originally brought in that court he would have recovered no costs. Under the practice in Louisiana, a judgment in plaintiff's favor in the state court in the instant case would have carried costs. Code Prac. art. 157.

Section 3220, Rev. St., is as follows:

"The commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty."

This statute seems to contemplate that in suits similar to the present one costs will be awarded against the government officers, and that in due course they will be paid by the United States. In our opinion, it would be an injustice to require a party who is compelled to pay an illegal assessment to bear all the burden of the successful litigation necessary to recover the same. The motion is denied.

BURROUGH V. ABEL.

(Circuit Court, E. D. Pennsylvania. May 11, 1900.)

No. 10.

On reargument. Former opinion (100 Fed. 66) reaffirmed.

McPHERSON, District Judge. In deference to the able and earnest argument of the plaintiff's counsel, I have reconsidered the decision heretofore made in this case, but I see no sufficient reason to change the conclusion then announced. The act of 1868 expressly declares that "there shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid" a tax of 70 cents per gallon, and, in my opinion, this tax fastened

immediately upon every gallon that was then in existence. The sum due was to be "paid" before removal, but the tax was "levied" by the act itself, without further proceeding. It is true that the act does not provide for gauging the whisky that was in bond at the time of the passage of the act, and this omission may add to the difficulties of the plaintiff's case; but I am bound by what I regard as the plain language of the statute, imposing a tax upon all of the plaintiff's spirits that were then in a bonded warehouse. It may be that the plaintiff has an equitable claim for repayment, such as congress acted upon in the case of other distillers (Act 1886; 24 Stat. 853), but the very fact that a statute was found to be necessary before their claims could be allowed is of some value in supporting the view that I have heretofore stated.

The government has signified its willingness to agree with the plaintiff upon an estimate of the amount in bond on July 20, 1868, and I think there is no insurmountable obstacle in the way of reaching a sufficiently accurate conclusion upon this point. If no such conclusion can be reached, however, I can only say that the court has not been furnished with a fact that is regarded as essential to the entry of a proper judgment.

In re LEE LUNG.

(District Court, D. Oregon. May 12, 1900.)

No. 4,499.

ALIENS—EXCLUSION—CONCLUSIVENESS OF DECISIONS OF CUSTOMS OFFICER.

Under the decisions construing the act of August 18, 1894 (28 Stat. 390), where a customs or immigration officer has decided adversely to the right of a Chinese person to land in the United States, a circuit court has no jurisdiction to review his action in habeas corpus proceedings, however illegal or unwarranted by the evidence such action may have been; the only remedy being by an appeal to the secretary of the treasury.

On Petition for a Writ of Habeas Corpus.

John H. Mitchell and Charles J. Schnabel, for petitioner.

John H. Hall, for the United States.

BELLINGER, District Judge. This is a proceeding on a writ of habeas corpus issued upon the petition of Lee Lung in behalf of Li Tom Shi and Li A Tsoi, his wife and child, who recently arrived at this port on the steamer Monmouthshire, and were refused landing by the collector of customs. Lee Lung is a merchant doing business in this city, and having business connections with various Chinese mercantile establishments throughout the country. He is the agent of the North Pacific Steamship Company in soliciting Chinese passengers to and from China by that line. He was a passenger by the same steamship upon which his wife and daughter arrived. Before going to China he consulted an attorney in this city, and also saw the collector of customs at this port, with reference to the evidence necessary to secure the landing of his wife and child, and was

informed that a certificate issued out of the registrar general's office at the port of Hong Kong (that being the port of his intended departure), viséed by the American consul, would accomplish such object. In accordance with this advice, Lee Lung procured certificates issued out of the office of the registrar general at Hong Kong, and under the seal of that office, viséed by the American consul general at that port as required by law, which certificates in all respects conform to the requirements of the act of congress, and which are made by such act prima facie evidence of the right of the persons named therein to land in the United States. It is alleged in the petition for the writ that the collector of customs at this port disregarded the evidence thus provided, and, without authority of law, refused to permit Li Tom Shi and Li A Tsoi to land; that he made no decision such as the law contemplates shall be made, and that his acts as aforesaid, in ignoring the certificates issued out of the registrar's office at the port of Hong Kong, were wrongful and unlawful, and in violation of the rights of the petitioner's wife and daughter aforesaid, under the provisions of the treaty of the United States with the Chinese government; and that the appeal taken by the petitioner to the secretary of the treasury was not heard or passed upon by that officer, but that there was a pretended decision in respect thereto by one W. S. Chance, a special agent of the treasury department. The collector of customs, in his return to the writ, alleges that the certificates in question were not in conformity with the laws of the United States, by reason of the fact that they were not signed by the registrar general at Hong Kong, the person in authority there, but were signed by one F. A. May, who is alleged to be the captain general of police at that port. He further alleges that said certificates were duly considered by him, and that he took other testimony as to the right of the persons named in the petition to land, and decided adversely thereto, and that petitioner's appeal from such decision was heard and adversely decided by O. L. Spaulding, assistant secretary of the treasury.

In the Case of Way Tai, 96 Fed. 484, it was held in this court, by Judge Gilbert, on the authority of decisions by the supreme court of the United States, that the collector is not required to conform his proceedings to what is known as "due process of law"; that he is not required to take any testimony at all, but may decide as to the right to land upon his own inspection and examination; and that his decision in respect thereto is final. And such is the effect of the decisions of the supreme court cited in that case. By these decisions it is held that "the statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land." *Nishimura Ekiu's Case*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146. In the earlier case of *Gin Fung*, decided by the same judge (89 Fed. 153), the petitioner was discharged upon writ of habeas corpus, where it appeared that the collector of customs only heard part of the testimony of one witness, and then left the room, delegating further examination of the witness to one B. F. Jossey, Chinese inspector; that the petitioner presented another witness on the following day at the office of the collec-

tor, where he was met by said inspector, who offered to hear the testimony of the witness presently, but intimated to such witness that he might be arrested for false swearing if he testified as a witness in the proceeding, with the result that the witness was intimidated thereby and refused to testify; that as a matter of fact the steamer had cleared from the port of Portland on the previous evening, on her way to China, taking the petitioner with her. Upon appeal to the circuit court of appeals, this case was reversed, and it is held, in effect, that the court is without jurisdiction to discharge upon writ of habeas corpus where the collector undertakes to deport a petitioner without a hearing, or pending a hearing; that the power of the court might be properly exerted in such a case to arrest the consequences of the collector's illegal act, but that it could go no further. 100 Fed. 389. It is not clear as to what is meant by jurisdiction in the courts to "arrest the consequences of the collector's illegal act." If the court is without jurisdiction to inquire, upon writ of habeas corpus, as to the legality of the petitioner's detention under such circumstances, it is without any jurisdiction whatever in the premises. So far as I am advised, there is no power in the courts to control the action of the collector of customs as suggested. These cases establish the doctrine that the collector of customs, in determining the right of Chinese persons to land, may act upon his own information and discretion, and that such action, however taken, is conclusive of the matter, subject to the right of appeal to the secretary of the treasury; that his decision, if he decides not to hear testimony, or not to give effect to evidence which the laws of congress have provided shall be sufficient to establish the right to land in the first instance, or decides not to decide, is conclusive. Under the doctrine of these cases, it is immaterial, so far as the jurisdiction of this court is concerned, whether the petitioner's appeal to the secretary of the treasury is heard by the secretary in person, or by a subordinate official in his department, or is heard at all. The petition for the writ is dismissed.

WOLFSON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1900.)

No. 770.

For majority opinion, see 101 Fed. 430.

BOARMAN, District Judge (dissenting). The two defendants, Leefe and Wolfson, were tried on the same indictment, and before the same jury; each of them having different counsel. Each of the numerous counts in the indictment charges and shows a distinctive, substantive crime. A number of the counts charged such crimes as occurring dehors the statute of limitation. All of these counts were nolle prosequied. In considering the reasons herein given for dissenting in this case, it will be necessary to keep in mind that this is not a case in which Wolfson, one of the co-defendants, could be found guilty unless the evidence also convicted Leefe, the principal.

I think it will be conceded that the evidence, a full report of which we have before us in the record, shows: First, that the government, up to the moment Moxey was permitted to give the testimony to which objection was unsuccessfully made by defendant Wolfson (Leefe not joining in this objection), had offered no evidence incriminating Wolfson in the case on trial; secondly, that the government's evidence, up to the time Leefe was allowed to testify against the objection of Wolfson, was equally as free from incriminating circumstances against Wolfson. I think it will be further conceded, under the well-established jurisprudence relating to criminal trials, that if the government had, before the time that Moxey was allowed to answer the objectionable questions, rested its case, the court, on motion of defendant Wolfson, would have readily discharged him from the case. The same may be said as to the right of Wolfson to be discharged at or before the time Leefe was permitted to give his testimony. At neither of these periods could a conviction have been had on the government's evidence against either Leefe or Wolfson. Under the jurisprudence relating to the practice in criminal trials, Wolfson, I think, had a legal right at either of those periods to move for his discharge from the case, and to have deprived him of such a right by cutting him off from exercising it was error.

I think the evidence of Moxey, to which objection was urged, should not have been admitted: First, because it related to substantive offenses which occurred, if they occurred at all, dehors the period of limitation; and because it was directed to the purpose on the part of the government (though this purpose is denied by counsel for the government) of proving that defendant Wolfson was guilty, or had been antecedently guilty, of a distinctive, independent, extraneous crime, which crime, if committed at all by defendant, was begun and completed so as to subject him to indictment before the day when prescription began to run in his favor. The statute of limitation, it is conceded, began to run on the 21st day of April, 1894. The statute is as follows:

"No person shall be prosecuted, tried or punished for any offense not capital * * * unless the indictment is found or information is instituted within three years after such offense shall have been committed." Rev. St. § 1044.

It was conceded on the argument that the testimony of Moxey, if true, showed conclusively that Wolfson had committed an independent, extraneous crime antecedently to the above date.

The rule as to prescription or limitations seems to be founded on public policy. Such policy suggests two reasons why a defendant, even though the facts in the case might show, antecedently to said date, that he had committed such a crime and acts as would, in law, incriminate him in an indictable offense, should not be "prosecuted," "tried," or "punished" for such substantive crime after the time fixed in the statute had elapsed. The basic principles on which the moral reason of the rule is founded, I suggest, rest on our common knowledge of things. The reason of the rule suggests that with a lapse of time men often give up evil-doing and become more law-abiding citizens; and, secondly, that, after the lapse of the time fixed by the statutes, the courts, because of the infirmity of human methods and

things, become less efficient in their purpose to fairly administer the law between the state and the defendant. A purpose, too, of the rule seems to be that the law, after the lapse of the time fixed, is disposed to pardon and condone such independent offense. With the lapse of time fixed by law, the presumption of innocence, as to a crime occurring dehors the statute, ripens into a legal conclusion of innocence of such substantive offense. Considering these reasons, it may be said to be the general rule that a defendant in a pending trial, after the lapse of the period of limitation, earns by operation of law an absolute indemnity from judicial prosecution, trial, or punishment for any extraneous crime in which the government might show he may have been implicated. Under the general rule, founded upon public policy, the law, in a sense, condones or pardons him, not only for the offenses which he may have committed antecedently to such fixed time, but guaranties him indemnity from any damage or injury that might come to him if he should be on trial for some offense committed within the period of limitation. To be tried, means that a person has had a trial under legal methods. A fair view of the legal effect of the statute we have cited forbids anything relating to any extraneous crime to be used in the pending trial which may aid the purpose of the government to convict such defendant in a pending case. The indemnity invested in the defendant by lapse of time is not diminished because it may be that the extraneous crime was a similar one to the offense on trial. Notwithstanding the statute of limitations, it is argued that testimony as to an extraneous crime committed at any time, if such crime be similar to the one for which the defendant is on trial, is relevant, and should be admitted, because it is a part, or may be, of the *res gestæ*, or because it may show to the jury trying the case the intention with which the defendant may have done the criminal acts for which he is on trial. So far as I am advised, the United States courts have never considered the legal effect of the statute of limitation as to the admission of testimony against a defendant in a criminal case to show he was implicated in an extraneous crime occurring antecedently to the day the statute began to run in his favor; nor have I been able, in an extensive examination of the state authorities, to find therein authority for allowing the testimony offered by the government, for any reason, to show the defendant's connection in or with an independent, extraneous crime occurring antecedently to the running of the statute of limitation. There are some cases reported from both jurisdictions showing that testimony has been admitted to show that a defendant was implicated in a crime similar to the one for which he was being tried, when such crime was committed about the time alleged in the indictment; but in none of them, so far as I have seen, is the question we are now considering there discussed. The state statutes of limitations usually employ language not so liberal in its indemnities to the defendant as is found in the federal statutes. The Texas statute of limitations briefly forbids "an indictment * * *" in certain cases "to be presented within" so many years. The statute of limitations of Louisiana is along the same line. The other several states, so far as I have examined them, have similar statutes to those I have quoted. Decisions of

the state courts on the question I am considering would, of course, be based on the language of their statutes of limitation. Such decisions would be advisory or persuasive, but not at all controlling, in the matter I am discussing. The United States statute forbids a person to be "prosecuted," to be "tried," or to be "punished" for an offense committed dehors the statute. In the absence of authority to the contrary, I think a fair interpretation of the words "prosecuted," "tried," and "punished," when they are considered in relation to the reasoning and philosophy on which the rule of limitation is founded, and in relation to the common-law rules of evidence, which are grounded on the principles which secure for defendants a fair trial under well-established legal methods, authorizes the suggestion that the legal effect of the statute is to run a line dividing, radically, as to the defendant on trial, his past from the present, and to say to him that he has, in the philosophy and reason of the law, by the lapse of time, earned an absolute indemnity, so far as the government is concerned, from having anything said or done in its courts, for any purpose, as to any extraneous crime in which he may have been antecedently thereto implicated.

The testimony of Moxey as to objectionable extraneous matters was earnestly objected to by Wolfson's counsel on the ground that the government could not, for any purpose, in the pending case, go behind the line which in law divides the present from the past of the defendant. The district attorney urged that the evidence as to substantive crimes dehors the statute, *ex necessitate rei*, should be admitted, so that he would be able, after proving such crimes, to prove the fraudulently false condition of Wolfson's account on a day within the prescriptible time. It was contended by him, notwithstanding the bank's books on the 21st day of April, 1894, showed a credit in Wolfson's favor, that as a matter of fact on that day he was a fraudulent debtor to the bank, and had no funds to his credit therein upon which he could lawfully draw. In order to prove this contention, the court allowed Moxey, after saying that Wolfson's account was apparently not overdrawn upon the said day, to state, substantially, that as a matter of fact it was largely overdrawn by him, and that he was in fact a fraudulent criminal debtor, and not a creditor, of the bank. Moxey was allowed further to say, substantially, that Wolfson had repeatedly been guilty, antecedently to that day, of feloniously overdrawing his account with the bank; that he had often committed distinctive, completed, extraneous crimes similar to the crime for which he was then on trial. If Moxey's testimony was true, it follows, of course, that Wolfson was criminally implicated in, or guilty of, such extraneous crimes. It appears that the trial judge zealously endeavored to keep Wolfson from being "prosecuted" or "tried" for such extraneous crimes, and sought earnestly to forbid the jury to enter upon the trial of him for any such offenses; but was it within the possibilities of judicial suggestion, under the proceedings that were then going on, to forbid him to be "tried," if not "punished," for the extraneous crimes about which Moxey testified? In the very nature of things, whether we judge from the matters and things that were then going on in the court in the pending trial, or from our knowledge of the effect that

such testimony would have on the jury, the hurtful fact remains that the facts as to the extraneous crimes were being heard and "tried" contradictorily in the pending case. The district attorney urged that Wolfson's account had "to be taken as a whole"; inferring that the crime, though the indictment sets up counts charging distinctive crimes, was a continuous one, and that if he was not allowed to proceed in that way, notwithstanding the statute of limitation, "the defendant would be done injustice, and that it would be utterly impossible, by the nature of the case, to prove it." Clearly the prosecuting attorney meant to prove Wolfson's guilt by showing the very extraneous crimes which were charged in the several counts, and which he had "nolled" because the acts charged therein occurred before the said date. It is clear that, if he meant to do so, he must enter upon a trial contradictorily with the defendant upon the question as to whether Wolfson was guilty, or had been implicated in the extraneous crimes similar to the one for which he was on trial. The only way the government could show that Wolfson was guilty, or implicated in the extraneous crimes, was, under the trial methods in court, to show it contradictorily by legal and satisfactory evidence. For what use or for what purpose, to be served in the pending trial, did the United States attorney zealously endeavor to have such testimony given to the jury? His only legal purpose must have been to learn, by satisfactory proof, whether or not Wolfson, as a matter of fact, had, antecedently to the fixed date, committed such extraneous crimes, so that the result of the trial thereon, if against Wolfson, might be valuable to the jury in determining the matter of intention. Such proof could be used or made relevant in the pending case only after the defendant was criminally connected with the extraneous crime by legal evidence. The difficulties the government's counsel was contending against, it appears to me, were difficulties inherent in the nature of the case; and he sought to prove by methods, as I think, unwarrantable in law, a case that otherwise, as he suggested, it may have been impossible to prove against the defendant Wolfson. In this effort he seems to have had the approval of the judge, who zealously, in his suggestions, on admitting the testimony to the jury, endeavored to forbid the jury to try Wolfson on the issue as to the extraneous crimes. Our everyday, commonplace knowledge of men and things suggests unerringly that the admission of the testimony on which the guilt vel non of Wolfson in the extraneous crimes was determined imperiled the opportunity of the defendant Wolfson to enjoy a fair trial under legal methods in the criminal prosecution against him.

Considering these matters further, it will be seen that there are two material elements in the crime charged against Leefe and Wolfson, viz.: The commission of the act itself, of overdrawing, and the felonious intention in committing such act. The mere act of overdrawing his account would not be criminal in Wolfson. To incriminate Wolfson in the acts of Leefe, it must be shown that the overdrawing was fraudulently effected against the bank, and that the principal and accessory acted, in the overdrawing charge, in the exercise of a felonious intention common to both of them. It matters not at what time the felonious intention came into the mind and purpose

of both or either of them to do the criminal acts charged in the indictment. No crime was committed by either or both of them until the act of fraudulently overdrawing was committed. Every over-drawing, in itself, with such intention, made up a substantive, completed crime. Of course, the fraudulent act of overdrawing followed the felonious intention. The formation of the intention to plunder the bank might have existed a short or a long while before the criminal acts could be charged against Wolfson, but an indictment cannot be founded merely on criminal intention. The acts or things done by either of the defendants which merely show the beginning or active life of an intention in the defendants to plunder the bank, whether or not such acts or things were done antecedently to the running of the statute, may, if not too far remote, be relevant testimony to show circumstantially the intention with which the criminal act charged may have been done. The prosecution may show facts occurring dehors the statute which in themselves reasonably suggest the existence of an intention to do or carry out a criminal act, where the act itself was committed within the statute; but I do not think, for any purpose, the government should be allowed to go behind the line drawn by its statute of limitation to prove by trial evidence a criminal act itself against the defendant.

Cases in which the legal effect of the statute of limitations was not at issue or discussed can be readily cited, from the reasoning in which authority may be deduced for allowing the prosecution to offer evidence to show that a defendant answering to a charge of counterfeiting, say, "did at or about" the day laid in the indictment pass similar spurious coin upon other persons. Of course, this could for no purpose be shown until after, in the pending trial, the defendant was by sufficient evidence criminally implicated in the material matters for which he was being tried. After defendant was criminally implicated in passing spurious coin at a time within the statute, it would be competent for the prosecution to show that he had in his possession spurious coin at a time dehors the statute. Similar cases, too, may be cited, from the reasoning in which authority may be deduced to allow the prosecution in the trial, say, of a person for horsetealing at a date fixed in the indictment, to offer testimony to show that the defendant was seen frequently at or about the barn or lot from which the horse was taken before the statute began to run; for being frequently at the barn, even with an intent to steal, whether before or after the date the statute began to run, is not a criminal act. Taking the horse, within the statute, with felonious intention, makes the material element of the crime. To allow the prosecution to offer evidence to prove in such a case, contradictorily with the defendant, that he was often antecedently at the barn, or that he was seen antecedently with a halter similar to or the one found on the stolen horse, could not be objected to on the ground that testimony showing an extraneous substantive crime was sought to be offered by the prosecution; but if the person on trial had, as a matter of fact, stolen a horse, and therein committed a completed, felonious act, the line of reasoning I have suggested would forbid the government to offer testimony, for any purpose, to show incriminating circumstances against

the defendant, which in their legal effect would prove that he had stolen a horse, even from the same prosecuting witness, antecedently to the beginning of the statute of limitations. Under this view, it would follow that the prosecution should not have been forbidden, on the trial of Wolfson for feloniously overdrawing his account, to show any of his acts with Leefe, or things done collusively by either of them in a common purpose to plunder the bank, when such acts or things merely showed an intention or preparation to commit the act of overdrawing for which he was on trial.

Putting aside the reasons I have given to show error in allowing Moxey to testify to substantive, extraneous crimes occurring antecedently to the statute, I think there is another reason why the trial judge should have forbidden Moxey's testimony to be heard, for any purpose, at the particular time he was asked the objectionable question. It is conceded that at the time Moxey was allowed to show incriminating facts as to the extraneous crime there was, as a matter of fact, no evidence of any kind showing that Wolfson had criminally overdrawn his account, as charged in the pending case; that is, there was nothing at that time to show Wolfson's guilt under the indictment. Under the jurisprudence relating to the admission of evidence in criminal cases, it is clearly established, as a general rule, that "it is a violation of the fundamental sanctions of our law to admit evidence that the defendant committed one offense in order to prove that he committed another." Whart. Cr. Ev. §§ 37, 38, 48. We are not permitted, while trying the case against Wolfson, to go backward; that is, find him guilty of the last extraneous offense, and then take that as a factor to establish his guilt in the matter directly in judgment. Before evidence against the defendant relating to a substantive, extraneous crime can be offered by the government for any purpose, the text-books, as well as the authorities in cases in which such matters are put in issue, clearly show that the ground must be first laid, implicating the defendant in the case on trial, and, unless sufficient evidence of this has been received, all evidence of other substantive, extraneous offenses, even to prove intent or systematic purpose to commit similar crimes, must be excluded. The extraneous crime cannot be put in evidence without first proving, contradictorily with the defendant, that he was concerned in the commission of such crime. When that has been shown the prosecution may offer such evidence as may show his guilt therein, for the purpose of showing a systematic purpose on the part of the defendant to commit such crimes, or to show the intention with which the acts proven in the pending case may have been committed. The rules I have stated, substantially, are found in Wharton's Criminal Evidence, beginning at section 31 et seq., and authorities cited therein; and they are amplified in the case of *Williams v. State*, 38 Tex. Cr. R. 129, 41 S. W. 645. The court therein cites text-books and authorities extensively, as well from other states as from Texas. I have found no United States authorities in which the point is considered.

When the testimony of Moxey relating to extraneous crimes in which the government sought to implicate Wolfson was being offered, the trial court should not, under my view of the authorities cited, have

allowed such evidence to go to the jury, because Wolfson, so far as the evidence then disclosed, was not shown to be guilty of having criminally overdrawn his account, no evidence having been offered to show any such guilt. Moxey, in answering the objectionable questions, said Wolfson was, on the day fixed, a debtor, though the books showed him then to be a creditor, of the bank. This answer, if true, shows that Wolfson had merely overdrawn his account, but the answer itself did not implicate Wolfson in any crime. As a matter of fact, it cannot be said that his answer, taken together with the bank books, in which Wolfson's account was kept by the principal, Leefe (there being antecedently to the time the question was asked no testimony showing any fraudulent act of either Leefe or Wolfson), did satisfactorily establish the guilt of Wolfson in the pending case. Granting that the testimony as to extraneous crimes was not offered for the purpose of proving Wolfson's guilt in the pending case, and that the court did not admit it for that purpose, it must be conceded that it could have had at the time no other legal effect, either morally or legally, in the pending case. The court in its opinion cites two cases supporting the well-established right of the prosecution to offer evidence which shows the intention of the defendant, where such intention is material, but the authorities cited therein do not militate against the effect of the rule cited above; that is, that "it is a violation of the fundamental sanctions of our law to admit evidence that the defendant committed one offense in order to prove he committed another." There are exceptions to this rule, as shown in the text writers, as well as in the decisions involving matters of this rule; but in no case where such exceptions were considered have I found authority for allowing testimony as to substantive extraneous crimes to be offered for any purpose until after the prosecution has established by sufficient proof the commission of the acts charged in the indictment. In none of the authorities cited in the court's opinion does it seem to have been necessary for the court to have considered and passed on the legal effect of the exceptions I have just cited, and which are so well established in the text-books and authorities. The court cites the case of *Wood v. U. S.*, 16 Pet. 342-360, 10 L. Ed. 994, in which it is said that:

"Where the intent of a party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

The opinion just cited does not discuss a criminal case. The suit therein considered was a libel of information in rem to forfeit goods illegally entered in the custom house. The evidence was not objected to because it tended to prove one crime by showing defendant's guilt in another, nor was it objected to because it was offered at a time in the pending case when nothing had been shown to incriminate the defendant in the matter directly in judgment. It was offered by the government to show that the defendant had antecedently made fraudulent, but not criminal, entries. The opinion of the court cites the case of *Moore v. U. S.*, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996. In that case it is said:

"The government relied mainly on circumstantial evidence tending to show that the defendant was also guilty of the murder of a man named Camp."

Objection was interposed to that part of the evidence. Mr. Justice Brown, speaking for the court in that case said (page 61, 150 U. S., page 28, 14 Sup. Ct., and page 998, 37 L. Ed.):

"The fact that the testimony also had a tendency to show that the defendant had been guilty of Camp's murder would not be sufficient to exclude it, if it was otherwise competent."

The words "if it was otherwise competent" disclosed the thought that was in the mind of Mr. Justice Brown, and support the suggestions I have made as to the inadmissibility of the testimony before Wolfson's guilt was established in the pending case. Until his guilt was established in the pending case, the testimony would be incompetent, and such testimony as the justice was discussing could not be competent until after incriminating circumstances against Wolfson were established. Clearly, it was not necessary for the supreme court, in considering those two cases, to pass upon the legal effect of the exception to the general rule I have cited above. The exception was not invoked in either case, nor was it useful or pertinent to illustrate the objection the justice was considering. The court says:

"The jury were instructed as to this purpose, and were informed that it was not offered and could not be used for the purpose of convicting defendants of offenses for which they were not on trial. The fact that this evidence tended to prove another crime does not, as we have seen, exclude it. The fact that the prosecution relied upon facts offered in evidence that would have been barred by the statute of limitations is immaterial. If the evidence was relevant, it was not affected by the lapse of three years from the occurrence."

The court had in mind only the objection as to the effect of the statute of limitations. It will be seen in the opinion that no consideration was given to the rule or to the exceptions to the rule which I have cited. This rule itself, and its effect, may have been in the mind of the court in a general way, as it seems to have been in the mind of the trial judge, but in the court's opinion there is no consideration given to the effect of the exceptions which are as well established as the rule itself. Under such exceptions it follows that the testimony of Moxey was prematurely offered, and should have been rejected, because at the time it was offered the ground was not first laid implicating the defendant in the case on trial. The fact that the evidence of Moxey, in the opinion of the court, was in itself relevant, seems to have been sufficient cause for allowing Moxey's evidence to be heard against Wolfson, notwithstanding the statute of limitation, and the force of the rule, with the exceptions thereto, relied upon by Wolfson's counsel. The bank books show that Wolfson was a creditor—had funds in the bank—on the 21st day of April, 1894. The government itself offered the books, but contended they were false as to Wolfson's account, and proposed to show this by Moxey's evidence. The objection, in my view, was not to allowing the government, at the proper time and by competent evidence, to show that the books had been falsely kept by Leefe (this was shown later on by Leefe's evidence), and that Wolfson knew he had in fact no funds to his credit, and could not lawfully draw on the bank. The government might

have been permitted to prove such knowledge on Wolfson's part, and the circumstances as to the false books could have been used against him, to show his intention in overdrawing his account. Such evidence, if it had been addressed and limited singly to that purpose, should have been admitted. Going beyond this, Moxey was allowed to show that Leefe had frequently allowed Wolfson to fraudulently overdraw his account, and that he covered up such overdrafts by false entries. I think, under the rules of evidence now under discussion, the objection made to Moxey's testimony should have been sustained because it was prematurely offered. When Moxey was sworn, nothing incriminating Wolfson had been shown by the government. Later on, when the court (as I think, erroneously) allowed Leefe, as a witness against Wolfson, to show his own criminality in keeping the books, and Wolfson's conspiracy with him to share in the criminal purpose, Moxey's evidence could have been admitted to supplement Leefe's confession that he had fraudulently kept the books, and that Wolfson was also guilty in the matter directly in judgment. Until after Leefe's testimony was given to the jury, incriminating himself and Wolfson, Moxey's evidence should not have been permitted for any purpose. Leefe's testimony proved that the books had been fraudulently kept by himself, and that Wolfson knew that he was fraudulently overdrawing his account. Until Leefe gave his testimony, nothing had been shown by the government incriminating either himself or Wolfson.

Before discussing the error assigned as to the admitting the testimony of Leefe, I quote from the record, to show the attitude of the case when he was admitted to be sworn: Counsel, after urging his objection, said:

"I ask the court to rule now, unless he [Leefe] is called as a witness on the part of the government, that the testimony be deferred until the defense is called upon to put its testimony in before the jury. By the Court: Has the government closed? By Mr. Theard [counsel for Leefe]: I have offered him freely, to be used by the government if the government sees fit. By Mr. Rouse [counsel for Wolfson]: Does the government call him? By Mr. Gurley [United States attorney]: The government accepts the request, and will examine him as a witness of the government at this time. By the Court: Swear the witness, Mr. Clerk."

Nothing occurred in the further colloquy between the court and counsel to change substantially the matter disclosed in the questions and answers cited from the record. It is clear from this colloquy that the government, at the time Leefe was sworn, had not closed its case. The trial judge asked, "Has the government closed?" No response was made to this inquiry. Leefe's offering himself as a witness for the government if it saw fit to use him was made while the government's case was being heard. The court seems to be of the opinion that the colloquy shows only an irregularity; that it was, as a matter of fact, of no material importance whether Leefe was permitted to give his evidence then, before the government evidence was closed, or later on, after defendant's side was taken up. In view of the evidence he gave, it was not material to him, because he could as well then as later on be heard to make a confession as to his own guilt; but the irregularity was fatally damaging to Wolfson, because

up to the time Leefe was tendered as a witness by his counsel for the use of the government, and the United States attorney proceeded to "examine him as a witness for the government at this time," there was no evidence implicating Wolfson in the matter directly in judgment. The effect, substantially, of the evidence adduced under the examination made by the United States attorney of the witness, freely tendered for the government's use, was that Wolfson was convicted by the confession of Leefe, who was on trial under the same indictment with Wolfson. It will be seen that Leefe was permitted to be sworn as a government witness over the objection made by Wolfson's counsel. The court said:

"The common-law rule of evidence is that, when two persons are jointly indicted and put upon trial before the same jury, neither can be a witness for or against the other unless the interest of the one so called has been terminated by an acquittal, conviction, or nolle prosequi."

The authorities, without exception, sustain this view; but the court says the rule just mentioned is abrogated, and in this court it is not to be considered, because the matter in contention is one of statutory construction, and quotes the United States statute of 1878. The court says this statute makes Leefe a competent witness at his own request; that, notwithstanding the common-law rule cited by the court, he should be heard to give testimony against the accessory, Wolfson, though both were on trial under the same indictment before the same jury. The court suggests that:

"This statute, in terms, makes the defendant a competent witness. The statute does not say 'a competent witness for himself.' It does not say 'a competent witness for the government.' He is simply made, at his own request, but not otherwise, a competent witness."

Certainly there was no power, even though he was a competent witness, in the statute authorizing the government's counsel at any time during the progress of the trial to call and appropriate Leefe as a witness for the government against Wolfson. A competent witness is a person allowed to be sworn in a pending case,—to give legal testimony therein under the rules of evidence. All that can be claimed for the statute is that Leefe, if permitted at all, under the rules of evidence, to be sworn, was made by its terms a competent witness. However competent the statute might have made him, Wolfson, the accomplice, could not have called him as a witness; nor could he on his own motion, or at the instance of the government, become a witness against Wolfson. The history of the case shows that no conviction could have been had against Wolfson at all, but for the testimony of Leefe, because, up to the time he was offered, no incriminating facts had been stated by any witness against Wolfson. Leefe never requested to become "a witness in his own behalf." It seems to have been the purpose of congress to allow a defendant to become a witness "in his own behalf upon his request." "In mercy to him, he is, by the act in question, permitted, upon his request, to testify in his own behalf in the case." *Wilson v. U. S.*, 149 U. S. 66, 13 Sup. Ct. 765, 37 L. Ed. 650. The statute says a defendant may be a competent witness at his own request. The United States courts, in considering the words "at his own request," have treated them as

if they meant in his own behalf. The view taken by the federal courts of the statute of 1878, as shown by the federal authorities, is different from the ruling of the state courts on similar statutes. The law and rules of evidence in the state jurisdiction do not control United States courts as to the competency of witnesses or as to the admissibility of evidence therein in criminal cases. *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. The common law rules of evidence, obtaining when the judiciary act of 1789 was passed, are the rules under which United States courts now test the competency of witnesses and the admissibility of evidence. Those rules remain in full force unless changed by statute, and there is no authority or reasoning therein to show that the act of 1878 has impaired the common-law rule forbidding the principal to be appropriated by the government as a witness against his accomplice when both are on trial under the same indictment. The competency of the defendant, under the act of 1878, in a criminal case, to give testimony, and the admissibility of such testimony, are to be determined by the rules of evidence that apply to other competent witnesses. The only case I have found in which the United States court considered and passed upon the question as to how far the statute of 1878 is affected by the common-law rules of evidence is reported in *U. S. v. Hollis* (D. C.) 43 Fed. 248. The court therein said:

"The act of the 16th of March, 1878, provides that a defendant charged with crime shall at his own request, but not otherwise, be a competent witness; that is, he shall not labor under disabilities because he is a party in interest, and notwithstanding this may testify. But, when a party offers himself as a witness in his own behalf, he must be treated as any other witness, and subject to any exceptions that would apply to any other witness. In other words, the act frees him from such disability."

In the state decisions, it may be said, a more liberal view has been announced. Under such decisions the views of the court might be established. The effect of the United States statute is limited to making the defendant a competent witness to testify in his own behalf. It does not abrogate as to him all the rules which at common law qualify and limit the testimony of other competent witnesses. Wolfson is charged with a crime against the United States. He is entitled to a trial under the common-law rule, which forbids the testimony of a principal to be appropriated by the government against his accessory when both parties are on trial at the same time under the same indictment. The court says:

"We think the statute made Leefe a competent witness at his own request. To construe it otherwise would do violence to its plain words, and would defeat the legislative intent."

In support of this suggestion the court cites no United States authorities in which the effect of the common-law rule, taken together with the act of 1878, is considered, but relies upon a liberal quotation from state authorities. The state authorities are at variance on the subject, and are not in line with the rule so far as it has been laid down in the federal courts in any case where the matter at issue

was involved. The court cites the case of *Benson v. U. S.*, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991, but says it is not strictly in point, because in that case there had been a severance, and only one defendant was on trial. The court's use of this authority is like the play of the Prince of Denmark with Hamlet left out. In the *Benson* Case the defendant alone was on trial, and the common-law rule prohibiting a principal being called as a witness when he and his accessories are on trial before the same jury was not varied by anything that was ruled upon in that case. Antecedently to the act of 1878 a defendant on trial by himself was, under the common law, incompetent, because of interest, to testify to relevant matter in his own behalf, for any purpose, in the case. Whether a defendant is on trial by himself alone, or whether he is on trial as a principal with his accessory, under the same indictment, the act of 1878 makes either of such defendants a competent witness to give testimony under the common-law rules of evidence obtaining at the time of the act. If Leefe, as principal, and Wolfson, as accessory, had been on trial antecedently to the act of 1878, there were then two common-law rules of evidence which would have made Leefe incompetent to testify against Wolfson. If he had been offered as a witness, he would have been "arrested at the book," because of the legal effect of those two rules: First, he could not have been sworn because he was a party in interest; secondly, he could not have been sworn because he was on trial as a principal with his accessory, under the same indictment, before the same jury. Each one of these two rules of evidence rests on different reasons. The first one suggests its own reason. The second rule rests in public policy. After the act of 1878 neither of them, if seasonably offered as witnesses, could have been "arrested at the book." They would have been sworn, but in the process of their examination, as competent witnesses, they would have been subjected to the rules that would have qualified or limited or have been applicable to the evidence of any other competent witness. It was not the purpose of the act, in removing a disability resting on the ground of interest, to relieve Leefe from other rules of evidence resting on public policy, and applicable to the conditions of the case in which he was being tried. Certainly, at no time, whether on the trial or antecedently to the trial, could Leefe have made a confession which would have been heard to convict his accomplice, Wolfson. It would not be a fair construction of the law to say that the act, which was intended to remove a defendant's incompetency resting on the fact that he was a party in interest, should be allowed to operate so as to violate the right of Wolfson under the common law to forbid Leefe's testimony, which in fact was substantially a confession made by himself against Wolfson. It had that effect in bringing about a conviction of Wolfson. Considering the matter of admitting Leefe's testimony, under the conditions of the case quoted from the record, it occurs to me that the trial judge, if authorized at all to admit Leefe's testimony, or let it be appropriated by the government at the time his counsel "freely" offered him as a witness, should have said to Leefe, substantially:

"You may now give your testimony under the act of 1878 if you choose to do so; but, under the rules of evidence, to the benefit of which Wolfson is entitled, your evidence will be limited to a denial or admission of your guilt. You cannot give any testimony against Wolfson. If you choose, you can give testimony for yourself or against yourself, or you can now make a confession of your own guilt in the presence of the court, just as you could have made it elsewhere; but nothing you can say will be taken against Wolfson."

I think, to allow any other view to obtain, under the conditions of the case, would, in effect, be to refine away Wolfson's right to a fair trial under the common law as it existed when the judiciary act of 1789 was passed.

"The reason for the exclusion of husband and wife when called for or against the other being social policy, and not interest, statutes abolishing incompetency resting on interest do not remove the common law of incompetency of husband and wife for or against the other." Whart. Ev. par. 431, and numerous cases cited thereunder.

In *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779, the court says, in discussing the admissibility of a wife's evidence in a case where the husband is the party in interest:

"But, it is argued, because congress has enacted that in civil actions in the courts of the United States there shall be no exclusion of any witness because he is a party to or interested in the issue tried, the wife is competent to testify for her husband. Undoubtedly the act of congress has cut up by the roots all objections to the competency of a witness on account of interest. But the objection to a wife's testifying on behalf of her husband is not, and never has been, that she has any interest in the issue to which he is a party. It rests solely upon public policy. To that the statute has no application. Accordingly, though statutes similar to the act of congress exist in many of the states, they have not been held to remove the objection to a wife's competency to testify for or against her husband."

By analogy, this quotation sustains the contention that the legal effect of the act of 1878 is to relieve a defendant of disability on the ground of interest, but that the common-law rule of evidence as to inadmissibility of a principal's evidence, quoted and sanctioned by the court in this case, is founded on public policy, and is not abrogated by the legal effect of the act of 1878. That statute removes the disqualification of a witness by reason of interest, but does not remove such disqualification as is shown in the authorities to rest "solely on public policy." *Mitchinson v. Cross*, 58 Ill. 367, and American and English cases cited thereunder; *Ney v. Swinney*, 36 Ind. 455, citing numerous cases.

PARIS MEDICINE CO. v. W. H. HILL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 764.

1. UNFAIR COMPETITION—UNLAWFUL IMITATION OF NAME OR PACKAGE.

Where there are strong resemblances between the name or dress of the goods of defendant and complainant, for which no sufficient reason appears, the inference is that they exist for the purpose of misleading; and where they are of such a character as to deceive ordinary purchasers, in the exercise of ordinary care, they are sufficient to establish unfair competition. The fact that the dissimilarities are such that, if called to the attention of a purchaser, or if he were given an opportunity for comparison, he would not be deceived, is not a defense.

2. APPEAL—REVIEW—ORDER DENYING PRELIMINARY INJUNCTION.

The review on appeal of an order granting or denying a preliminary injunction is not as if the appeal was from a final decree upon the merits, especially where such order was based in large part upon conflicting affidavits; and, to justify its reversal, it must clearly appear that a mistake was made by the court below.

3. SAME—UNFAIR COMPETITION.

On an application for a preliminary injunction against the infringement by defendant of the name "Bromo Quinine," claimed by complainant as a trade-mark for a medicinal preparation, the court found, upon conflicting affidavits, that the word "bromo" was one of description, and was used by complainant for the purpose of inducing the belief in the public that bromine was a leading constituent in its compound, in which it was not in fact an ingredient, and that by reason of such facts complainant was not entitled to be protected in the exclusive use of the word as a trade-mark, or to relief in equity from unfair competition. *Held*, that such findings were not so clearly erroneous as to justify the reversal of an order, based thereon, denying a preliminary injunction.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is a bill in equity to restrain unlawful competition in trade, and the appeal is from a decree denying to the complainant a preliminary injunction. The motion for the injunction was heard upon the bill and certain affidavits and exhibits thereto, and upon counter affidavits filed by the defendant. The complainant is a corporation which since some time prior to 1893 has been engaged in the manufacture and sale of a medicinal preparation or remedy which is called "Bromo Quinine," or "Laxative Bromo Quinine," or "L. B. Q.," and which, it claims, has acquired a high reputation as a remedy for coughs, colds, and la grippe. It is averred that complainant first began the use of these names for its remedy, and that the remedy, under these names, has acquired a wide reputation, and has been sold throughout the United States, Canada, and Europe in large and increasing quantities. Complainant does not disclose its formula, claiming that it constitutes a valuable trade secret; but it avers that it has expended more than \$300,000 in introducing and establishing a demand for its preparation, and has adopted for it, not only a distinctive name, but a dress, by which it has become well known to the trade and the consuming public. Complainant's preparation is put up and sold in small tablets, circular in form, each being about three-eighths of an inch in diameter and one-eighth of an inch thick. On one face of the tablet appears in relief the letters "L. B. Q." Twenty-five of these tablets are put up in a small pasteboard box. Upon the top, bottom, and sides of this box appears certain printed matter, printed partly in red and partly in black colors; thus making a distinctive dress and advertisement, best shown by the appearance of the box when opened out, as shown below:

This best remedy for Coughs and Colds. Relieves the Cough and also the feverish conditions and headache, which are usually associated with colds. The second or third dose will relieve the Cough and the feverish conditions in 10 to 15 minutes and in 10 hours when the cold will be cured. In treating Colds it is very important that the bowels should move well every day. This preparation moves the bowels easily without griping. Directions:—Adults, take 2 tablets every 2 or 4 hours until the Cough is relieved and the bowels move well. After Cough and Cold are relieved, 1 tablet to be taken 2 or 3 times a day, after meals, to keep the bowels in good motion. In case of children, half and given in proportion to age. To be swallowed plain; the tablet can be broken or cut in half and given. For headache, take 2 tablets every 2 or 4 hours until relieved.

ST. LOUIS, MO.

PRICE, 26 CENTS.

FOR
LA GRIPE
AND
COLDS.
W. H. Hill

Twelve of these small boxes are packed in a large box or carton, which is adapted to stand on the counter or show case; being provided with folding legs projecting from the box, so that the carton may be held in a vertical or slanting position. These cartons are made of white pasteboard, and are about 8½ inches long and 4½ inches wide. Upon their front face is contained certain lettering in red ink, of much the same general import as that upon the smaller boxes, in which the words "Laxative" and "Bromo Quinine" are particularly conspicuous.

The bill charges that the defendants, "in violation of complainant's rights, have caused to be made and sold, and are now causing to be made and sold, a medicinal preparation purporting to be of the same nature as complainant's, and for the same diseases, marked and called 'Bromide Quinine,' which said name is a colorable imitation of complainant's trade-mark and trade-name, 'Bromo Quinine,' and is marked on the boxes and packages containing this preparation for the purpose of selling defendants' goods as and for the complainant's, with the object and result of deceiving the public into buying defendants' product as and for complainant's, for the purpose and in order that the defendants may sell their production on the reputation of complainant."

The defendants' preparation is also made into small tablets, greatly resembling, in size, shape, and color, the tablets of the complainant, and across the face of each tablet is impressed the raised letters "W. H. H." These tablets are placed in small paper boxes, having a general similitude to those used by complainant. Upon the top, bottom, and sides of this box is certain printed matter, best shown by the following fac simile of defendants' box opened out:

Twelve of these small boxes are placed in a larger pasteboard carton, adapted to stand in a vertical position. Upon this carton is printed in lettering of chocolate color a part of the most striking and "taking" parts of the printed matter on the smaller boxes; the words "Cascara" and "Bromide Quinine" being particularly conspicuous.

The court below, upon a comparison of the tablets, boxes, and cartons made and used by the rival makers, reached the conclusion that there was "no such similarity as would deceive the public or those accustomed to using complainant's remedy." In respect to the use of the words "Bromide Quinine" as a substitute for "Bromo Quinine," the court held: First. That "bromo," in chemical compounds, was well known as indicating the presence of bromine as its principal element, and that "its use by complainant was obviously intended to imply that bromine was a leading constituent in the compound which it made and sold, and the prefix 'bromo' was evidently used for the purpose of inducing that belief in the public, and affirms the presence of that ingredient in the preparation." Second. That "bromo" is not an ingredient in the complainant's remedy. Third. That the right of the complainant to be protected in the exclusive use of that word as a trade-mark, or against its use in the alleged unfair competition of defendants, should be denied, because "complainant, being engaged in deceiving the public by false representations as to the ingredients of its compound, has no more right to protection in a court of equity against unfair competition than it has to a monopoly in the use of the word 'bromo,' which is a descriptive word." A temporary injunction was therefore denied, chiefly upon the ground that "bromo" was a descriptive word, which complainant used deceptively.

Paul Bakewell, for appellant.

A. C. Lightner and C. F. Burton, for appellees.

Before LURTON, Circuit Judge, and SEVERENS and THOMPSON, District Judges.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It must be admitted that the resemblances between the trade-name and dress of the rival preparations here involved are numerous and striking. There are differences between their packages, including differences in the colors of the lettering thereon, but the differences are less observable than the resemblances. An intentional infringer is never likely to make his packages exactly like that of the tradesman whose trade he proposes to steal. To avoid the consequences of infringement, an intentional infringer will usually take care that there are plenty of what Judge Lacombe, in *Scheuer v. Muller*, 20 C. C. A. 161, 74 Fed. 225, 228, called "arguable differences," to stand upon when brought into court, but resemblances to the article he desires to imitate sufficient to deceive the average purchaser into buying the simulated article as and for the goods of another. Speaking of the infringement of a trade-mark, Justice Cotton, in *Tea Co. v. Herbert*, 7 Eng. Rep. Patents & Trade-Mark Cas. p. 183, said:

"Of course, when one person imitates another's mark, he never takes it absolutely in all points. If so, there is no question. But there is always a similarity and dissimilarity, in order that he may say, 'If you look at the marks carefully, you will see such a difference that you cannot be deceived.' Of course, when you are told that there are two marks, and the differences pointed out, or they are put before you so that you can see the differences, then in that case you might say there is hardly any probability of deception; but, when one only is shown, there are certain incautious purchasers who would probably be deceived by the similarities which exist, the articles being the same."

When there are found strong resemblances, the natural inquiry for the court is, why do they exist? If no sufficient answer appears, the inference is that they exist for the purpose of misleading. *Taylor v. Taylor*, 2 Eq. Rep. 290. We are to remember that the average purchaser has seldom the opportunity of making a close comparison; that he is apt to act quickly, and is therefore not expected to exercise a high degree of caution. *Pillsbury v. Flour-Mills Co.*, 12 C. C. A. 432, 64 Fed. 841.

In *McLean v. Fleming*, 96 U. S. 245, 255, 24 L. Ed. 832, the court said:

"Difficulty frequently arises in determining the question of infringement, but it is clear that exact similarity is not required, as that requirement would always enable the wrongdoer to evade responsibility for his wrongful acts. Colorable imitation, which requires careful inspection to distinguish the spurious trade-mark from the genuine, is sufficient to maintain the issue, but a court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser, in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress, if he has been guilty of no laches."

The general resemblance between the names "Bromo Quinine" and "Bromide Quinine" is very striking. The words "Bromo Quinine" catch the eye and fasten themselves in the memory, and, as the name of the remedy, become easily known and recognizable. The difference between "Bromo Quinine" and "Bromide Quinine" is slight, and not likely to attract the attention of the average public. It is true that complainant uses the word "Laxative" as a prefix, but that is a word indicative of a therapeutic effect. The defendants have substituted "Cascara" as a prefix, that being a drug widely and generally known as one of the best laxatives. Here, again, is both a resemblance and a difference, by which the literalness of imitation is avoided, while the laxative property of the defendants' "Bromide Quinine" is called to the attention of the public.

But is the complainant entitled to prevent the defendants from using the words "Bromide Quinine," as a trade-name greatly resembling that of complainant? The defendants say that they use the name "Bromide Quinine" as descriptive of the ingredients of their remedy, and for the purpose of telling the truth. But the chemical analysis made of their tablets show but the barest trace of bromine,—not enough to have the slightest therapeutic effect. The court below thought, however, that the presence of even a trace gave a color of truthfulness to the use of the word "Bromide." If the fact be, as shown by the affidavits, that defendants do not use "Bromide Quinine," and that the trace of bromine in their preparation can have no possible medicinal effect in the doses intended to be taken, it is a fact tending to show that the use of so infinitesimal a quantity was intended to justify the use of a word in their trade-name for the purpose of not only misleading the public into the belief that bromine was a leading element in their preparation, but to also justify the use of the same word against the trade-name of complainant. Such a device was resorted to in the case of *California Fig-Syrup Co. v. Fred-*

erick Stearns & Co., 20 C. C. A. 22, 26, 73 Fed. 812, 33 L. R. A. 56; but this court regarded the device as not altering the legal effect of the fact that the syrup advertised and sold was a syrup of senna, and not of figs. Complainant, on the other hand, urges that its prefix, "Bromo," is a coined word, and is not descriptive. The court below took judicial notice of a definition of "bromo" found in the Standard Dictionary, where it is stated that the word is "derived from bromine," and is "a combining word used mostly in names of chemical compounds in which bromine is a principal element." Upon this definition and certain affidavits filed by defendants, made by chemists, of the same general tenor, the court reached the conclusion that the trade-name of the complainant was descriptive, and that complainant, by its use, intended to affirm that bromine was a leading constituent in its remedy. The court below also found, upon the strength of certain affidavits purporting to state the results of chemical analysis made for defendants of the tablets of the complainant, that its tablets contained no bromine whatever. Upon these considerations the court reached the conclusion that, upon the showing made, the complainant's trade-name was descriptive, and therefore not the subject of a technical trade-mark, and that complainant was not entitled to protection against a use of the same name by the defendants, because it was a descriptive name used descriptively. Whether the word "bromo" has or has not acquired a definite significance as a term of science, indicating a compound in which bromine is an element, is a matter upon which this court is not clear, and is therefore reluctant to disturb the order denying to complainant a temporary injunction. There is no finding and no proof as to whether there is known, either in chemistry or medicine, such a compound as "bromo quinine." In the case of *Keasbey v. Chemical Works*, 142 N. Y. 467, 37 N. E. 476, the trade-name "Bromo Caffein" was protected as a trade-mark; the court, after elaborate consideration, holding that the name was arbitrary and fanciful, and was not so descriptive "as to impart information as to the general characteristics and composition of the plaintiff's preparation" to such an extent as to make the trade-mark invalid because descriptive. If the word "bromo" is not descriptive, in the sense that it affirms the presence of a particular and known drug in complainant's preparation, and could therefore be the subject of a valid trade-mark in association with the word "quinine," it is difficult to see how its use can be regarded as so misleading and deceptive as to exclude complainant from the doors of a court of equity. In *California Fig-Syrup Co. v. Frederick Stearns & Co.*, 20 C. C. A. 22, 25, 73 Fed. 815, 33 L. R. A. 57, the term "Syrup of Figs" was held by this court to be plainly and distinctly descriptive of a syrup "in which the medicinal quality of the fig is the active and chief element." It was also found from the facts of that case that the complainant intended that the public should understand that the name was used in this descriptive sense. The court below, upon the evidence, reached the conclusion that the word "bromo" was also a word of description, and that the complainant, by its use, intended the public to understand and believe "that bromine was a leading constituent in the compound which they made

and sold"; thus bringing the case within the rule applied in the Fig-Syrup Case. In *Proctor & Gamble Co. v. Globe Refining Co.*, 34 C. C. A. 405, 406, 92 Fed. 357, this court refused to reverse the action of the court below in denying a temporary injunction, upon the ground that it was not so plainly apparent that the court below had made a mistake as to justify a reversal of its action in a matter in which much must be left to the discretion of the court below. The trial of the question, upon appeal from an order granting or denying a preliminary injunction, especially when the action of the court below was based in large part upon conflicting affidavits, is not as if the appeal was from a final decree upon the merits. In the case cited above, this court, speaking by Judge Severens, said:

"This being an appeal from an order denying a preliminary injunction, the question to be determined is whether the discretion of the court below was improvidently exercised, and not whether, upon the final hearing, upon full view of all the facts in the case, this court would, upon the evidence before it, reach the same conclusion as that of the court below. *Duplex Printing-Press Co. v. Campbell Printing-Press & Mfg. Co.*, 16 C. C. A. 220, 69 Fed. 252; *Garrett v. T. H. Garrett & Co.*, 24 C. C. A. 173, 78 Fed. 472. To justify this court in reversing an order of this kind, it must be quite clearly apparent that a mistake was committed by the court below. *Ritter v. Ulman*, 42 U. S. App. 263, 24 C. C. A. 71, 78 Fed. 222."

The ruling of Judge Swan, who heard this case in the court below, was based upon certain conclusions of fact, already stated, drawn from conflicting *ex parte* affidavits. In this situation of the case, we are not so clearly convinced that there has been such a plain error as to justify a reversal. The decree will therefore be affirmed.

LA REPUBLIQUE FRANCAISE et al. v. SCHULTZ.

(Circuit Court of Appeals, Second Circuit. January 24, 1900.)

No. 74.

1 UNFAIR COMPETITION—LABELS—MINERAL WATERS.

Labels on bottles of artificial mineral water, describing it merely as "Vichy (Grand Grille)," imply that the bottles contain natural Vichy water from the Grand Grille spring, and the sale of such water in competition with the natural water constitutes unfair competition.¹

2 SAME—ACCOUNTING FOR PROFITS—LACHES.

Where a defendant had sold artificial mineral waters for 30 years under the same labels, which implied that the water was from a well-known natural spring, before the proprietors of such spring took any steps to prevent the unfair competition, they are not entitled to an accounting for gains and profits made during such time.

3. SAME—SUIT IN NAME OF FOREIGN NATION.

The fact that a suit for unfair competition in the sale of water purporting to be from mineral springs is brought in the name of a sovereign nation, which is the owner of such springs, will not preclude the defense of laches, where the party beneficially interested as plaintiff is a private corporation.

¹ As to unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For former opinion, see 94 Fed. 500.

Rowland Cox and Herman Gustow, for appellants.

Briesen & Knauth, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The existence in the commune of Vichy, in France, of numerous mineral springs, which have long produced water of high medicinal value, is well known. The water began to be sold as early as 1716, and became popularly known as "Vichy" or "Vichy Water." The republic of France is the owner of nearly all these springs, and by the terms of acts passed in 1853 and 1864 La Compagnie Fermiere de L'Etablissement Thermal de Vichy (hereinafter called the "Company") obtained the concession of the springs owned by the state for terms of years which have not yet expired. This company bottles at Vichy, and sells in France and in other countries, the waters of which it is the lessee, under labels which are its property, and of which the characteristic marks consist in the name "Vichy," and the name of the particular spring, and a woodcut vignette showing the "thermal establishment." In 1853 it began to export its water to this country, and in 1893 its shipments to this country were about 300,000 bottles. In 1896 its entire shipments amounted to nearly 10,000,000 bottles. The natural waters are exported in their original condition, and are not artificially charged with gas. In 1823 Struve, a German chemist, commenced in Dresden the manufacture of artificial mineral waters, by carefully analyzing the water of the natural mineral springs of Europe, and reproducing them with the same ingredients and the same properties, added from time to time to the scope of his manufacture, and included the imitation of the Vichy water, and his various products became widely known in Europe. In 1862 Carl H. Schultz, the testator of the defendant, began in New York the manufacture and sale of artificial Vichy water in accordance with the standard analysis of the Grand Grille spring by Bauer, an assistant of Struve. This spring was one of those owned by the French republic, and its water was considered to be of especial value. The labels upon the bottles in which the water was sold contained the words: "Vichy (Grand Grille). Carl H. Schultz,"—and also contained the words, "Carl H. Schultz's Vichy (Grand Grille)," and Bauer's analysis. This label was not in any respect an imitation of the company's label. After the commencement of this suit, Schultz changed his label so that it read: "Vichy. Manufactured by Carl H. Schultz,"—and contained the words, "Carl H. Schultz's Vichy, Compounded After Bauer's Analysis." This water has been usually put in siphon bottles, and has been continuously sold in very large quantities by druggists, vendors of soda, saloon keepers, and at hotels. In the year 1897 the output was about a million siphons. The bill in this case was filed against Carl H. Schultz on January 23, 1892. He died on May 29, 1897, and thereafter the complainants filed their bill of revivor against Louise Schultz, as executrix of his last will. After Decem-

ber 31, 1892, until his death, his label on each bottle was as follows: "Artificial Vichy. Manufactured from Distilled Water by Carl H. Schultz." In the publications and advertisements of Schultz there is no representation that his water is natural Vichy; but, on the contrary, its artificial character is asserted, and his water has gained a high reputation from its accurate conformity to the analysis of the genuine water. By intelligent purchasers of his Vichy, it was understood to be artificial, and the distinction was well known by physicians, who prescribed one or the other article according to the needs of the patient; and while, undoubtedly, the use of the name "Vichy" by Schultz when his water was first introduced into this country diminished the sales of the waters of the complainants, and gave quick notoriety and popularity to the article which he made, it did not confuse in the public mind the identity of the two articles, because the one was a still and the other a sparkling water. The sales of artificial Vichy in this country far exceed those of the natural water. No complaint or remonstrance by the lessees or their agents against the use of the Schultz labels was made prior to the commencement of this suit.

The facts of this case, like those in *City of Carlsbad v. Schultz* (C. C.) 78 Fed. 469, which, in its main features, resembles this case, are unique in their character. The word "Vichy," by itself, without other words of explanation, is not a technical trade-mark, but the words which Schultz originally placed upon his labels, "Vichy (Grand Grille)," imply that the water which the bottle contained was Vichy water from the Grand Grille spring; and thus the case becomes one of unfair competition by the testator's assertion that he was selling the water of the plaintiff's spring, and by the untruthful appropriation of its reputation. The principles in this class of cases, which are not strictly trade-mark cases, but analogous thereto, have been often stated, and are found in the decisions quoted in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537-549, 11 Sup. Ct. 396, 34 L. Ed. 997, among which is *Thompson v. Montgomery*, 41 Ch. Div. 35, known as the "Stone Ale Case." Many of the cases are collected in *Flour Mills v. Eagle*, 30 C. C. A. 386, 86 Fed. 608, 41 L. R. A. 162. This misappropriation could have been prevented because the label did not fairly describe the water which he manufactured, and he could have been compelled to tell with complete plainness upon his labels that he was manufacturing in New York artificial Vichy water. What he was doing was to imitate Struve, and artificially manufacture a water which corresponded with the analysis of the Grand Grille spring. This misappropriation was, however, more apparent than real, because he was, in the literature which he circulated, announcing that his product was artificial and not natural; and this fact was thoroughly known by the ordinary consumers of the article, until Schultz's Vichy became an article distinct from the still water of the natural spring.

It is conceded that an injunction cannot now be directed, because the original defendant is dead, and there is no proof that his executrix is continuing her husband's business. The question of importance is whether an accounting shall be directed. An accounting

for the period within which the distinctively artificial character of the Schultz Vichy has been well understood would not seem to be equitable; but it is needless to consider that subject, for it is established in trade-mark cases, in accordance with the general principles of equity (2 Story, Eq. Jur. § 1520), that when "acquiescence of long standing," and "inexcusable laches in seeking redress," have been shown, the complainant is not entitled to an accounting, nor to a decree for gains and profits. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828. These prerequisites to a refusal for an accounting clearly appear in this case.

It is said that there can be no imputation of laches against the owner of the springs, the republic of France being a sovereign power. The lessee is the actual party in interest, which would profit by a decree for an accounting; and while the republic of France is the owner of the springs, and a party to the suit, the lessee is the one beneficially interested in the gains and profits which might result from a decree. The principle that laches are not imputable to the government of a nation is not applicable in this case. The decree of the circuit court is affirmed, with costs.

WEBER MEDICAL TEA CO. v. WEBER et al.

(Circuit Court, E. D. New York. April 25, 1900.)

TRADE-NAMES—UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

Where the rights of parties to the use of certain trade-names and labels have been adjudicated, and the defendants thereafter submitted to counsel for complainants a proposed new form of label, which was by them approved as unobjectionable, another court will not grant a preliminary injunction against the use of such label by defendants on the application of the complainant.¹

In Equity. Suit for unfair competition. On motion for preliminary injunction.

Goepel & Raegener, for complainant.
James A. Whitney, for defendants.

THOMAS, District Judge. The complainant's assignors, on August 29, 1899, obtained in the supreme court of the state of New York a judgment, which, as to the rights determined therein, is an estoppel upon the defendants herein. After such judgment, the present defendants, with a view of complying therewith, submitted to the counsel for the present complainant the label which is the subject of the present controversy, and such counsel stated that he saw no objection to it, and the defendants thereupon adopted the label, and for such adoption they are accused by the complainant in the present action. It was the impression of the court upon the hearing of the motion for a preliminary injunction that a label which seemed unobjectionable when submitted to the skilled and advised counsel for the complain-

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

ant should not be deemed a violation of the complainant's rights within the limits of examination observed upon applications of this nature. The impression is not diminished after an examination of the briefs, and upon that ground alone the motion for a preliminary injunction is denied. The position apparently taken by the defendants, that their tea is now known as "Weber's Tea," may enter into the ultimate decision, but for the purposes of a preliminary injunction the consent above discussed must have the greater influence.

ALBANY PERFORATED WRAPPING-PAPER CO. v. JOHN HOBERG CO.

(Circuit Court, E. D. Wisconsin. May 18, 1900.)

TRADE-MARKS—NATURE AND PURPOSE—RIGHT TO PROTECTION IN USE.

A trade-mark must denote origin, and its legitimate purpose is to distinguish the goods of the manufacturer using it from those of other manufacturers. Hence a manufacturer of a single article, like toilet paper, who uses upon his packages a large number of different names, to designate difference in quality, shape, or size, or merely to meet the whims of customers, and which tend to produce confusion, rather than certainty, as to origin, cannot be protected in the exclusive use of such names as trade-marks.

In Equity. Suit to enjoin infringement of trade-marks.

Winkler, Flanders, Smith, Bottum & Vilas, for complainant.

Erwin, Wheeler & Wheeler, for defendant.

JENKINS, Circuit Judge. The complainant filed its bill to enjoin the use by the defendant of 13 different trade-marks of which the complainant claimed to be proprietor, and used upon toilet paper which it manufactured and sold. These brands were, respectively: Sunflower, adopted in 1891; Beverwyck, adopted in 1893; Club, adopted in 1891; Clover Leaf, adopted in 1891; Pacific, adopted in 1891; Diamond, adopted in 1891; Hotel, adopted in 1886; Factory, adopted in 1886; Standard, adopted in 1886; Economy, adopted in 1886; Victor, adopted in 1893; Cabinet, adopted in 1891; A No. 1, adopted in 1891. The complainant appears to have been the first to manufacture and sell perforated toilet paper in rolls. It also made and sold it in sheets. Some of these brands were attached to the rolls, and some of them to the sheets, or the packages containing the sheets. With respect to most of the brands, they would seem, from the evidence, to have designated in some cases the quality, and in some cases the size, of the sheets; and the sale prices differed according to the quality and the size of the sheets. Thus, sheets to which the Sunflower brand was attached were 4 by 6, and the price \$5 per case, while the Beverwyck brand represented a finer quality of paper, and in size was 4½ by 6½, and was sold at \$7.25 a case. The Hotel brand represented the quality of paper commonly supposed to be used in hotels. I do not find that the same brand was used on different qualities and sizes of paper, with the possible exception of the Diamond brand, which appears to have been used

upon three qualities and two sizes of paper. The complainant commenced the business of manufacture and sale of toilet paper in the year 1877, its principal officer testifying that he was unable to say how many different brands were used by it,—whether 1,000, 2,000, or 5,000; but the testimony leaves no doubt that it employed a large number of brands. Certain of these brands were originated by its officers, and a large number of other brands suggested by customers, and it placed the particular brand suggested upon the paper sold that customer; and, when requested, the name of the customer was also printed upon the package. This was done because, as the witness testified, “it is impossible to account for the whims of the trade. The trade demands many things that are quite unaccountable.” “Because the trade demands a good many different styles of packages and of wrappers. We use it for that purpose, and to designate the different styles, to distinguish them one from the other.” And this is done for the purpose, first, “to make an attractive looking package,—one that will command a ready sale; and the other purpose, as I have already stated, is to designate the different kinds of paper.” The defendant, engaged in a like business, uses seven or eight hundred different trade-marks or brands; and it would appear that every person engaged in this trade uses a large number of brands, to the extent that there would seem to be rivalry among the different manufacturers who should be able to use the greater number of brands. I find no difficulty in holding that, with the exception of the Diamond brand, the defendant's brands designated in the bill are clear infringements upon 12 of the complainant's brands, as stated in the bill. I have as little difficulty in finding that the defense of prior appropriation, except as to the brands Pacific and Victor, is not established. At the hearing the complainant abandoned its claim to the brands Standard and A No. 1, conceding that the words of themselves denoted quality; to Pacific and Victor upon the ground of prior appropriation; and to the brand Diamond upon the ground that infringement had not been proven. I am impressed with the conviction that the 8 brands upon which the complainant relies are used to designate size or shape or quality of the paper used, although the fact that the arbitrary words are attached to packages without reference otherwise to the manufacturer lends considerable doubt to the conclusion.

The principal question which is suggested by the bill and the evidence is whether the manufacturer of a single article has the right to use, and to be protected in the use of, more than one trade-mark for that article. I find little authority upon the subject, and have given to the question much consideration. Upon principle, I think that he cannot. A trade-mark must denote origin. A trade-mark is defined by Mr. Upton to be the name, symbol, figure, letter, form, or device adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise. Upton, Trade-Marks, p. 9, c. 1. How can that

purpose be accomplished, if a manufacturer dealing in a single article used a thousand different trade-marks to designate the article and its origin? Such use necessarily produces confusion, and fails of the single purpose of the trade-mark,—to designate with certainty the origin of the product. Certainly no manufacturer would, in regard of self-interest, indulge in such a practice; for he would thereby defeat the very purpose he sought to accomplish. This consideration has led me to the conviction that the complainant, the originator of perforated rolled toilet paper, would not do that which would blind the public mind to the originator and manufacturer of the article, and would tend to dissipate its trade. It is more probable (and the evidence, I think, sustains the conclusion) that its design was, by the various names, to distinguish between the size, shape, and quality of the paper manufactured, and that the marks were not placed thereon as indicating origin. The only authority which I have been able to find passing directly upon this question is the case of *Candee v. Deere*, 54 Ill. 439, 457. In the conclusion reached by the supreme court of Illinois upon this particular question, I fully concur. It is remarkable that, with respect to so simple a product as that in question, it should be found that so large a number of claimed trade-marks should be used by one manufacturer. A court of equity cannot be impressed by an appeal to protect that which produces infinite confusion. It may be that in the struggle for trade the whims of retailers must be consulted, and that rivalry between dealers to present something attractive to the public eye must exist; but courts of equity do not sit to indulge the whims of purchasers, or to protect one in creating confusion. They sit to protect and to enforce legal and equitable rights. If this bill can be maintained, the extent of the proprietorship of the complainant in the use of arbitrary names applied to the subject of toilet paper would be limited only by the imagination of its officers. The bill will be dismissed for want of equity.

CAMPBELL PRINTING-PRESS & MFG. CO. v. MIEHLE PRINTING-PRESS & MFG. CO.

MIEHLE PRINTING-PRESS & MFG. CO. v. CAMPBELL PRINTING-PRESS & MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. May 16, 1900.)

Nos. 634, 635.

1. PATENTS—INFRINGEMENT—PRINTING PRESSES.

The Miehle patent, No. 317,663, for improvement in machinery, consisting of a pinion operating with a rack or racks to effect a reciprocating movement, as in printing presses, etc., claim 1, which covers a combination of a rack frame and racks with a pinion provided with a wrist pin, which engages automatically into end slots for the purpose of effecting a reversal of the movement of the rack frame, discloses nothing new in the means employed except the form of the slots, by means of which the reversal is completed by a shorter movement than in prior

devices, and such claim is not infringed by machines made in accordance with the Southgate patent, No. 606,096, in which the wrist pin or its equivalent travels through a half circle to effect the reversal, as in previous forms of presses.

2. SAME.

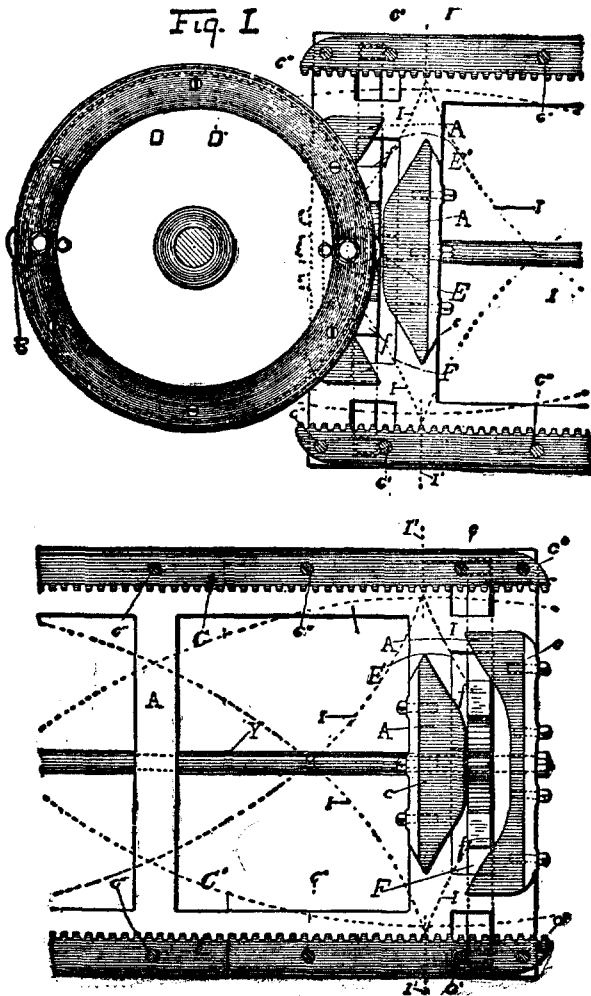
The Miehle patent, No. 322,309, for improvements in printing machines, held not infringed as to claims 1, 2, and 4.

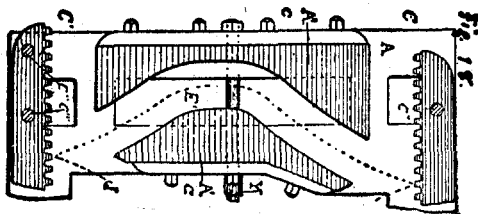
Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

These appeals are from a final decree in the suit of the Miehle Printing-Press & Manufacturing Company against the Campbell Printing-Press & Manufacturing Company for infringement of the first claim of patent No. 317,663, and the first, second, and fourth claims of patent No. 322,309, issued on May 12 and July 14, 1885, to Robert Miehle. The first patent was declared valid, and further infringement enjoined. The claims of the second patent were given a narrow construction, and found not to have been infringed. 96 Fed. 226. Each company has appealed and has assigned error on the portion of the decree which is adverse to it.

The first claim of patent No. 317,663 and portions of the specification read as follows: "1. In a mechanical movement, the combination of a rack-frame and racks, with a pinion provided with a wrist-pin, which engages automatically into end slots, to properly guide the pinion with the said racks, substantially as described." "This invention relates to improvements in that class of devices consisting of a pinion operating with a rack or racks to effect a reciprocating movement for printing presses, pumps, iron planers, large church-organ bellows, and other machinery wherein a regular reciprocating movement is desired between the centers, with a slow stopping and starting movement at the centers or turning points of each reciprocating stroke. The invention consists of a mechanism by which a very slow stopping and starting movement is obtained at each end of the reciprocating movement without losing the amount of stroke heretofore lost by diminishing the revolutions of the pinion, as will hereinafter be explained. The invention also consists of a novel mechanism and arrangement of parts whereby the racks are shifted laterally of the pinion,—that is to say, parallel with the axis thereof,—to require less space in its operation; also to obviate the necessity of a counterbalance when the pinion shaft is placed in a horizontal position; and, furthermore, to obtain from a pair of racks and a pinion which has but one revolution a regular and complete reciprocating movement between its centers greater than the radius of the pinion or sweep of the wrist pin across the center, with a very slow stopping and starting movement at the end of each reciprocating stroke, the same as obtained from a crank arm and wrist pin. * * * By arranging the parts so that the pinion has an odd number of revolutions,—as one, three, and five,—only one wrist pin is required; but, when the pinion has an even number of revolutions,—as two, four, and six,—two wrist pins are necessary. * * * The diagram Fig. 13 is to show the length of stroke obtained from pinions having two, three, and four revolutions, the large pinion being proportioned the same as pinion D in the drawings, and the smaller one just one half thereof. It is evident that, when the revolutions of the pinions are diminished, the length of the stroke is also diminished, the greater amount of stroke being lost when the revolutions of the pinion are diminished from three to two revolutions for completing a reciprocating movement, and the length of stroke heretofore obtained from pinions, as shown in Fig. 13, is indicated by the dotted lines, I', at the pitch-lines of the gears, and the dotted lines, I', at the end of that portion representing the racks. The manner in which the present improvement obtains a stroke greater than heretofore by a pinion with two revolutions is by the additional length of the racks, C C', which extend outwardly from the dotted lines, I', as indicated in Figs. 1 and 6, to enter the wrist pins, E, between the end shoes, A' A'', the ends of which are formed upon the epicycloidal curve, I, heretofore described, sufficiently to receive the wrist pins, E, properly while

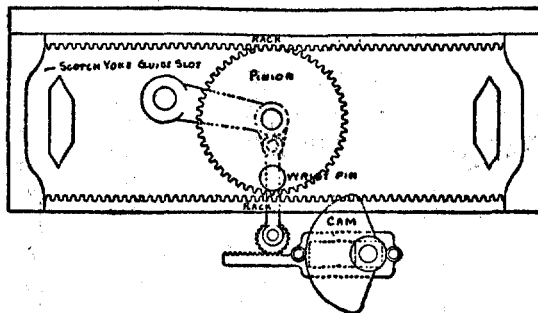
the pinion is disengaging with either of the said racks, after which the shoes are shaped to impart a reduced movement to the rack frame, A, by the wrist pins, E, in time to retain the slow stopping and starting motion at the centers or turning points." "The shoes, A' A'", in the present drawings, are formed in such manner as to produce a stroke,—which is indicated by the dotted lines, I', at the end of the dotted lines, I", in Fig. 6,—with a pinion which has two revolutions, to equal that obtained from the devices heretofore constructed, in which the driving circumference of the pinion is just one-half thereof, having four revolutions. It is evident the length of stroke can be extended by forming the shoes, A' A'", in the manner shown in Fig. 18, the upper half of which is formed upon the epicycloidal curves, I, very near to the center or turning point, the lower half of the shoes, A' A'", being formed the same as in the main drawings. By this arrangement a quick stopping or a slow starting movement at the centers or turning points is imparted to the rack frame, A, and in turning the pinion in an opposite direction just the reverse movement is obtained."





Patent No. 322,309 is for "improvements in printing machines," and the claims in question read as follows: "(1) In a bed motion for printing presses, as herein described, in which the bed is operated by a pinion that engages alternately with top and bottom racks attached to the press bed, the combination of the operating pinion provided with a wrist pin, E, with the rack frame provided with a vertical guide slot, E', at each end, for the purpose of properly guiding the pinion into gear with the racks, essentially as set forth. (2) The combination, with the reciprocating bed of a printing press, of a rack frame having racks, C C', and vertical end slots, E' E'', driving pinion, D, provided with a wrist pin, E, and mechanism, substantially as herein described, for alternately engaging the pinion, D, with the upper and lower racks, C C', essentially as set forth. (4) The combination, with the reciprocating bed of a printing press, of a rack frame having racks, C C', and vertical slots, E' E'', driving pinion, D, carrying the wrist pin, E, said pinion being journaled at the end of a rock arm, I, and receiving a continuous rotary motion through gears, K K', and an intermittent rising and falling motion from cam, M, all combined essentially as set forth."

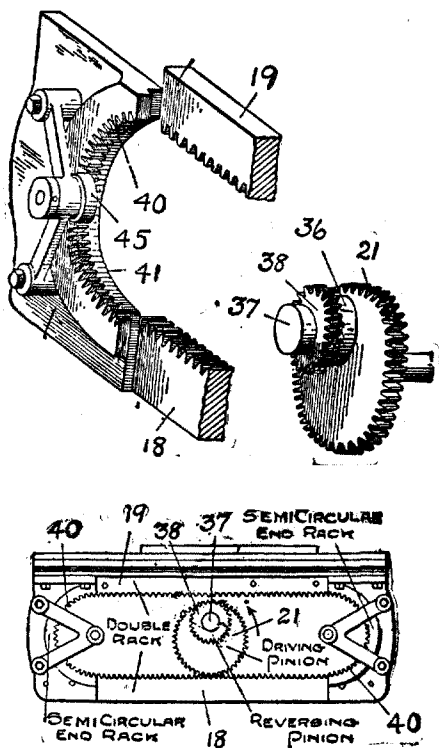
In the brief for the Miehle Company the following cut is given as "a picture of the entire combination or mechanism consisting of the parallel racks constituting a rack frame, the pinion with the wrist pin mounted on it, the cam for raising and lowering the pinion and maintaining it in the raised or lowered position, and the guide slots applied at each end of the rack frame"; and it is further said of it that "it embodies the subject-matter of claim 1 of the principal patent No. 317,663, and claims 1, 2, and 4 of the subordinate or improved patent No. 322,309, the specific mechanism here shown being one of those illustrated in the latter or improved patent":



The machines made by the defendant, the Campbell Company, it is conceded, conform substantially to the construction shown in letters patent No. 606,096, issued on June 21, 1898, to Louis W. Southgate, one of the counsel for that company in this litigation. In his brief, referring to the following cuts, he says of it:

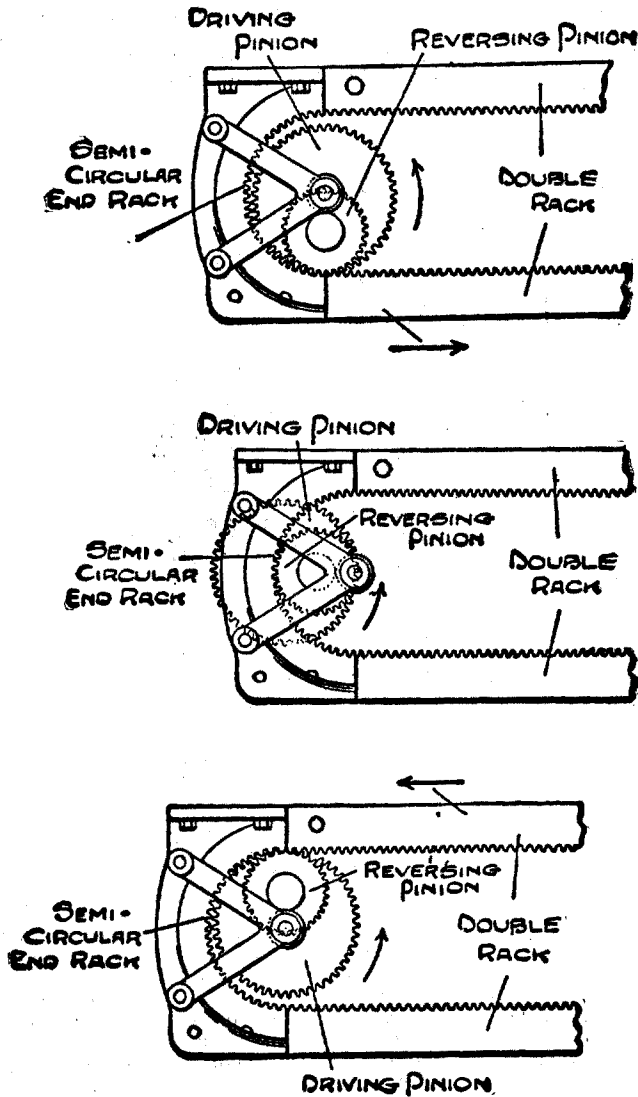
"For a reversing mechanism, the defendant has rigidly secured on the face of the driving pinion, 21, a reversing pinion, 38, of one-half the diameter of the driving pinion, 21, and at each end of the bed has arranged a semi-

circular rack, 40-40, with which said pinion will engage during the time of the reverse. A large circular working shoulder or bearing, 36, is arranged on the pinion, 21, concentrically with and behind the reversing pinion, 40, to engage semicircular shoulders, 41, arranged concentrically with the curved racks, 40, carried by the bed. Projecting through the reversing pinion, 38, is a stud, 37, which engages behind rollers, 45, carried by the bed concentrically with the curved racks, 40, and shoulders, 41. The principle on which the device is arranged to work is to have a continuous engagement of gearing between the pinion and the bed during both the working and the reversing movements."

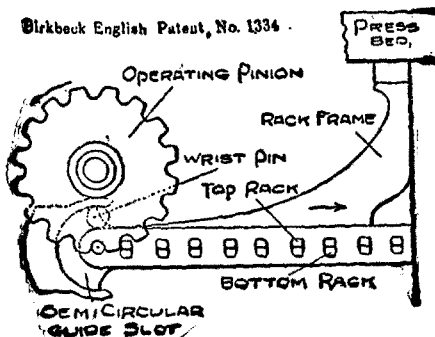
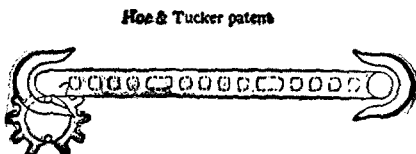
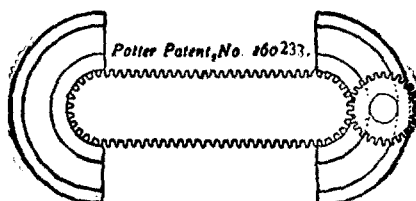
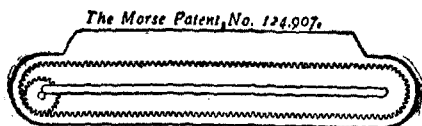
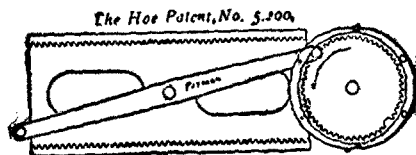


"The operation may be clearly understood from the opposite (next following) cuts. In the first figure of the cuts, the main movement to the right is just completed. The driving pinion is leaving the double rack, and the reversing pinion is just engaging one semicircular end rack. In the second of the figures, the driving pinion is shown as having made a quarter turn from the position shown in the top figure, and the movement to the right has been retarded and stopped with a crank-motion action by the reversing pinion running up the lower part of the curved rack. In the bottom of the figures the driving pinion is shown as having made another quarter turn, and as just engaging the double rack to commence the full or main working stroke to the left. During this last quarter turn the bed has been started from zero up to full working speed to the left by a crank-motion action, by the reversing pinion running up the upper part of the curved rack. In defendant's machine, instead of relying upon a wrist pin and slot for the reversing movement, the momentum of the bed is resisted and opposed by the mesh

of gearing between the circular end racks, 40, and the reversing pinion, 38. The defendant's machine secures a continuous mesh of gearing between the parts at all times, which point has been recognized for years as advantageous, if it could be properly embodied and used."



The prior art, pleaded and introduced in evidence, consists of numerous letters patent, of which the following have been treated as the more relevant: Hoe, 5,200; Campbell, 56,701; Henry, 114,557; Morse, 124,907; Cottrell, 172,974; Hoe & Tucker, 173,295; Campbell, 274,560; Potter, 260,233; Larter, 279,571; and of British patents No. 1,334, granted on May 27 1861, to Birkbeck; No. 12,690, to Welding; and No. 4,176, in 1882, to Hope. The relevant parts of the Hoe, Morse, Potter, Hoe & Tucker, and Birkbeck devices are illustrated by the following diagrams:



Mr. Livermore, an expert for the defense, comparing the Hoe and Miehle movements, testified: "The mechanism of this Miehle patent differs from that of the Hoe patent mainly in the means for connecting and disconnecting the rotary and reciprocating parts that produce the reversal movement at the beginning and end of the working stroke, which in the Miehle patent is produced by the pinion and racks which are generally employed in mechanism of this kind. As shown in the Miehle patent, the two racks are in different planes, so that only one at a time is in mesh with the pinion, being in this respect the same as the mechanism of the Hoe patent, but the shifting movement is effected by moving the racks laterally instead of moving the pinion, being in this respect the converse of what is employed in the mechanism of the Hoe patent. In the Miehle patent the reversal movement is effected by a revolving crank or wrist pin on the pinion or gear wheel that co-operates with the rack, but the construction is such as not to give a true crank reverse, being in this respect substantially different from the mechanism of the Hoe patent in the result produced. In the Miehle patent the crank is permanently connected with the pinion, and engages with and disengages the reciprocating part at the beginning and end of the reversal movement, being in this respect the converse of what is shown in the Hoe patent, where the crank is permanently connected with the reciprocating part, and is engaged with and disengaged from the gear wheel at the beginning and end of the reciprocating movement. In the Miehle patent the crank engages with the reciprocating part by entering a transverse slot in said part instead of connecting with a pitman, so that the movement of the crank in the direction at right angles to that of the movement produced or controlled by it is accommodated by traveling lengthwise of the slot instead of by the rocking movement of a pitman. Such connection between a crank and a reciprocating part by a slot in the reciprocating part at right angles to its part of reciprocation is a well-known equivalent for a pitman connection, and has been used as such in engines and pumps for years. If the slot employed in the Miehle device were straight, and the crank pin remained constantly in it, the revolution of the crank by the pinion would produce a back and forth reciprocation of the press bed, or part to be moved, just like the piston of a steam engine, or like what would be produced in the Hoe device if the crank pin permanently connected the pitman and rotating pinion. The problem, therefore, with this Miehle mechanism, like that involved in the mechanism of the Hoe patent, is to engage and disengage the revolving crank and reciprocating part, or, in other words, in Miehle's specific construction, to get the crank or wrist pin into and out of the slot. The construction by which this is accomplished is the sole novel or characteristic feature of the mechanism so far as the parts or elements referred to in claim 1 are concerned. The crank must enter and leave the slot at points adjacent to the racks, or, in other words, when it is at or near the diameter of the pinion that spans the space between the racks. The path of movement of the crank relative to the rack frame is a cycloid (i. e. when the racks are travelling at uniform speed in the working stroke), and, in order to effect the proper entrance of the crank into the slots, the latter are, for a portion of their length leading to the points of entrance and exit of the crank pin, formed to correspond to the path of movement of the crank relative to the rack frame, i. e. are of cycloidal shape. The result of this construction is that the uniform movement or working stroke of the reciprocating part may be continued after the engagement is effected between the crank and slot of the reversing mechanism; or, in other words, the crank travels in the cycloidal portion at the end of the slot while the reciprocating part remains in engagement with the rack, or has the same speed of movement as when in engagement with the rack, and it is only when the crank enters the straight part of the slot that the actual reversing movement begins. The complete reverse, i. e. slowing down, stopping, and starting in the reverse direction, is therefore accomplished during the movement of the crank through a very small arc instead of through a complete half circle, as is the case with a true crank reverse, such as is employed in the mechanism of the Hoe patent. The Miehle patent refers to this feature of prolonging, so to speak, the working stroke as one of the features of his improvement." On the contrary, Mr. Dayton, an expert for the complainant, after dwelling at great

length on the manifest differences between the two devices, pronounced them radically and essentially different, and declared it apparent, as he thought, that the Hoe patent and machine were "incapable of suggesting the construction and arrangement of the parts constituting the Miehle invention."

The differences between the experts in respect to the bearing of the other patents are not less radical or emphatic. Responding to the testimony of an expert for the defendant concerning the Potter patent, Mr. Dayton testified in part as follows: "The stud on the arm or disk, about which stud the rack pinion rotates, may be called properly enough a 'wrist pin,' precisely as the same stud on any crank arm or crank disk is called a 'wrist pin.' Indeed, there is where it gets its name. But this wrist pin in the Potter machine is not on the rack pinion, as called for in the Miehle patent. It is on an arm or disk, which is not the pinion, and which merely gives movable support to the pinion. In short, in the Potter machine, this wrist pin carries the rack pinion, and is not on the rack pinion for some other purpose. This is a vital and radical difference between the two machines, and as a result of this and attending differences, apparent from the foregoing description of the Potter device, the latter is radically unlike the Miehle in its composition, combination, and mode of operation. For example, I have pointed out that the Potter rack is an external rack, while the Miehle is an internal rack; that is, has its teeth directed towards each other. I will add that the Potter construction necessarily calls for an external rack. The swinging rack pinion will not work in the same way with an internal rack to give the reversals effected in this particular arrangement. The Potter device is one of its own kind, and is essentially unlike in construction, principle, and mode of operation to that of the Miehle patent. Recognizing that the prolonged stud or wrist pin on the crank disk of the Potter machine extends into semicircular end grooves or slots on the rack frame, by which means the pinion is held in engagement with the rack, and also that a portion of the outer wall of each said end grooves or slots is concerned in the reversal of the movement of the rack, said wrist pin, not being on the driving pinion, is not the wrist pin of the Miehle invention and claims in suit, and the Potter mechanical movement is not the Miehle mechanical movement, and contains no suggestion of the Miehle invention, as embodied and claimed in either of the patents sued on. * * * In the old pin-rack and star-wheel construction semicircular guides were provided outside the ends of the rack to coast with the extended shaft of the pinion, or with studs on the pinion, to hold the pinion in mesh with the end tooth of the rack during its swing up or down around said end of the rack, and sometimes these curved grooves extended in straight portions outside and parallel with the rack, between its ends, just as might be done in the case of Potter, where, however, the straight portions are omitted because the rack pinion is held in engagement by other means, to wit, to the arm or disk on which it is mounted. The Miehle invention or mechanical movement does not relate to the form of rack or rack frame to which the Potter relates and from which the Potter invention springs. On the other hand, the Miehle relates to that form of double rack where two straight racks are placed at a considerable distance from each other with their teeth towards each other, and the pinion is placed between them, requiring only such a small movement of the pinion in its own plane as will enable its teeth at one side to disengage or clear the teeth of one of the racks, while its teeth on the opposite side are engaged with the opposite rack. There is a fundamental difference between these two kinds of rack and pinion movement, as there is between races of animals. The Miehle belongs to one and the Potter to the other. Their fundamental distinctions cannot be obliterated by developments in either, and they cannot run together in underlying principle, whatever superficial and local resemblances they may appear to have."

Concerning the Hoe & Tucker patent, after explaining the construction, he testified: "The wrist pin has, therefore, a definite relation to a particular notch or gap in the pinion, and the semicircular guide at the end of the rack frame has a corresponding relation to the cylindrical end stud or pin of the rack, which is to be held engaged with this particular gap in the pinion. It is true that, inasmuch as the rising and falling pinion shaft is held from lateral displacement by the slotted upright through which it passes, this

semicircular guide at each end of the rack frame takes a small part in the reversal of the movement of the rack. That is to say, the walls in the gap of the pinion are the principal agencies concerned in the reversal of the motion of the rack, and the principal function of the wrist pin is to keep the gap in engagement with the end rack pin, that said gap may do this. At the immediate point of reversal, or immediately adjacent thereto, the pin has some office in effecting this change of movement. This fact, however, cuts no figure, in my judgment, in the determination of any question here at issue. The pin-rack and star-wheel movement, with its bodily moving pinion or star wheel sweeping through an arc whose chord is at least its own diameter, is a wholly different 'mechanical movement' from any such 'movement' involving the separated racks with their teeth directed towards each other, and having an allowably large pinion arranged between them, with a motion measured by little more than the depth of the pinion teeth. Both these types of rack and pinion movement are old and well known, and they are recognized as different types in the nomenclature of the printer's art; the type represented in the Hoe & Tucker model being known and recognized at the 'Napier Movement.'

In the brief for the Miehle Company it is said: "The characteristic feature of this invention of Miehle's and which distinguishes it radically from all prior structures, is the use of a wrist pin upon the main pinion and slots on the rack frame to accomplish the reversal of movement of the rack frame while the pinion is wholly disengaged from, and out of mesh with, the racks. It is this feature of a complete disengagement of the pinion from the racks during reversal, and the governing of the movement at this period solely by means of the engagement of the wrist pin with the slots, which makes it possible for Miehle to obtain such a great variety of movement during reversal, either slow or fast, or both slow and fast, by simply giving different shape to the open-ended slots to suit the special requirement. This fact of complete disengagement of the pinion from the racks while the wrist pin is operating in the slot to produce the reverse distinguishes the Miehle invention from the old Napier movement of the prior art, and all of its kinsfolk, such as the English patent to Birkbeck and the others of that sort."

The court below found "that Miehle was the first to adopt the idea of the pinion, wrist pin, and end slot for the purpose of utilizing the advantages of a crank reverse in reciprocating motion; that this mechanical combination was a distinct advance in the art; and that Miehle is entitled to the benefit of the doctrine of equivalents as to these three devices to the extent of any changes in their relative size, outlines, or proportions."

Louis W. Southgate, for Campbell Printing-Press & Mfg. Co.
John W. Munday, for Miehle Printing-Press & Mfg. Co.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

A patent for a "mechanical movement," according to one of the experts in the case, is "for a mechanism transmitting power or motion from a driving part to a part to be driven." Another of the experts says:

"A 'mechanical movement' is the combination and arrangement of mechanical parts intended for the translation or transformation of motion. * * * They are mechanisms adapted usually for employment in wholly different classes of machines, * * * [which] happen to require a similar resultant motion or movement of parts. * * * A claim for a mechanical movement in a patent is unrestricted to its use in any particular kind of machine, although for its proper illustration and explanation it may be shown and described in connection with such machine."

If such a movement is patentable, evidently it must be because in itself, and apart from any form of mechanism, it constitutes "a new and useful art." Rev. St. § 4886. Rejecting as surplusage, if not as meaningless, the words, "in a mechanical movement," in the claim of the first patent, and the corresponding words of the other claims in controversy, they are in the ordinary form of claims for mechanical combinations designed to accomplish the particular movements described, none of which appear to have been unknown before. There seems to be no controlling reason against considering the claims as if for mechanisms. So, in effect, the experts have treated them. Saying little or nothing in explanation of the characteristics of different movements, and pointing out no novelty of movement distinguishable from a function of mechanism, they have dwelt upon such differences of construction between devices as that the wrist pin of one is located on the driving pinion, and of another on the end of a pitman or lever, while in the first the slot is in the rack frame, and in the other is on the pinion; differences which an expert for one of the parties declares radical and essential, while the expert for the other party finds in them nothing more than a converse arrangement of parts. The difference between the "two kinds of rack and pin movement" illustrated by the patents of Miehle and Potter one of the experts has declared to be fundamental, and in a general sense the proposition is perhaps undeniable, but it has not been explained that in either device is there a new kind of movement, or a combination of the parts employed to produce the particular movements described, of which the prior art does not afford parallels either in direct or converse arrangement. It serves no purpose to emphasize the numerous differences in details of construction and operation between the earlier patents and Miehle's patent as entireties. A few elements only are involved in the issue presented. It is only with Miehle's pinion, wrist pin, rack frame, and slot, arranged to operate as stated, that we have to deal, and it is only corresponding parts of earlier patents which can aid in determining the patentability and scope of the combination. The characteristic feature of the invention, according to counsel, is the use of the wrist pin upon the main pinion and slots on the rack frame to accomplish the reversal of movement of the rack frame while the pinion is wholly disengaged from, and out of mesh with, the rack. There seems, however, to be no justification for the emphasis put upon the disengagement of the pinion from the racks. It is not a feature of the invention. It is not mentioned in the claim, and only indirectly is referred to in the specification. There was no need for more, because it is manifestly impossible that the rack frame should come under the retarding control of the wrist pin in the slot until released from the pinion, or again should come under the control of the pinion until released from the wrist pin. The invention, therefore, consists, or at least has its manifestation, in the combination of the racks, pinion, wrist pin, and slots so adjusted, for the purpose of producing a uniform reciprocal movement of the rack frame, as to guide the pinion from the point and moment of disengagement to the point and moment of re-engagement with the racks. In the means em-

ployed there was nothing new except the form of the slot. The utility or advantage achieved was that each reverse of movement was effected "without losing the amount of stroke [t]heretofore lost by diminishing the revolutions of the pinion." Theretofore the reverse was accomplished by a movement through a half circle, while by the use of the Miehle slot the reverse may be completed by a movement through an arc of any less number of degrees than 180, and thereby a proportionate increase in the length and in the movement at full speed of the racks is made practicable. The possibilities of variation in the form and operation of the slot are illustrated by Figure 18 of the patent. In these two things (the form of the slot and the greater length and movement of the rack frame) are to be found the novelty and utility necessary to support the patent. That there is nothing new and patentable in the mere arrangement and relation of the parts, one to another, seems evident. In the Hoe patent, for instance, the parts are the same, but they are placed in a converse order. The wrist pin, instead of being on the driving pinion, is on the end of a pitman or lever which is fulcrumed upon a pin or stud on the rack plate, while the slot is on the driving pinion. In form it is not a slot, but rather the equivalent of one, consisting of a recess in the periphery of the pinion or mangle wheel, into which the stud on the end of the pitman engages, and a semicircular guard plate on the pinion, which during the reversing movement, and while the pinion is entirely disengaged from the racks, holds the stud in the recess. If it be said that the equivalent of a slot is not to be found in that arrangement, then it may be equally well said that there is no slot or its equivalent in the devices of the defendant which are alleged to have been made in infringement of the Miehle patent.

The patents of Morse, Potter, Hoe & Tucker, and Birkbeck all show even more clearly combinations of rack frames, pinions, wrist pins, and slots employed, substantially, in the same manner as in the Miehle device, for the purpose of effecting the reverses necessary to the accomplishment of reciprocal movements. The essential difference is that in all the older devices the reverse is effected by the passage of the pin through a semicircular slot. The advantages of the crank movement are common to all the forms of construction referred to, but the peculiar advantage of a complete reversal of motion by the movement of a pin through less than a semicircle was left to be achieved by Miehle. For that he was probably entitled to a patent, but it follows that his patent is not infringed by any construction which, retaining the old semicircular slot, does not admit of the shortened movement which characterizes his invention.

The proof is clear that in the defendant's form of construction the reversing pinion, secured on the face of the driving pinion, and the semicircular racks at the end of the bed, may be omitted without affecting the operation of the device, and it is insisted, not without support in the evidence, that they were introduced solely for the purpose of disguising an intended infringement; but, on the construction of the patent which we are constrained to adopt, infringement is not established, because, conceding that the defendant's device

contains a wrist pin on its pinion and a slot in its rack frame, in substantially the same relation to each other as the corresponding parts of Miehle's construction, yet the slot of the defendant, like those in the earlier devices, is semicircular, and is incapable of effecting the reversal of movement in the manner characteristic of the Miehle invention. This conclusion is applicable to the claims of the other patent in suit, and makes it unnecessary to consider whether they were subject to the narrow construction given them by the court below.

The decree in respect to the first, second, and fourth claims of patent No. 322,309 is affirmed; in respect to the first claim of patent No. 317,663 it is reversed, with direction to dismiss the bill.

DUFF MFG. CO. v. KALAMAZOO RAILROAD VELOCIPEDE & CAR CO.

(Circuit Court, W. D. Michigan, S. D. May 21, 1900.)

PATENTS—ANTICIPATION AND INFRINGEMENT—LIFTING JACKS.

The Barrett patents, Nos. 455,993, 455,994, and 455,995, for improvements in lifting jacks, considered with reference to anticipation of the yielding tripping plate, upon which such patents rest, by the Gard device, shown in patents Nos. 116,296 and 123,010, and *held* not anticipated, and valid and infringed.

In Equity. Suit for infringement of patents. On final hearing.

Kay & Totten, for complainant.

Howard, Roos & Howard and Fred L. Chappell, for defendant.

WANTY, District Judge. This suit is based on three patents, Nos. 455,993, 455,994, and 455,995, all dated July 14, 1891, granted to Josiah Barrett for improvements in lifting jacks, and assigned by him to the complainant. Claims 1 and 6 of 455,993 are alleged to be infringed, and these claims are in the following language:

"(1) In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, two pawls pivoted to said lever and having fingers rigid therewith, and a yielding tripping plate having lugs thereon, adapted to engage with said fingers, and through the same draw the pawls from engagement with the toothed bar, substantially as and for the purposes set forth."

"(6) In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, a pawl pivoted to said lever and having a finger rigid therewith, and a yielding tripping plate mounted on the frame, and having a lug adapted to contact with said finger, and through the same draw the pawl from engagement with the toothed bar, substantially as and for the purposes set forth."

Claim 3 of patent 455,994 is as follows, and is alleged to be infringed:

"(3) In a jack, the combination of a bar having teeth on one face thereof, a frame having an operating lever mounted therein, a pawl pivoted to said lever and carrying a projection or finger, a yielding tripping plate mounted on said frame, and having a shoulder engaging with said pawl finger, and a spring supported by the jack frame, and pressing against said tripping plate, substantially as and for the purposes set forth."

Claim 3 of patent 455,995 is also alleged to be infringed, and is:

"(3) In a jack, the combination of a bar having teeth on one face thereof, a pivoted hand lever having a pawl engaging with said toothed bar, a slidable tripping plate mounted on the jack frame, and having a spring pressing against the same to hold it in its operative position, and a withdrawing device to hold said plate away from engagement with said pawl, substantially as and for the purposes set forth."

The defenses are anticipation and noninfringement, and it is contended on behalf of the defendant that, if the patents sued on are given the broad construction claimed for them by the complainant, they are anticipated by the patents issued to Emory R. Gard,—No. 116,296, June 27, 1871, and No. 123,010, January 23, 1872,—and, if a narrow construction is necessary to sustain the patents, then there is such a dissimilarity in the mechanism of defendant's structure used to obtain the same result that it does not infringe. The complainant contends that the validity of patents Nos. 455,993 and 455,994 has been established in prior litigation, and as to those patents the court should require most cogent proof before holding them invalid. *Manufacturing Co. v. Forgie* (C. C.) 57 Fed. 748; *Manufacturing Co. v. Forgie* (C. C.) 78 Fed. 626; *Forgie v. Manufacturing Co.*, 81 Fed. 865, 26 C. C. A. 654; *Manufacturing Co. v. Norton* (C. C.) 92 Fed. 921; *Manufacturing Co. v. Norton* (C. C.) 96 Fed. 986. In none of the cases referred to was the anticipating matter pressed by the defendants here brought to the attention of the court or passed upon. I have not overlooked the fact that in the defendant's answer in the *Forgie* Case (C. C.) 57 Fed. 748, the Gard patent, No. 123,010, is, with more than 20 others, set up as anticipating the Barrett invention, but it was not put in proof, nor passed upon by the court, and this court is not bound by principles of comity to follow that judgment, nor the others referred to, as they were all based upon records in which the defense relied upon here was not brought to the attention of the court. This court is, therefore, free to examine the alleged anticipation of the Barrett device by that of Gard. It is practically conceded by both parties that, if the Gard patents do not anticipate, under the broad construction claimed by complainant, then on this record complainant's patents must be held to be valid and infringed. All of the patents introduced in evidence are for improvements in lifting jacks; and not only Gard, but a dozen others, had issued to them patents for improvements in jacks bearing more or less similarity to that of complainant before Barrett's first patent, No. 312,316, February 17, 1885. The idea of a lifting jack which by the same movement of the lever would raise and lower a load by a step by step movement was not new, as the records of the patent office, which were thoroughly searched by the defendant before manufacturing its device, disclose. It would seem, however, that Barrett first discovered and used for this purpose the yielding tripping plate upon which his patents rest, unless that device is described by the Gard patent. In the Gard patent No. 116,296 this device for lowering is described in the following language:

"An important feature in this invention is a device for lowering weights automatically by the same action of the lever and pawls as when raising weights, the construction, arrangement, and operation thereof being sub-

stantially as follows: On the two opposite sides of the standard, A, are pivoted two guides, G, G, so that they can be swung into different positions. Their upper ends are curved substantially as shown, or otherwise formed so as to effect the purpose desired, and their lower ends are weighted so as to hold the upper ends steadily in position for the suspended pawls, E, E, which project laterally over the guides, to slide on without disturbing them when the device is in action. These guides, when not in use, are swung up into the position shown in Fig. 1, and are held there by a sliding band, H (or its equivalent), on the stock of the standard, A, this band catching into a notch, f, in the edge of one of the guides, as shown. When the guides are to be brought into action, the one having the notch, f, is lifted a little to disengage the slide, H, which drops or slides on the standard till it reaches and rests on stops, g, g, on the standard, as seen in Fig. 2. The guides then swing down by their own gravity into the position shown in Fig. 2, being held there in the exact positions required by stops, h, h, thereon striking the sides of the standard. The upper ends of the guides in this position are such as to throw the pawls, E, E, sliding thereon successively out of gear with the teeth of the ratchet bar, B, in descending, as indicated at the left hand in Fig. 2, but not to prevent the ascending pawl from taking into the next higher ratchet tooth, as indicated at the right hand in the same figure. The effect is to lower the lifting bar by the ordinary action of the lever,—a great desideratum in lifting jacks."

It will be noticed that the parts adapted to perform the functions of the yielding tripping plate are called "guides"; but defendant's counsel say that if they answer the same purpose, and are in effect the same device, it does not matter whether they are called "guides" or a "tripping plate." That is true, but they are described as stationary when in action, "so as to hold the upper ends steadily in position for the suspended pawls, E, E, which project laterally over the guides, to slide on without disturbing them when the device is in action." One could not, by reading the description in this patent, have any idea that these guides were expected to perform the duties of a yielding tripping plate. To be sure, a model has been made from the specifications in the patent, with some modifications, in which these guides are movable when the device is in action, and they then perform the functions of a yielding tripping plate. If this model had been described in the patent, and the functions of the guides stated therein to yield as they do in the model, then I would have no hesitancy in holding that this Gard patent anticipated the complainant's; but the guides, according to Gard's description, are to be held "steadily in position for the suspended pawls to slide on without disturbing them when the device is in action."

In the second Gard patent,—No. 123,010,—the functions of these guides are referred to as follows:

"In order to adapt the weighted or swinging guides, G, G (claimed in a former patent issued to me for changing the lifting to a lowering jack), to the long and short pawls, D, E, and still be able to adjust them simultaneously, they are hung on pivots, i, k, respectively, opposite to or in line with each other, and their upper ends reach the different heights, so as to meet the pawls in the proper positions. The catch notches, l, l, of the two guides are also in line, so that the same swinging detent, I, may retain both at the same time, as indicated in full lines in Fig. 1, and relieve both together when it is swung down into the position indicated by dotted lines in the same figure. This detent may be simply and cheaply made of a single piece of wire bent into the form shown. The full lines in Fig. 1 show the position of the guide, G, when held away from its pawl, E, for lifting by the pawls; and its position for throwing out the pawl for lowering with the jack is shown by dotted lines in the same figure."

This does not, taken with patent No. 116,296, show the yielding tripping plate which is covered by complainant's patents. No one could, from these descriptions, have supposed that a yielding tripping plate was in the mind of Gard, and as the prior patent to invalidate must have placed the invention in the possession of the public by describing every essential element clearly and completely, the defense of anticipation is not, in this case, established, and the complainant's patents on this record are adjudged valid. As the yielding tripping plate is the principle upon which the defendant's structure is based, it must be adjudged to infringe the complainant's patents, and a decree will be entered accordingly.

THE NIKOLAI II.

(District Court, S. D. Alabama. May 21, 1900.)

No. 863.

1. ADMIRALTY—NEGLIGENCE—PERSONAL INJURY—EVIDENCE.

Libelant, who was one of a stevedore's gang employed in loading a vessel, while attempting at night to walk a beam that led to a wing between decks, where his hammock was swung, fell to the hold below, and was injured. On the question whether the master and crew were negligent in not having the between-decks properly lighted, the testimony was conflicting; libelant and others testifying that it was perfectly dark, or that the lamps were turned down so low that one could not see to walk the beam in question, while, on the other hand, it appeared that one of the gang was reading a newspaper 10 or 15 feet from the place where the libelant fell. *Held*, that the negligence of the master and crew was not established.

2. SAME.

If, when libelant descended the ladder to between-decks, he found it perfectly dark, so that he could not see where to walk, it was his duty to return up the ladder for a light, or attempt to get one.

3. SAME.

It being the custom for stevedores, employed in loading a ship, to furnish their own lights, the master and crew were not negligent in not keeping the between-decks lighted, to enable the stevedore's gang to reach their sleeping hammocks in safety.

In Admiralty. Libel for personal injuries.

The libelant was one of a stevedore's gang employed by the shipper to load the bark Nikolai II. The stevedores went aboard in the afternoon of the day before the loading was to begin. The vessel lay some distance off shore, and, as was customary in such case, the stevedores remained aboard both night and day during the period of loading. It was also customary at that season of the year for the stevedores to sleep between-decks, where they would swing their hammocks or put their cots for the purpose. The foot of the ladder leading to the between-decks rested on a cross beam 12 or 15 inches wide. Between the foot of the ladder and the decking in the wings of the vessel there were 7 or 8 feet on each side of the ladder over which there was no flooring, so that a person passing from the foot of the ladder to the wing decking must necessarily walk said beam. The libelant was acting cook for the stevedore gang, and some time after dark on the evening of the day on which he came aboard the vessel, in going to his hammock between-decks, he fell from the beam at the foot of the ladder into the hold below, and was severely injured, for which he brings this suit.

Denny & Wood and Gregory L. & H. T. Smith, for libelant.
Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge, after stating the case, delivered the following opinion:

The libelant was lawfully upon the ship, and was injured by falling into the hold. The question is, did his injuries result from the negligent failure of the officers of the ship to perform a duty necessary for his safety? There must be reasonable evidence of negligence on their part. *The Germania*, Fed. Cas. No. 5,360; *The Gladiolus* (C. C.) 22 Fed. 454; *The Jersey City* (D. C.) 46 Fed. 134; *The Louisiana*, 21 C. C. A. 60, 74 Fed. 748; *The Max Morris* (D. C.) 24 Fed. 860; *The Saratoga*, 36 C. C. A. 208, 94 Fed. 221; *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586.

It is not claimed by the libelant that the master and crew were guilty of any negligent act of commission which caused the injury complained of, but they are charged with an act of omission in that they omitted to keep the passway between the foot of the ladder leading to the between-decks and the wing decking between-decks safe and properly lighted. The evidence shows that the ladder, the passway, and the decking between-decks was such as is customarily found in vessels of the kind, build, and trade of this vessel. There was nothing unusual in their construction, and no special defect in them. The passway in question was commonly used, and shown by the proof to be reasonably safe. It was used by libelant's fellow stevedores on the same evening and night of his misfortune, and by some of them after dark, and but a short time before his accident.

On the question whether the between-decks were properly lighted there is some conflict of evidence. There is none, however, that they were lighted, except so far as libelant's testimony is concerned. He says it was perfectly dark. The evidence is not entirely harmonious as to the extent of the lighting; but from it we can have no doubt that Carr and Mitchell, the foremen or "boss" stevedores, were in their cots or hammocks some 10 or 15 feet from the foot of the ladder, and that they, or at least one of them, was at the time of the accident reading a book or newspaper. Some of the witnesses say there was but one lamp burning; others, that there were two. Suffice it to say there was sufficient light to see to read by. As to this there can be no serious dispute. Some of the stevedore gang came down between-decks after dark, and safely found their hammocks. One of them says his hammock was 40 or 50 feet from the ladder. Witness Jordan testifies that he saw libelant descend the ladder, and saw him as he reached the foot of it, but that before he saw who it was and could call to him he had fallen into the hold below. Jordan was some 15 or 20 feet away, laying in his hammock. He had during the evening swung libelant's hammock for him, but libelant had not been down between-decks to learn its location. One of the libelant's witnesses testifies that libelant fell while descending the ladder, and before reaching its foot. But he must be mistaken as to this. He is entirely uncorroborated.

When libelant descended the ladder, if it was as dark below as he

represents it to have been,—so dark that he could not see at the foot of the ladder what the passway was and in what direction to go, so dark that he “could not see where to walk,”—it seems to me that ordinary prudence and precaution required him to return up the ladder for a light, or to endeavor to get one, or while on the ladder to have called to his companion, Jordan, for a light, and particularly as he did not know where his hammock was swung, and had to depend on Jordan for information as to it. The statements of libellant, and of the witnesses who testify that it was perfectly dark, or that the lamps were turned down so low that a person could not see to walk the beam used as the passway between the foot of the ladder and the wing decking, are not only in conflict with much direct testimony on the subject, but are inconsistent with the circumstances shown by the testimony in that connection. Hence I am bound to believe that there was sufficient light to enable a person, exercising ordinary care, to have walked the passway to the wing decking. It is true that the ship did not furnish this light; but my opinion is that, under the circumstances of the case, it was not its duty to do so. It appears that it was customary for the stevedores to furnish their own lights, and that in this particular instance a number of them did so, as usual. *The Auchenarden* (D. C.) 100 Fed. 895. The unfortunate accident by which the libellant was injured was not attributable to any negligence or omission of duty of the master or crew of the vessel. The libel is therefore dismissed.

THE RIPON CITY.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1900.)

No. 868.

1. ADMIRALTY JURISDICTION—MARITIME CONTRACTS.

A clause of a charter party giving the charterer the agency of the ship in case she is in general average during the term of the charter creates a maritime contract, which may be enforced in a court of admiralty.¹

2. SHIPPING—MUTUAL LIENS OF VESSEL AND CARGO.

The mutual lien between vessel and cargo, resulting from a contract of affreightment, exists, as against the ship, only in favor of the cargo itself, and does not extend to agreements in the charter party which do not relate to the cargo.

3. MARITIME LIENS—BREACH OF CHARTER—REFUSAL TO PERMIT RENDITION OF SERVICES.

Under the general maritime law, there is no lien upon a ship for damages resulting from a breach of a provision of a charter making the charterer the ship's agent for the adjustment of general average, and, in the absence of an express provision for a lien in the charter, a suit in rem cannot be maintained against the ship to recover such damages because of a refusal to permit the charterer to act as such agent.

4. SHIPPING—CONSTRUCTION AND OPERATION OF CHARTER—PROVISION MAKING CHARTERER SHIP'S AGENT.

A charterer had no interest in the cargo, and his only interest in the voyage was in the excess of freight earned over the amount of the hire

¹ As to admiralty jurisdiction in matter of contract, see notes to *The Richard Winslow*, 18 C. C. A. 347, and *Boutin v. Rudd*, 27 C. C. A. 530.

stipulated for in the charter. The charter contained a provision that, in case the ship was in general average, "the agency and the settlement thereof" should remain with the charterer or his agents. After the ship had loaded and started on her voyage she took fire, and returned to the port of sailing, where, the charterer not being at such port and having no agents there, the master employed another agent, who took charge of saving the vessel and cargo, and continued to perform such services as were required on behalf of the vessel resulting from the disaster. *Held*, that the master was justified by the emergency in making such employment, and that he did not violate his duty in refusing to discharge such agent when the charterer appeared two days later, and demanded that the ship be placed in his charge, as the result of such action would have been to fasten double liens on the ship for one set of services.

5. SAME.—LEGALITY OF PROVISION OF CHARTER.

A provision of a charter which would authorize the charterer, as the ship's agent, in case of her taking fire, to assume entire charge of her, and of the matter and means of extinguishing the fire, the unloading and reloading of cargo, and otherwise performing the duties which under the maritime law devolve on the master, is void, as against public policy.

Appeal from the District Court of the United States for the Southern District of Georgia.

This is an appeal from a decree in admiralty in favor of the libellant for the sum of \$1,000, with interest and costs. The action is in rem for breach of a special clause in a charter party, to wit: "The drafts for difference in freight and for disbursements are to be insured by the charterers against general average and other marine risks incidental to the interest, and in case steamer is in general average at port or ports of loading, or on the voyage, or at port or ports of discharge, the agency, and settlement thereof, shall remain with the charterers or their agents." The charter party, among other provisions usual in such instruments, contained the following concerning liens: "Any difference in the amount of freight between the bills of lading (and the drafts for disbursements referred to below) and this charter party to be settled at port of loading before sailing,—If in favor of vessel, by cash at current rate of exchange, less insurance; if in favor of charterers, by usual draft of master, payable three days after arrival at port of discharge, or sixty days after date, whichever occurs first, to the order of the charterers or advancers; and the agents, with the consent of the owners, do hereby authorize the master to sign such drafts, and said drafts shall be a lien against the freight, taking precedence of all other claims. Freight payable on 'through' bills of lading from interior points, and on the usual ship's bills of lading, shall (subject to the steamer's lien thereon for chartered freight, and the lien of the drafts of the master and the rights of the holders thereof for difference in freight and [or] disbursements), belong exclusively to the charterers, and shall be collected by their agents at port of discharge. Cargo shipped on 'through' bill of lading from interior points, and for which no ship's bill of lading, but only a 'master's receipt,' is taken, it is understood and agreed that the cargo described in the 'master's receipt' shall be delivered at the port of discharge upon presentation of the said 'through' bill of lading, provided that the particulars agree with those stated in the triplicate 'master's receipt' held by the master. The master shall, if required, give the customary draft on the consignees for whatever inland railway charges are collectible from the receivers of the cargo, as shown on bills of lading and manifest, and said draft shall be a lien against the vessel and her freight. All cargo on board under this charter not claimed by bills of lading shall belong to the charterers, and is to be delivered to their agents at the port of discharge, without any claim by the steamer, except for freight as above mentioned, after shorts are provided for." "Cash for steamer's ordinary disbursements at port or ports of loading to be advanced to the master by charterers, at current rate of exchange, steamer paying two and one-half per cent. commission thereon and cost of insurance, and the master to give the usual draft, payable three days after arrival at port of discharge, or sixty days after date,

whichever occurs first, for the amount of such disbursements, to the order of the charterers or any other parties advancing the said money; and the agents, with the consent of the owners, do hereby authorize the master to sign such draft, and said disbursements and said drafts shall be a lien against the vessel and freight, taking precedence of all other claims." "Charterer's liability under this charter to cease on cargo being shipped, but the owners or master of the steamer to have an absolute charge and lien upon the cargo and goods laden on board for freight."

The libel pleads a charter party of the British steamship *Ripon City*, for a voyage to the Baltic, dated the 3d of October, 1896, and alleges that the steamer loaded cargo at Savannah, and departed from that port for Reval, on November 16, 1896; that about 100 miles out fire was discovered, and the vessel put back, arriving in Savannah on November 17th; that the master returning in this distress took no steps to notify the libelant in Philadelphia that the vessel had put back, and instead put the ship and cargo in the charge of the firm of J. F. Minis & Co., of Savannah; that on the 17th of November libelant cabled to the owners in England, requesting that the vessel be put in his hands as agent, and telegraphed also to the master in Savannah to take no action except what was absolutely necessary until the libelant arrived there; that libelant proceeded from Philadelphia to Savannah, arriving on Thursday, the 19th of November, and was then informed by the master that he would not permit libelant to take charge of the agency, since the vessel was already in charge of Messrs. Minis & Co.; and that libelant had tendered his services as agent, offering from day to day to act as such, and to furnish and disburse all sums of money necessary for the vessel, which offers had been steadily and persistently refused by the master and owners, "so that the libelant has not been permitted at any time to enter upon the performance of such duties as agent." As damages, the libelant claimed \$2,500 for services that he was prevented from performing, \$500 for unnecessary trouble and expense incurred in attempting on his part to carry out the charter-party stipulations, with \$1,000 for further damage incident to the breach of the charter party, causing the libelant to employ counsel and file a libel for his protection.

The libel was filed on December 14, 1896, and process issued, upon which the *Ripon City* was attached. Upon the return of process, the master appeared, filed claim, and excepted to the libel on the ground that the allegations thereof did not disclose any admiralty and maritime lien upon said vessel to found an attachment in rem. The various items of damages were also excepted to. After hearing, the exceptions were overruled.

The respondents thereupon answered, setting forth that it was the duty of the libelant to present himself or be represented by a competent agent at the port in which the said steamer, in case of distress, should be in general average, so that the steamship should be enabled to have the immediate benefit of such agency; that the *Ripon City* returned on fire, the sides of the engine room and bulkheads being terribly heated, and signals of distress hoisted at Tybee; that a tug met the returning steamer with a member of the firm of J. F. Minis & Co., who had represented the libelant in the original loading; and that as the vessel was burning fiercely, and, with the cargo, was in imminent peril, in the emergency and in the interest of all concerned the master requested the firm of J. F. Minis & Co. to take charge. A detailed statement of the services of the said firm followed in regard to extinguishing the fire, employment of tugs, contract with stevedores, surveyors, discharge and storage of the damaged cotton; all of which had been accomplished before the libelant had come on the scene. The answer further alleged that, if the master had been obliged to wait until he had heard from the libelant before taking steps to protect the vessel, it would have been destroyed, with her cargo. The answer admitted that on and after the 19th of November the libelant did offer to proceed as agent, which services were declined.

On the trial it appeared that Mr. Willson prepared his own form of charter party, with his name conspicuously printed at the top, and that this special clause giving him an agency in case of average is a novel provision of his own devising. He has incorporated it in charter parties for the last six or seven years. The libelant was not the owner nor the shipper of the cargo of the

Ripon City. His function appears to have been that of a middleman, who merely engages tonnage by lump-sum charter, and then turns over the contract to the responsible merchants,—in this case, to Messrs. McFadden & Bro., of Philadelphia, who employed Messrs. J. F. Minis & Co. as agents in loading the ship. The libelant had no part in loading the ship after he turned the contract over to McFadden & Bro., but the appointment of Messrs. Minis was known to the libelant and agreeable to him. On leaving Philadelphia to come to Savannah after the fire, Mr. Wilson had secured the special agency for the cargo interests of the Ripon City. Testimony was given that it was inconsistent for the interests of cargo underwriters and shipowners to be represented by one and the same person in the average. Much testimony was taken tending to establish the matters propounded in the libel and alleged in the answer, but the bulk of it was in relation to the manner in which the Ripon City and her cargo was handled from the discovery of the fire, and in the methods followed in extinguishing the same; the libelant, Wilson, contending and seeking to prove, by experts who had handled cotton fires under his instructions, with steam, that it had simply been flooded with water in the usual way, to the great loss and damage to all concerned, instead of being extinguished by the more modern, economical, and efficacious mode, namely, by the application of steam mainly, with as little water as possible.

The court held, on final hearing, that, after the ship had entered upon the performance of the charter party by loading cargo, the charterer had a lien in rem for the breach of any stipulations of this contract, and that in the emergency the master acted rightfully for the common interest in the employment of Messrs. Minis & Co., saying: "The emergency was immediate. I do not doubt that but for the prompt assistance, like that rendered by Mr. Minis, the cargo and the ship would have been destroyed. It was then the duty of the master to secure that assistance, and this he did by the employment of experienced and competent agents who acted for him. Minis & Co. are not parties to this proceeding, but the services they rendered were in fact services which the charterer, if on the ground himself, must have rendered." The court further concluded that libelant, on reaching Savannah, had a right to settle with Messrs. Minis & Co. for the work already done, and then take from them the agency of the ship. As the libel estimated the entire services at \$2,500, the court inferred that Minis had already earned \$1,500, and awarded the libelant a decree for \$1,000 as his recovery.

The claimants appealed to this court, and assigned error as follows: "(1) That the court erred in deciding that a libel in rem was the appropriate remedy for the wrongs alleged by said appellee in his said libel; (2) that the court erred in not dismissing the libel filed in said case on the ground that there could be no lien for services not rendered; (3) that the court erred in finding that any sum was due to the libelant in said case; (4) that the court erred in finding that the vessel having been in peril, and the master having, in the exercise of his duty, employed an agent, the said agency should have been revoked, and the interest of the vessel turned over to the libelant, after most of the services had been already rendered by another, and the libelant had assumed antagonistic relations to the respondent; (5) that the court erred in overruling the exceptions filed in said case, and erred in finding against any one of the contentions therein set forth."

Harrington Putnam and Walter G. Charlton, for appellants.
William Gerrard, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The clause of the charter party which is the basis of this suit so far relates to the rendition of maritime services that it may be called a maritime contract, and, as to its enforcement, held to be within the jurisdiction of the admiralty; but whether, to recover damages for the breach of the contract, the libelant can proceed in rem, and cause

the seizure of the ship, is another question. To warrant the seizure of the ship as the thing indebted, the libellant must have a lien on the ship to the extent of his damages. It is clear that he has no express lien. The charter party expressly contracts for and preserves a lien on the freight for the difference in amount of freight as shown by the bills of lading and the freight agreed upon in the charter party, a lien on the ship and freight for inland charges and ship's disbursements, and a lien in favor of the ship for the freight on the cargo and goods laden on board, but gives no other liens; wholly omitting the usual provision where a general lien is given to carry out the provisions of the charter party, to wit: "To the true and faithful performance of all and every of the foregoing agreements we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, and also said vessel, freight, tackle, and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of estimated amount of freight." *Expressio unius est exclusio alterius*. It follows that, if the present libellant has a lien, it must be because allowed and provided under general admiralty and maritime law. "Admiralty and maritime liens are *stricti juris*, and are not given by implication." *Vandewater v. Mills*, 19 How. 89, 15 L. Ed. 554.

Mr. Justice Curtis gives the rule applied in the United States courts as follows:

"For I understand it to be a settled rule that privileged liens constituting a *jus in re*, accompanying the property into the hands of bona fide purchasers, and operating to the prejudice of general creditors, are matters *stricti juris*, which cannot be extended from one case to another argumentatively, or by analogy or inference. They must be given by the law itself, and the case must be found described in the law. *Privilegia, cum sunt stricti juris, nec extendi possunt de re ad rem, nec de persona ad personam*. 1 Boulay Paty, *Cours de Droit Com. et Mar.* p. 36; Emerigon, *Contrat a la Grosse*, c. 12, § 1. Even when the court may be of opinion that the law might be beneficially extended to include cases not described in its terms, it must be left to the legislative power so to extend it. This is even expressed by Pardessus (3 *Droit Com.* pp. 597, 598), when reasoning on the policy of allowing a privilege for premiums of insurance. 'Analogy cannot afford a decisive argument, because privileges are of strict right. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words. We cannot arrive at it by reasoning from one case to another.'" *The Kiersage*, 2 Curt. 421, 424, Fed. Cas. No. 7,762.

It is settled with substantial unanimity that unexecuted maritime contracts carry no lien. See, as to affreightment, *The Freeman v. Buckingham*, 18 How. 188, 15 L. Ed. 341, and *Vandewater v. Mills*, *supra*; towage, *The Prince Leopold (C. C.)* 9 Fed. 333; furnishing supplies, *The Cabarga*, 3 Blatchf. 75, Fed. Cas. No. 2,276; wages, 1 W. Rob. Adm. 89.

In some instances, where services are rendered or supplies are furnished, no lien follows; for, by the maritime law, the master has no lien on the ship even for wages, nor the ship's husband any lien. See *The Orleans v. Phoebus*, 11 Pet. 184, 9 L. Ed. 677; *Norton v. Switzer*, 93 U. S. 365, 23 L. Ed. 903; *The Larch*, 2 Curt. 428, Fed. Cas. No. 8,085; *The Shortcut (D. C.)* 6 Fed. 631; *The Daniel Kaine (D. C.)* 35 Fed. 787; *The Nebraska*, 21 C. C. A. 448, 75 Fed. 599.

Conceding that the libellant in this case had a valid contract with the ship to employ his services in and about the affairs of the ship in case of general average, and that the master intentionally violated the contract, and refused to employ libellant, to his damage, still it seems clear, on general principles, that no lien on the ship resulted.

It is, however, contended that as the contract to employ libellant's services was one of the provisions of a charter party, contracting for the affreightment of the ship, which contract of affreightment was executed by the delivery and acceptance of cargo duly loaded, and the ship begun her voyage under said contract, a lien resulted; and reliance is had upon the well-settled proposition that after cargo is delivered the ship is bound to the cargo, and the cargo is bound to the ship, for the full performance of the contract. The libellant was not the owner, nor shipper, nor consignee of the cargo of the Ripon City. His sole interest, after the Ripon City was loaded and started on her way, was to be employed as the ship's agent in the matter of general average resulting from the fire which broke out on board. His employment or nonemployment in no way affected the ship's liability to the cargo. If employed, it was to be for the ship, and, it may be presumed, if he had been employed his services would have benefited the ship; but it can hardly be pretended that his employment to represent the ship in general average could or would have been in the interest of the cargo, if, for no other reason, because in general average the interests of the ship and those of the cargo are adverse. That the ship is bound to the cargo, and the cargo bound to the ship, for the fulfillment of the contract of affreightment, is in all maritime codes, and we may examine text-books and adjudged cases to see how the principle has been applied, controlled, and limited.

Conkling, in his treatise on Admiralty, says:

"It may be safely said, therefore, it is presumed that in this country the rule declaring the liability of the ship to the merchandise, and of the merchandise to the ship, is practically, as well as theoretically, true. As it is here interpreted and applied, it imports that the freighter has a lien on the ship and freight for the safe conveyance and delivery of his goods according to the contract under which they are shipped; that the owners, upon the fulfillment of their engagement, have a lien on the goods for their freight; and that these liens may be enforced by admiralty process in rem." Volume 1, p. 166.

In *The Maggie Hammond*, 9 Wall. 435, 19 L. Ed. 772, the supreme court of the United States said:

"Undoubtedly the owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport, and right delivery of the same, as much as the shipowner has upon the cargo for the freight, as expressed in the maxim, '*Le batel est obligé à la marchandise et la marchandise au batel.*' Subject to the exception that the lien of the shipowner may be displaced by an unconditional delivery of the goods before the consignee is required to pay the freight, or by an inconsistent and irreconcilable provision in the charter party or bill of lading, the rule is universal, as understood in the decisions of the federal courts, that the ship is bound to the merchandise, and the merchandise to the ship, for the performance on the part of the shipper and shipowner of their respective contracts. Shipowners contract for the safe custody, due transport, and right delivery of the cargo, and for the performance of their contract the ship, her apparel and furniture, are pledged in each particular case, and the shipper, consignee, or owner of the cargo contracts to pay the freight and charges, and to the fulfillment of their contract

the cargo is pledged to the ship, and those obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement."

Judge Ware, whose admiralty decisions are of very great authority, expresses himself to the effect: "The reciprocal lien exists only between the goods and the carrier." *The Drinkwater v. Spartan*, 1 Ware, 149, Fed. Cas. No. 4,085. The vessel is liable in specie to the shippers. *The Phebe*, 1 Ware, 263, Fed. Cas. No. 11,064. The ship is, by operation of law, hypothecated to the shippers for any loss they may sustain from the insufficiency of the vessel or the fault of the master and crew. *The Casco*, Davis, 184, Fed. Cas. No. 2,486. A lien on the vessel is called by Lord Tenterden "a security to the merchant who lades goods on board." See *Abb. Shipp.* 122. In the Code de Commerce there are two articles that deal with the subject, as follows:

"280. Le navire, les agrès et appareils, le frêt et les marchandises chargés sont respectivement affectés à l'exécution des conventions des parties."

"191. Sont privilégiées et dans l'ordre ou elles sont rangées, les dettes ci-après désignées: * * * 11° Les dommages-intérêts dus aux affrèteurs pour le défaut de délivrance des marchandises qu'ils ont chargées, ou pour remboursement des avaries souffertes par les dites marchandises par la faute du capitaine ou de l'équipage."

In 1 *Traité de Droit Maritime par Lyon-Caen & L. Renault*, pp. 559, 560, we find the following:

"Privilege of the Charterer. The privilege granted by the law to the charterer upon the ship does not secure all the charterer's claims against the owner, as might be inferred by the provision of article 280 that the ship, its tackle and apparel, the freight, and the goods laden, are, respectively, liable for the fulfillment of the conventions of the parties. Article 191, subd. 11, restricts the privilege to the damages due to the charterers by failure in delivering the goods which they have loaded, or for recovery of the damages which the goods have sustained by fault of the master or crew. Privileges are matters of strict law. The charterer is not privileged for the damages due by reason of delay occasioned by fault of the owner, or by those for whom he is liable."

In respect to the contention that the maritime lien resulting from a contract of affreightment extends to all agreements in a charter party, whether relating to cargo or not, Mr. Justice Thompson says:

"If a charter party embraces stipulations purely of a personal nature, having no relation to a maritime service, in the safe carrying and delivery of the cargo, the admiralty jurisdiction of the district court could not reach the case, and afford relief for a breach of such part of the contract." *Alberti v. The Virginia*, 2 Paine, 115, 128, Fed. Cas. No. 141.

It seems to be text-book law that there is no lien for dead freight, i. e. unliquidated damages under the name of freight. 1 *Pars. Adm.* 292; *Macl. Shipp.* 435. Indeed, it has been so held in many English cases where the charter party expressly stipulated for a lien for dead freight. *Id.*, and notes. And it is the same for money in the name of freight, stipulated to be paid in advance. *Id.* The learned judge in the court below maintained the proceeding in rem in this case on general principles, and cited in support thereof several decisions and opinions of the supreme court of the United States, to wit: *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465;

Morewood v. Enequist, 23 How. 493, 16 L. Ed. 516. These cases were proceedings in personam where was discussed the general jurisdiction of the admiralty courts over maritime contracts, and the particular question as to whether a lien was given by the general maritime law to cover every stipulation in a charter party, or even to cover every maritime contract, was not before the court nor discussed. The learned judge also cited a number of cases arising in the circuit and district courts, and we find many others in the brief filed by the learned counsel for the appellee. So far as we have been able to examine these cases, we find that no one of them involved the question here pending, and, while we do not question that these cases were correctly ruled, we do not feel called upon to reconcile all the expressions used in the several opinions with our own views on the subject. We are satisfied that for the damages which libellant may have suffered by the failure of the master of the ship to employ his services, as propounded in the libel, he has no lien, either by contract or under the general maritime law, and therefore we conclude that there was error in the court below in overruling the exceptions to the libel in rem.

On the merits of the case, we agree with the court below in holding that when the fire broke out on board the *Ripon City* the libellant was in no position to have afforded assistance to the master; that the emergency was immediate, and that the master properly acted in the employment of experienced agents to assist him, and in making contracts looking to the preservation of the ship and cargo. But we do not agree that when the libellant arrived in the port of Savannah, after the above steps had been taken by the master, and demanded the discharge of the agents theretofore employed and the employment of himself, it was the duty of the master to comply with his request. The result of this action would have been to fasten double liens on the ship for one set of services.

We do not undertake to determine exactly the meaning of the clause of the charter party which is the basis of libellant's suit. As propounded in the libel, and as contended for in argument, to wit, that immediately upon the ship's taking fire the libellant had the right under his contract to take entire charge of the ship, and of the matter and means of extinguishing the fire, loading and unloading cargo, and otherwise performing the duties which, under the maritime law, devolve upon the master, we are satisfied it is contrary to public policy. The duty of preserving the ship and cargo, and of protecting the lives of people aboard, devolves on the master, and by express statutes the owners of no English or American steamship can employ as a master any but a duly-qualified and licensed seaman, and any contract which undertakes to set aside the master, and to put in charge of a going steamship any unlicensed person,—no matter how well qualified otherwise, or how much interested in ship or cargo,—ought to be held void in any court of admiralty.

The decree of the district court is reversed, and the cause is remanded, with instructions to dismiss the libel.

THE ELIZA LINES.

(Circuit Court, D. Massachusetts. April 20, 1900.)

No. 368.

1. SHIPPING—GENERAL AVERAGE—RULES FOR ADJUSTMENT.

Although a court directs that contributions to general average be made on the basis of the completion of a voyage, interrupted without right by the charterers, it may also properly direct the adjustment to be made in accordance with the customs of the port where the voyage actually terminated, and where the adjustment is in fact made; the question of what custom shall be adopted being one of convenience, rather than of theory.

2. SAME.

An item of general average charges, based on the estimated cost of re-loading cargo discharged on account of injury to the vessel, is not properly allowable where, by reason of the fact that the voyage was not resumed, the expenditure was not actually made. Aliter, under the circumstances, as to estimated commissions.

3. SAME—ASCERTAINMENT OF CONTRIBUTORY VALUES.

Although, under the circumstances of a case, salvage is a matter of particular averages against the vessel, cargo, and freight severally, yet where such averages arose out of a peril which renders a general average necessary they are to be deducted in ascertaining contributory values for the purpose of the general average.

4. SAME.

In computing contributory values for the purpose of a general average adjustment it is not necessary that they should all be taken at the same time and place, but, according to the custom of Boston, the value of the vessel is obtained by taking her value at the port of refuge, and adding to it the benefit she received from the general average, while the value of the cargo is taken according to the place and time of its arrival at the port of destination.

5. SAME—FREIGHT.

In a general average adjustment no deduction is to be made from freight charged against the cargo owner because the cargo has been subjected to particular average charges for salvage.

6. SAME—INTERRUPTION OF VOYAGE BY CARGO OWNER—DAMAGES RECOVERABLE.

Where the cargo owner takes the cargo from a vessel before the completion of her voyage, under circumstances which do not entitle her to exemplary damages, she can recover only such damages as will compensate her for the net injury suffered, and from the estimated net freight she would have earned is to be deducted the net amount she earned, or should reasonably have earned, during the time it would have taken her to complete the voyage.

In Admiralty. This was a consolidated suit arising out of the abandonment at sea, after a storm, of the Norwegian bark *Eliza Lines*, and the subsequent bringing of such vessel, with her cargo, into the port of Boston, as a derelict, by the original libelants.

Edward S. Dodge, for Black and others and Bank De Genes.

John Lowell and James A. Lowell, for Andreasen.

Lewis S. Dabney and Frederic Cunningham, for Ward & Co. and Darrach.

PUTNAM, Circuit Judge. The question before the court is that of confirming the report of the commissioner appointed in accord-

ance with the opinion passed down on April 3, 1894. (C. C.) 61 Fed. 308. The commissioner has, in the main, pursued the course marked out in that opinion, and his report is of the utmost value to the court in disposing of the case. No exceptions have been filed except by James E. Ward & Co. Near the close of our prior opinion, we directed that all things decreed by the district court should be followed except as otherwise provided for or modified by us. This had relation to what was in fact decreed, and it had none to the report of the assessor in that court, estimating that the amount to be contributed for general average was \$4,818.01. This estimate was not confirmed by the district court, nor made the basis of any decree. The details of the assessor's estimate were stated and accepted by the commissioner, and they include, "Commission on advancing and paying out general average, five per centum, \$224.67." This is now excepted to on the ground that this amount was never in fact paid by the owners of the vessel. The commissioner also included in his estimate of the amount of general average charges an item of \$319, supposed cost of reloading the cargo at Boston. These two items stand in the same general category, and will be referred to again.

The cargo was sold at Boston, the record shows, for the gross amount of \$1,825. From this were paid the charges of sale, amounting to \$116.61, which, of course, are no part of the general average, leaving \$1,708.39, which was paid into the registry of the court as net proceeds. The cost of discharging the cargo, pumping the vessel, wharfage, and storage, allowed by the district court, was \$1,051.09. Of this the district court apportioned to the cargo \$797.65, and to the vessel \$253.44. The \$797.65 was paid out of the registry, leaving net \$910.74 therein, as proceeds of the cargo. That court allowed the vessel pro rata freight to the amount of \$1,450, and directed that the \$910.74, net proceeds of the cargo in the registry, should be applied towards the payment of freight. Thus it was, as said in our prior opinion, that the proceeds of the cargo were applied to the payment of freight and general average, because the charges for discharging cargo, pumping, storage, and wharfage were of the latter class. The proceeds of the cargo thus applied to the payment of freight became, therefore, the property of the owners of the vessel, and were consequently again applied by the district court towards the payment of salvage on the vessel and of freight. Following strictly the terms of our previous opinion, we should confirm this application made by the district court, and regard so much of the proceeds of the cargo as amounted to \$797.65 as applied towards general average charges, and \$910.74 towards the payment of freight. We will refer to this again.

The district court decreed that the salvors recover against the vessel and her cargo \$750 for salvage, and also their costs of suit, taxed at \$313.61. It apportioned these sums between \$2,250, the valuation of the vessel, and the \$910.74 which the court applied towards payment of freight. If its decree in this particular should be lit-

erally construed, the salvors would have been allowed nothing on account of the cargo. Therefore, in our earlier opinion, we held this to be substantially an allowance for the salvage of the vessel and cargo only, and we directed an additional allowance for salvage services and expenses touching the freight, payable only from sums to be realized from James E. Ward & Co.

The main issue raised by the exceptions to the commissioner's report grows out of this expression in our former opinion with reference to adjusting general average:

"The value of the vessel on arrival at Boston will be taken at \$2,250. In other respects, general average will be adjusted on the same principles as though the voyage had been subsequently completed, and according to the customs prevailing at the port of Boston."

This was stated very briefly, and the court now perceives that it would have been better to have stated it more fully. However, a careful consideration of the principles expressed in the opinion, on which it proceeded, leaves no doubt as to its proper interpretation. We held that, in the eyes of the law, the charterers, James E. Ward & Co., without right, broke up the voyage at Boston, when they should have permitted the vessel to reload the cargo, and deliver it at Montevideo or Buenos Ayres, according to the terms of the charter party. It followed, as all must see, that the charterers were liable to make good in all respects as though the voyage had been completed. This, of course, cannot be done in form or in specie, but it can be accomplished in substance. Therefore, the charterers were decreed to pay net freight, estimated on the principles pointed out in the opinion, and also they were, of course, liable to contribute towards the general average on the same principles on which they would have contributed if the voyage had been completed, and the general average computed at the end of the voyage, as it would have been in due course. Very likely, a literal following out of the consequences of this proposition would have required us to direct that the general average should be adjusted according to the customs prevailing at the river Plate; but the voyage was in fact broken up at Boston, and the adjustment was necessarily to be made there. The place of adjustment of general average is a question of convenience, rather than of theory. The rules are largely artificial; and, as it is impracticable, from the nature of the thing, to do exact justice, the whole matter of general average is *judicium rusticum*. There is nothing in the record, and nothing was brought to our attention, to show that the practical results of an adjustment according to the customs at the river Plate would substantially differ from those of one made according to the customs at Boston, notwithstanding we are quite of the impression that, in at least two particulars, an adjustment according to the customs prevailing at Boston would be more favorable to James E. Ward & Co., as will appear from what we will say further on. The justice of our propositions would be illustrated by taking the diversities in practice as

shown in a general way by Gow, Ins. (1895) at pages 304 and 305, and undertaking to construct an adjustment throughout according to any particular custom there explained. How far, as applied to this case, modifications in certain directions required by any customs there explained, other than those of Boston, would be offset by other modifications, neither party has presented anything which will enable us to determine, or to cause us to hold that the net result would be materially modified. On the whole, we could see no reason why we should complicate the computations in this case by referring the parties to the customs of Buenos Ayres or Montevideo, when the customs of Boston were under our hands. The commissioner has followed our directions in this respect.

The commissioner makes the general average charges \$6,434.10. The only items questioned are those of \$224.67 and \$319, already referred to. Although these are items which ordinarily enter into adjustments of general average, yet there is no equity in compelling contribution for what was in truth saved to the vessel by the fact that James E. Ward & Co. took possession of their cargo at Boston. Of course, the item of \$224.67, which appeared in the assessor's report to the district court as a "commission for advancing and paying on general average five per centum," was not in fact paid in that particular form, because there was no general average adjustment. Nevertheless, the vessel was compelled to make the repairs which entered into the hypothetical adjustment. The commission was computed by the assessor in the district court on only the general average items which went into the cost of repairs, after the deduction of one-third for new. It covered no part of the items added to general average by the commissioner, which include \$1,051.09, the cost of discharging, pumping, wharfage, and storage. As the vessel was foreign, and as she in fact made the repairs estimated by the assessor, it is to be assumed from common knowledge that she, in some form, paid the commission allowed. On the other hand, the item of \$319 was clearly not paid, and, on a correct adjustment, should be deducted.

We come to the contributory values which the commissioner placed on the vessel, freight, and cargo. James E. Ward & Co. object that he has taken the value of the whole cargo, yet that he should have deducted 45 per cent. thereof, which they say was appropriated in Boston to the use of the salvors. Under some circumstances, salvage becomes a matter of general average; but, under the circumstances of this case, it constitutes particular averages against the vessel, cargo, and freight severally. Dix. Ins. (2d Ed.) 102; Lown. Gen. Av. (4th Ed.) 149; Gow, Ins. 285. As, however, these particular averages arose out of the peril which rendered necessary the general average, they are to be deducted in ascertaining contributory values. It is only necessary for this to refer to Phil. Ins. (5th Ed.) § 1402. The reductions, however, would not be theoretically 45 per cent., nor would they be from the cargo alone. The values of freight and vessel would also be reduced.

The salvage awarded against the vessel was \$1,249.32, and, as we have explained, against the cargo, \$505.68. If account were to be taken of the taxed costs, they would follow the same proportion. Adding to the salvage awarded against the vessel the amount which, according to the final determination of this case, must be awarded against the freight, and deducting these several sums from the contributory values given by the commissioner to freight, vessel, and cargo, as must be done if the exceptions of James E. Ward & Co. in this particular are regarded, the result would be to their detriment, and would more than offset what they have lost by the addition to the general average charges of the item of \$319, to which we have already referred.

James E. Ward & Co. also filed a group of exceptions to the report in various forms, the substance of which is that they object to it on the ground of its refusal to take the sale of the cargo at Boston as fixing its contributory value. In this connection they say the commissioner has taken the valuations of the respective contributories, vessel, freight, and cargo, at different periods of time; and especially they insist that, while the valuation of the cargo is taken as of the time of its arrival at the river Plate, that of the vessel is taken at Boston. In determining the value of the vessel, the commissioner added to her appraisal at Boston, \$2,250, as directed by our opinion,—the benefits which she derived from the general average. This is correct on the theory that the adjustment is to be made on the values at the river Plate, but according to the customs at Boston, as we directed it should be made. The repairs of the vessel cost quite an amount in addition to what went into general average, so that her value at the river Plate might be considered to be more than her appraised value at Boston, plus the benefit she received from general average; but her contributory value at the river Plate would be precisely what the commissioner has made it. For him to have increased her value as of the time of her arrival at the river Plate beyond the result of his computation would be a violation of the well-settled rule stated everywhere, but especially in section 1402, Phil. Ins., to which we have already referred.

The insistence of James E. Ward & Co. that all contributory values should be taken as of the same time is clearly wrong. The rules according to the custom at Boston are stated in *Dix. Av.* (1867) at pages 8 and 172, which shows that the value of the vessel is obtained by taking her value at the port of refuge, and adding to it the benefit which she received from general average, while the value of the cargo is taken according to the place and time of its arrival at the port to which it was destined. This is shown more clearly in *Dix. Ins.* (1866) at pages 343 and 345.

No complaint is made by James E. Ward & Co. of the contributory value of the freight as fixed by the commissioner. This was clearly in accordance with the custom of the port of Boston, although, if it had been made according to the custom at the river Plate, it might have been less advantageous to them, because the

deduction there from the gross freight would probably have been one-half, instead of one-third, as it is according to the custom which the commissioner followed. Moreover, at the river Plate, the ship would probably have contributed for only one-half of its value and the cargo for the whole, so that in this respect also James E. Ward & Co. might have been gainers, and not losers.

There is one minor item to which the exceptions relate, but, on the whole, we are satisfied that the result of the adjustment of general average made by the commissioner was favorable to James E. Ward & Co. Therefore, as the other parties have not excepted to the report, and as we are satisfied that James E. Ward & Co. cannot complain of the net result of the commissioner's adjustment of general average, we are of the opinion that we are not required to recommit the case to the commissioner, and thus cause further long delay in the litigation, merely because the commissioner has proceeded in the particulars to which we have referred on certain mistaken theories, while a recommitment could not be of any practical advantage to the excepting party.

We have not, in this connection, overlooked the objections taken by James E. Ward & Co. to the value which the commissioner has put on the cargo on the theory that it had arrived at the river Plate. Our first impressions were that the value was excessive, and that sufficient deductions were not made for its damaged condition. We were especially impressed by the fact that, if its actual value if delivered at the river Plate would have been so far in excess of its invoice value as the report makes it, James E. Ward & Co. would not have permitted it to be sold at Boston, but would have sent it forward, either in the Eliza Lines or in some other vessel. Nevertheless, the commissioner investigated the matter with evident care. Quite an amount of testimony was taken by him as to values, and the only proof offered in behalf of James E. Ward & Co. was the evidence of their own agent, who represented them in the proceedings at Boston about the vessel, and who was still interested in their behalf. It is true that this agent is evidently a man of experience in this particular; but on the question of values the commissioner had what he was entitled to accept as positive evidence of sales of similar cargoes at the river Plate at or about the time to which this litigation relates. Of course, he was not required to accept the opinions and estimates of the witness produced in behalf of James E. Ward & Co., in view of the relations which the witness sustained to them, and his testimony did not go beyond opinions and estimates. On the whole, notwithstanding our first impressions, we do not find sufficient to justify us in disturbing the valuation put by the commissioner on the cargo, having in regard the weight which the supreme court has frequently said should be given to conclusions of masters, assessors, and commissioners.

The remaining important question is that of the amount for which a decree should go against James E. Ward & Co. for freight. On this question both parties have cited to us the judgment of Lord

Mansfield in *Luke v. Lyde*, 2 Burrows, 882. James E. Ward & Co., relying on this, maintain that they should not be charged with freight on the portion of the cargo represented by the award to the salvors, which they also compute for this purpose as 45 per cent. thereof. Undoubtedly, some of Lord Mansfield's expressions sustain this proposition; and like expressions of Mr. Justice Story are found in *The Nathaniel Hooper*, 3 Sumn. 542, 552, Fed. Cas. No. 10,032. Mr. Justice Story cited, and apparently relied on, *Luke v. Lyde*, but the facts before him were entirely unlike those at bar, because in the case before him the ship was sold under an admiralty decree, and was not able to go forward with her cargo, and the only question was one of freight pro rata, which is not at all the question here. These references are against the underlying principles of the maritime law with reference to payment of freight. Mr. Justice Story has stated the pith of these in *Jordan v. Insurance Co.*, 1 Story, 342, 353, Fed. Cas. No. 7,524. As is there said by him, nothing is better founded in the law than that ships are bound to receive full freight if the cargo is carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea damage, even worthless. According to the ordinary rules of maritime law, the cargo being delivered, the freight is earned; and no exceptions are made because the cargo is subject to either general average or particular average charges. *Luke v. Lyde* is cited on various points, but it is not referred to as establishing the proposition now made by James E. Ward & Co., either by Carver, Abbott, Maclachlan, Wheeler, Leggett, or Scrutton. Moreover, neither of these authorities lays down the rule claimed by James E. Ward & Co., although in them we have practically referred to the whole body of the law. In *Metcalf v. Iron-Works Co.*, 1 Q. B. Div. 613, 620, *Luke v. Lyde* is cited as illustrating the rule of freight pro rata; and when the same case came before the court of appeal in 2 Q. B. Div. 423, 427, *Luke v. Lyde* was again referred to by Lord Coleridge, then chief justice, with reference only to the same subject-matter. In *Macl. Shipp.* (4th Ed.) at page 519, *Luke v. Lyde* is criticised, although not on the precise point which we are considering. We therefore do not think we are called on to accept this authority as against what seem to us the fundamental principles of the law of carriage by sea; and, so far as this point is concerned, we sustain the report of the commissioner.

On the other hand, *Luke v. Lyde* is cited by the opposing parties as sustaining the proposition that the court was wrong in not awarding against James E. Ward & Co. the gross freight for the voyage. In some respects, at least, they have misapprehended the rule laid down by us. The proposition is made that the court forbids that the vessel be reimbursed for her expenses in preparing for her voyage, and also her actual expenses from Pensacola to Boston. But our directions were explicit to deduct from the gross freight only such charges as were saved to the vessel. *Luke v. Lyde* refers to a determination of the house of lords in 1733 in *Lutwidge v. Gray*.

The best statement of that case within the reach of the court is found in Maclachlan's work, already referred to, at page 502. There is a class of well-recognized cases, like *Tindall v. Taylor*, 4 El. & Bl. 219, which asserts the often-repeated rule that the cargo owner cannot take his cargo pending the voyage, except on payment of gross freight; but *Luke v. Lyde*, and other decisions of that character, when they speak of full freight, refer to full freight as distinguished from freight pro rata itineris, and none of them had occasion to discuss the method of determining what is full freight.

Both with reference to this topic, and also with regard to the fact that we directed deduction from the estimated net freight to the river Plate of the net freight to Lisbon, we must follow modern rules, which give only actual damages, except where vindictive damages are allowed, which is not permissive in the case at bar. Following these rules, no damages can be recovered in excess of the net injury suffered, and we must hold that it is the duty of every person damaged to take reasonable measures to diminish the effects thereof. This is now the universal rule, applied in *Steel Co. v. Brush*, 33 C. C. A. 456, 91 Fed. 213, 221. Therefore, it was the duty of the *Eliza Lines*, after James E. Ward & Co. took possession of her cargo, not to lie idle, but to secure another freight, if one could be obtained. We have, therefore, no doubt that we were justified, on this question of the amount of net freight to be paid by James E. Ward & Co., to do exact justice between the parties, as was determined by our prior opinion.

The commissioner fell into an error in estimating the date from which the theoretical voyage to the river Plate should be computed. Until November 16, 1889, the cargo was in the hands of the court. Neither James E. Ward & Co. nor the owners of the bark are responsible for the delay which ensued therefrom. It was not until that time that the cargo was discharged, and the vessel commenced her repairs. These were concluded about December 12th, and the time for completing the voyage to the river Plate should be computed from that date. The voyage to Lisbon was undoubtedly completed within the period within which the voyage to the river Plate might have been completed theoretically. Therefore, James E. Ward & Co. should have received the benefit of the whole net Lisbon freight. On the other hand, the commissioner made an error in arriving at the net freights for this purpose by deducting from the gross freights one-third thereof. This was not in accordance with the instructions of the court, which were to compute the estimated charges of completing the voyages from Boston to the river Plate on the one hand, and from Boston to Lisbon on the other, according to the general rules found in *Williams & B. Adm. Jur.* (2d Ed.) 101, 102. The custom at Boston for arriving at the contributory value of freight cannot be accepted for the determination of net freight for the purposes of this part of the case. That the result was inequitable is at once seen from the fact that the deduction made by the commissioner from gross freight, covering the prob-

lematical expenses of earning it between Boston and the river Plate, was \$1,869.75, while the like deduction for the voyage from Boston to Lisbon was only \$968. Theoretically, the voyage from Boston to the river Plate would have cost only one month's more wages than that to Lisbon, with a slight addition for insurance and interest, while the voyage to Lisbon was chargeable with many incidents at Boston with which the theoretical voyage to the river Plate would not have been. The proper deduction for each voyage, therefore, must amount to substantially the same sum. Balancing, therefore, the error of the commissioner in giving James E. Ward & Co. the benefit of only a pro rata of the voyage to Lisbon against the errors in deductions from gross freights to obtain net freights, we are impressed with the belief that, all corrections being made, the net result would be substantially unchanged.

On the whole, we conclude to accept the gross amount awarded by the commissioner against James E. Ward & Co. for freight and general average. The final decree, therefore, will cover against James E. Ward & Co. \$1,585.29, with interest according to our prior opinion. So far as concerns the interests of the salvors, the decree may run directly in their favor against James E. Ward & Co. for the amount determined by the commissioner, \$996.33, with interest according to our prior opinion, the same being a part of the gross sum of \$1,585.29.

It is apparent that, in view of what we have said in this opinion, the total amount due from James E. Ward & Co. might, as we have already suggested, be distributed between freight and general average, and the amounts paid or payable as such from the proceeds of the cargo paid into the registry of the court, as we have pointed out, deducted respectively from each; but no interest which we perceive requires this. If, however, parties show cause therefor, it may be done.

The appellants will, on or before May 1st, file a draft decree in accordance with our prior opinion, as supplemented by this opinion, and James E. Ward & Co. may file corrections thereof on or before May 10th.

HALLOCK v. STREETER.

(Circuit Court, N. D. New York. June 19, 1900.)

1. PARTNERSHIP—DISSOLUTION—SETTLEMENT—EQUITY—ACCORD AND SATISFACTION—OPENING SETTLEMENT.

On the dissolution of a partnership between a young man and one mature in years, a settlement between them would not be inquired into in equity at the instance of the former, where it appeared that he was possessed of more than average business ability, and that the elder member, though a shrewd business man, resorted to no deception, and there was no mistake of fact, and a positive instrument of accord and satisfaction was executed by them.

2. SAME—DISAGREEMENTS—ACQUIESCENCE—WAIVER.

In a dispute between partners H. claimed that he was entitled to the interest on capital contributed by him, and to the proceeds of a patent used by the firm, which was his individual property. S. claimed that the same should be equally divided. H. thereupon said to S., "If you think so, I will let it go." Until dissolution such interest and profits were entered on the firm books in equal credits to both, in which H. acquiesced. *Held*, that the conduct of H. amounted to a waiver of his claim, and to a new agreement, and, after full settlement between them, equity would not interfere in favor of H., though by the terms of the original partnership agreement H. might have been entitled to such interest and profits.

Final Hearing in Equity.

Edwin Nottingham, for complainant.

Andrew J. Nellis, for defendant.

COXE, District Judge. This is an action for an accounting, growing out of an agreement made between the parties March 1, 1893, by which they agreed to engage in the manufacture and sale of gloves and mittens at Johnstown, N. Y., for the term of about five years, unless sooner terminated by mutual consent. Without entering into details it is sufficient to say that the defendant was to give his attention to the finances and the complainant to the manufacturing and selling. The business thus started was unusually successful, but in the latter part of 1896 the complainant became anxious to start branches in other states, employing convict labor and introducing other innovations. The defendant, who is older and more conservative, declined to enter these new fields of enterprise, but consented, if the complainant so desired, to terminate the agreement in January, 1897, although he could, of course, have insisted upon its remaining in force until January, 1898. The parties thereupon commenced negotiations for the winding up of the business. Many concessions were made. Positions were taken, maintained for a time and receded from on both sides. The usual debate and contention incident to the winding up of a complicated business followed, but it is impossible to find from the evidence that either party resorted to fraud or duress. It is now said that the contract of settlement was unfair and unilateral in that the complainant was not allowed the full amount due him for interest upon capital and assets contributed by him and also because the defendant was permitted to share in the proceeds of a patent owned individually by the complainant. It ap-

pears, however, that the facts regarding the interest and the patent were fully understood and discussed by both parties at the time. Several days were spent in negotiations and the complainant's account of his arguments with the defendant demonstrates that he fully understood his rights and strenuously maintained them. The defendant was equally positive and after the matters in controversy had been discussed in their various aspects a final settlement was reached, which, in view of all the facts and circumstances, is probably as fair a settlement as the court could make, even were it now in a position to enter upon an accounting. But conceding for a moment that the settlement is unfair in some aspects there is no rule of equity which authorizes the court to disregard it. This settlement was evidenced by a release in writing, dated January 1, 1897, signed, sealed, acknowledged and delivered by the parties. It is in the following words:

"We, Arthur T. Hallock and George A. Streeter, of the city of Johnstown, New York, do hereby acknowledge and confess, that we have, the one with the other, fully adjusted and settled all and every matter and thing whatsoever, under, in relation to, or in any manner arising out of, the agreement in writing made by and between us, and bearing date the first day of March, 1893, in regard to the manufacture and sale of mittens and gloves, and that each of us is fully released and forever discharged from any and all the covenants and obligations created by, or arising in any manner whatsoever out of the said agreement; and we do hereby, each, for ourselves, and for our respective heirs, executors, administrators and assigns, release, and forever discharge the other, of and from any and all such covenants and obligations, and as well also the respective heirs, executors and administrators of each of us."

A more clear, positive and comprehensive accord and satisfaction can hardly be imagined. This release lies directly across the complainant's path to recovery and until it is avoided the court is not permitted to enter upon the merits of the original controversy. If the parties have settled their differences it is the end of the discussion. The complainant proceeds upon the theory that this final and complete settlement is a trivial and inconsequential matter which can be lightly brushed aside on the ground that it was entered into through a mutual mistake of fact and law, or that it was induced by undue influence, misrepresentation and fraud. It should be noted at the outset that this is not a case where an innocent, ignorant, guileless and confiding youth has been entrapped into an unconscionable agreement by an unprincipled, cunning, overreaching and venerable swindler. The evidence does not warrant this contention. It is not a dispute between the lamb and the wolf. It is true that the complainant is a young man and the defendant is an old man, but the testimony establishes beyond a doubt that the complainant is a young man of more than ordinary activity, brightness and business ability and that he was fully able to cope with the defendant and protect his own interests in any business transaction. The considerations which induce courts to set aside solemn written instruments are all wanting here. Security in business ventures will be at an end if after two intelligent men have agreed upon an adjustment of their differences the court annuls their agreement for no other reason than that one discovers that he might have obtained

better terms if he had insisted with greater vehemence upon what he believed to be his rights, and had relied more upon his own and less upon his adversary's opinion.

Before the court can begin the inquiry as to whether the settlement was wise or unwise from the point of view of the complainant it is necessary to decide the following questions: First: Was the general release induced by the fraud of the defendant? Second: Was it the result of undue influence or duress upon his part? Third: Was it the result of a mutual mistake of fact? Fourth: Was it due to complainant's mistake of law, coupled with inequitable, unfair and deceptive conduct on the part of the defendant? As before stated there is insufficient proof to establish any of these propositions in favor of the complainant. But conceding that the general release were disposed of, the court would still be confronted by the following propositions: First: Is the complainant's construction correct that under the agreement of March, 1893, he alone was entitled to interest upon the profits of the business? Second: If the original instrument bears this construction did not the subsequent oral agreements dividing the profits and crediting interest to each of the parties change the original agreement in this regard? Third: Did not the complainant acquiesce in the division of the interest and waive his claim thereto with full knowledge of the circumstances? Fourth: In view of the manner in which the patent was disposed of did not the proceeds belong to the business? It is by no means certain that the complainant's contention with regard to the latter propositions can be maintained; at least it must be admitted that there are two sides to these questions. That good lawyers can honestly disagree regarding them is mentioned now solely for the purpose of emphasizing the impossibility of imputing fraud or duress to the defendant in maintaining his opinions during the negotiations. That the agreement of 1893 is capable of the interpretation placed upon it by the complainant may well be conceded. Indeed, it may be true that a strict construction compels such an interpretation, but looking at the matter from a broader point of view, and considering the business as a joint and equal venture, it surely seems inequitable that one of the parties at the end should receive \$6,000 more than the other. If he had supposed that such was to be the result can it be imagined for a moment that the defendant would have entered upon the undertaking? It is thought that no one can read the agreement, in the light of all the testimony, without being convinced that the parties intended that the profits of the joint enterprise should be equally divided. The manner in which the books were kept, the settlement with Hackney, the conduct of the complainant before and at the settlement, all point to this conclusion. But even were this otherwise, there can be no doubt that the complainant had a perfect right to waive the strict construction and settle upon the more just and equitable basis. He may have thought that it was unfair that he alone should pocket the interest upon profits which resulted from the combined efforts of himself and the defendant. So long as he understood the situation, so long as there was no mistake of law suggested or encouraged by the fraudulent conduct of the defendant,

there can be no ground for setting aside the solemn action of the parties. The testimony fails to show any dishonest act on the part of the defendant. No fact was misrepresented by him; no threat was made; there was no deception. He might with the utmost honesty and good faith have thought that he was entitled to his share of the interest and of the patent and he had a perfect right to insist upon his position with all the vehemence and ability he possessed. It appears that the complainant fully understood the facts and, though he entertained a different opinion as to his rights, he evidently thought, in view of all the circumstances, that it was more to his advantage to yield these points than to have the negotiations terminated or delayed. Even upon his own statement the complainant makes no case for equitable interference. He was asked,

"Did you have a conversation with Mr. Streeter at the time of this settlement with reference to allowing him interest as it had been credited to him on the books?" He replied, "Yes. * * * I told Mr. Streeter in substance that I thought there were some changes that ought to be made in our accounts as they then appeared on the ledger. I called his attention to the fact that I had not been credited with the proceeds of the patent, and that he had received interest on the amounts credited to his stock account; that I didn't think he was entitled to these items, because his compensation, according to the agreement, was not due him until the agreement was terminated. He replied in substance that it was no such thing; that, according to the agreement, he had as much legal right to the interest credits as I had, and that the same amounts had been credited to my account, and that the patent was invented and procured during the agreement with him and was part of the business, and he had just as much legal right to it as I did. I told him in substance that I didn't think that was right, but if he thought it was right and in accordance with the agreement, I would let it go. He replied in substance that it certainly was."

Again he was asked,

"Did you know at that time, whether Mr. Streeter had a legal right to the interest which had been credited to him or to a share in the proceeds of the sale of this patent and invention as though it had been owned by the business carried on under this agreement?" He answered, "I did not know positively, but I thought he did not have a right."

There can be no pretense that the complainant was in ignorance of any material fact regarding the interest or the patent. He knew all the facts as intimately as the defendant. He was not mistaken as to the law. He thought then, as he thinks now, that his construction of the agreement was the correct one. The defendant thought otherwise, as he had a right to think, and expressed his opinion forcibly, but it was only an opinion. It will establish a unique and startling rule in equity jurisprudence if fraud or unfair conduct, sufficient to avoid a contract of settlement deliberately made, can be predicated of a statement by one of the parties that in his opinion he is entitled to the items allowed him upon a settlement. The court has been unable to find an authority of any weight which sustains the advanced position taken by the complainant. No better exposition of the law can be found than that stated by Judge Story. He says,

"It may be safely affirmed, upon the highest authority, as a well-established doctrine, that a mere naked mistake of law, unattended with any such special circumstances as have been above suggested, will furnish no ground for the

interposition of a court of equity; and the present disposition of courts of equity is to narrow, rather than to enlarge, the operation of exceptions." 1 Story, Eq. Jur. (12th Ed.) § 138.

Of the accounts assigned to the defendant, as security for his liability upon a bond and upon certain notes and commercial paper, it is understood that the defendant admits that he has collected the sum of \$799.30 belonging to the complainant. The Barter matter is not entirely clear, but it is thought that this item of \$50 should be added also, making \$849.30. On the other hand the complainant admits that he is indebted to the defendant for goods sold and upon other matters transpiring since the settlement in the sum of \$295.49, leaving a balance due the complainant of \$553.81, which with interest amounts to \$654.31, for which sum the complainant is entitled to a decree. As the complainant has not succeeded upon the principal matters in dispute he is not entitled to costs.

HIGGINSON et al. v. CHICAGO, B. & Q. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1900.)

No. 1,431.

1. APPEAL—REVIEW—ORDER DENYING TEMPORARY INJUNCTION.

The granting of a temporary injunction rests in the sound judicial discretion of the chancellor, and his action in refusing such interlocutory relief will not be reversed on appeal unless there is a strong probability that the complainant on final hearing will show himself entitled to the relief prayed for, or unless it appears that the complainant will sustain great loss and damage, or be put to unnecessary trouble and expense, if the existing status is not maintained.

2. TEMPORARY INJUNCTION—GROUNDS—RESTRAINING ACTION OF STATE BOARD.

Where a state board of transportation had made an order requiring a railroad company to appear before it and show cause why a reduction in certain freight rates should not be made, and a temporary injunction was sought by a supplemental bill to restrain the board from entering upon such hearing, which relief was based on the ground that the board had no power to order a reduction in rates, it was *held* that an order denying a temporary injunction was properly entered—First, because the relief sought by the supplemental bill was based upon grounds which were so far doubtful that it would have been unwise to grant a temporary injunction; and, second, because it was doubtful whether the relief sought by the supplemental bill could be obtained otherwise than by an original bill.

Appeal from the Circuit Court of the United States for the District of Nebraska.

W. D. McHugh (J. M. Woolworth, on the brief), for appellants.

Constantine J. Smyth, Atty. Gen. of Nebraska, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an appeal from an order made by the circuit court of the United States for the district of Nebraska denying a temporary injunction. 100 Fed. 235. The appellants, Henry L. Higginson et al., filed a supplemental bill in a case originally brought by the same complainants against the Chicago, Burlington

& Quincy Railroad Company and the board of transportation for the state of Nebraska, as then constituted, wherein the complainants had succeeded, after a lengthy litigation (vide *Higgonson v. Railroad Co.*, 64 Fed. 165; *Smyth v. Higginson*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Id.*, 171 U. S. 361, 18 Sup. Ct. 888, 43 L. Ed. 197), in obtaining a decree which, in substance, restrained the defendants in the original case from putting in force the scale of rates that was prescribed by an act of the legislature of the state of Nebraska approved on April 12, 1893, entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the state of Nebraska and to provide penalties for the violation of this act." The supplemental bill which was filed in said cause, after setting out the previous proceedings that had been taken therein, and the terms of the final decree, alleged, among other things, that the state board of transportation for the state of Nebraska on February 3, 1900, had made an order reducing the local distance tariff on corn, oats, and some other agricultural products 30 per cent. below the tariff that was in force on such products on December 1, 1899, and requiring the various railroad companies in the state of Nebraska to show cause on February 20, 1900, why said rates as so reduced should not be put in force; also that said board on February 8, 1900, had made another order reducing the rate on cattle 10 per cent., and the rate on hogs 5 per cent., below the rates which were in force for the transportation of such animals on December 1, 1899, and requiring the aforesaid railroad companies to show cause on or before March 1, 1900, why such order should not be enforced. It was further averred in the supplemental bill that in making said orders said board claimed to be exercising powers that were conferred upon it by an act of the legislature of the state of Nebraska creating the state board of transportation, and defining its powers, which was approved on March 31, 1887; that the board claimed that said act of March 31, 1887, was still in force, and conferred upon it the power to hear complaints concerning unreasonable rates for the transportation of freight, and to order a reduction of the same if they were found to be excessive, but that such claim on the part of the board was untenable,—the fact being, as the complainants averred, that the power of the board to hear complaints of such a nature, and to prescribe rates for the transportation of freight from one point to another within the state of Nebraska, as conferred by the act of March 31, 1887, had been taken away and repealed by the act of April 12, 1893, heretofore mentioned, and that since the passage of the latter act the power originally vested in the board with respect to rates for the transportation of freight had ceased to be operative, its only power in that respect being such as was conferred by the act of April 12, 1893. In view of the premises, an injunction was asked to restrain the board of transportation from proceeding with the hearings contemplated by the aforesaid orders of February 3, 1900, and February 8, 1900, and from making any orders whatsoever with respect to rates for the transportation of freight between points within the state. The complainants made an application for a temporary restraining order to the effect last stated, to con-

tinue in force until a final decision, but after a hearing upon said motion the application was denied.

As the appeal is from the interlocutory order last mentioned, we do not deem it necessary or expedient to express a definite opinion at this time concerning the various questions that were discussed on the hearing of the appeal or to consider those questions at length. In disposing of the application for a temporary restraining order the lower court was called upon to exercise one of its discretionary powers, and the order from which the appeal is taken should not be disturbed unless there is a strong probability that on the final hearing the complainants will show themselves to be entitled to the relief sought by the supplemental bill, or unless it appears that the complainants will sustain great loss and damage, or that they will be put to unnecessary trouble and expense, if the existing status is not maintained until the final hearing. It rests in the sound judicial discretion of a chancellor to grant or withhold the species of interlocutory relief which was sought in the present instance, and, as this court has heretofore held, in substance, it will not undertake to reverse the action of a court or judge to whom an application for such relief is first addressed, unless it clearly appears that the court or judge erred in the exercise of that discretion, and that, in accordance with well-established equitable principles and rules of procedure, it should have acted differently. *City of Newton v. Lewis*, 49 U. S. App. 266, 25 C. C. A. 561, 79 Fed. 715; *Kelley v. Boettcher* (C. C.) 89 Fed. 125, 128, 129.

In the present instance we are not satisfied that the ground upon which the appellants base their right to relief is tenable, and that it will be upheld on final hearing, nor does it appear that the appellants will sustain any loss or damage, or that they will be put to any unnecessary trouble or inconvenience, by the refusal of a temporary injunction. The orders which have been made by the state board of transportation are merely tentative. They do not establish a schedule of freight rates, and require the same to be put in force immediately, but simply direct the various railroad companies to show cause why certain rates should not be established. No reason is perceived why the companies against whom the orders run should be relieved by injunction of the duty of appearing before the board, and disclosing to that public body the reasons which they may have to present why the board should not further proceed with the contemplated hearings, or why the proposed schedule of rates is unjust or unreasonable if the board determines to proceed with the hearing. No harm can result to the appellants from taking such action, and a court of equity should not relieve them from the performance of that duty unless it clearly appears that the board of transportation under existing laws has no power to enter upon the hearing, or to consider whether existing rates are reasonable or unreasonable, or to make any orders with relation thereto. As heretofore stated, we are not satisfied that the state board of transportation has been deprived of its powers to the extent last indicated; but without expressing a definite opinion upon that question, which can be better determined on the final hearing, we shall content ourselves with the general statement that a temporary restraining order ought not to have been

granted on the assumption that the board had been wholly divested of its powers in the respects last stated, and that further action on its part on the lines indicated in the aforesaid orders would be wholly in excess of its jurisdiction. The lower court, in our judgment, very properly concluded that the relief demanded was based upon grounds which were so far doubtful that it would be unwise to arrest the action of the board by a temporary injunction.

In conclusion we deem it proper to add that the fundamental question which is presented by the supplemental bill concerns the extent to which the act of March 31, 1887, creating the state board of transportation, has been repealed, and the powers of the board taken away by the subsequent act of April 12, 1893. The complainants base their right to relief, so far as we are at present advised, upon the theory that the board of transportation is at present proceeding to exercise powers conferred upon it by the former act which were withdrawn, by implication only, by the later act; and as this question was in no wise raised or considered in the original case in which the supplemental bill has been filed, but is essentially a new question, we have been led to entertain, and we do entertain, grave doubts whether a supplemental bill to settle that question can be lawfully entertained consistently with established rules of procedure in equity. It would seem to be more appropriate to litigate a new question of that nature by an original bill, and this is an additional reason which has induced us to approve of the action of the circuit court in denying a temporary injunction. The order from which the appeal was taken is therefore affirmed.

CITY OF DAWSON et al. v. COLUMBIA AVE. SAVING-FUND, SAFE-DEPOSIT, TITLE & TRUST CO.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1900.)

No. 879.

APPEAL—INTERLOCUTORY ORDERS GRANTING OR REFUSING INJUNCTIONS.

Under the amendatory act of February 18, 1895, which limits the jurisdiction of circuit courts of appeals as to interlocutory orders granting or refusing preliminary injunctions to cases in which an appeal from a final decree may be taken to those courts, an appeal will not lie to such a court from an order granting an injunction in a case involving the construction and application of the constitution of the United States, and in which ordinances of a municipality are claimed to be in contravention of the constitution, by impairing the obligation of a contract, although the case may also involve other questions.

McCormick, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

The bill in this case was filed by the appellee, a corporation organized under the laws of Pennsylvania, as trustee for the holders of 80 first mortgage bonds, of \$500 each, issued by the Dawson Waterworks Company, a Georgia corporation, against the city of Dawson, Ga., and the said Dawson Waterworks Company. The mayor, aldermen, and marshal, all citizens of Georgia, are formally made defendants. It is shown by the record that the city council of the city of Dawson on the 21st day of February, 1890, passed an ordinance

by which it granted to R. L. Bennett, of Philadelphia, Pa., and his associates, their successors and assigns, who were required to organize a company to be styled the Dawson Waterworks Company, the exclusive right and privilege, for the period of 99 years, of constructing, maintaining, and operating a system of waterworks. In compliance with the requirement of the ordinance, Bennett organized, under the laws of Georgia, a corporation known and designated as the Dawson Waterworks Company. The ordinance of February 21, 1890, or so much thereof as it is deemed necessary here to insert, provided as follows:

"Waterworks Contract.

"Sec. 231. The city council of the city of Dawson, Georgia, do hereby grant to R. L. Bennett, of Philadelphia, Pennsylvania, and his associates, their successors and assigns, who are to organize a company to be styled 'The Dawson Waterworks Company,' the exclusive right and privilege for a period of ninety-nine years, of constructing, maintaining and operating a system of waterworks for the purpose of supplying said city and its inhabitants with water for protection against fire, and domestic, sanitary, and other purposes.

"Sec. 232. The said company, for the purpose of constructing, maintaining, operating, extending, and repairing said system of waterworks, shall have the sole and exclusive privilege, and full power, right and authority to lay water pipes and mains along any or all streets and avenues of said city, as the same are now open, or may hereafter be extended, and to that end shall have full right to dig ditches or trenches in the streets of said city of such depth and of such width as may be necessary: provided, that the city shall not be responsible for any damage occasioned thereby, and that the streets shall not be unreasonably obstructed by such work.

"Sec. 233. The said company shall have the right to erect buildings and tanks, lay pipes and erect any other structures, or make any other improvements which may be necessary for its purpose on any or all lands owned or controlled by said city except its public squares.

"Sec. 234. The said company and their successors and assigns shall complete and have in operation within eighteen months from the date of the passage of this ordinance, a complete and thorough system of waterworks, laying four and eight-tenths ($4 \text{ and } \frac{8}{10}$) miles of pipe, size eight, six and four inches in diameter, with a reservoir of not less than forty thousand gallons capacity, and of sufficient height to produce a pressure on the mains such that from any hydrant located on principal streets a stream of water will be projected fifty feet vertically, in still air, through one hundred feet of fire hose with a one-inch nozzle attached. The said company, and their successors and assigns, shall be, and are required, from the completion of their system of waterworks till their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereafter mentioned, unless prevented by unavoidable and providential causes. In such event they shall be allowed a reasonable time to make repairs, and if, after such reasonable time has been allowed, they should still fail to furnish said supply of water, their franchise from that fact be forfeited.

"Sec. 235. The said company shall extend its mains and pipes, enlarge its plant, and generally enlarge its system from time to time to meet increasing demands consequent upon the growth of the city.

"Sec. 236. The city of Dawson, in consideration of said company guarantying to it, for the period of twenty years, and as long thereafter as the said company, its successors and assigns, shall continue to operate waterworks, a free and unrestricted use of its water, in case of fire and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains, fire plugs of approved pattern, not to exceed fifty in all, until the corporate limits of said city are extended and the population of said city increased so that there are five hundred persons living in said extension, after which they shall be increased proportionately if required, and, as an additional fire protection, also furnish water to fill the present public cisterns if needed, the said water to be used exclusively for fire purposes only, and the said water to remain the property of the said company except in case of fire, hereby obligates itself to pay to the said company or to such trust company as the Dawson Waterworks may elect or decide upon as their trustee for

their bonds, the sum of two thousand dollars annually for twenty years, in semiannual payments of one thousand dollars each, on the first day of January and July of each year. The first payment to be made on such of said days as occur after the completion of said works as provided in section 234 of this ordinance; and, in case said city shall not have sufficient funds at any of such times to make said payments, or for any cause does not pay said money at time fixed as aforesaid, then in that case warrants shall be issued on the city treasurer, in favor of said company, for the amount due.

"Sec. 237. The council shall, and they are hereby required to, make provision each year for the payment of two thousand dollars as provided in the foregoing section, by levying a tax, sufficient for that purpose, on the taxable property of the city.

"Sec. 238. Said company, its successors and assigns, shall have the right to make reasonable rates and regulations for the government of private consumers in the use of its water; and to charge such rates for its use, as it may from time to time establish: provided, the rate charged per annum shall not exceed those named in the following schedule. * * *

"Sec. 239. That in consideration of the said company agreeing to furnish water to the public municipal buildings, and further agreeing to furnish water to two public fountains of $\frac{1}{2}$ -inch nozzle each, the city of Dawson hereby obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied or assessed by said city against said company or upon the plant to be used in said waterworks system.

"Sec. 240. That full assent is hereby given to a charter to be granted by the legislature of the state of Georgia, to said R. L. Bennett and associates, their successors and assigns, or to be obtained by them under the general incorporation laws of said state, incorporating them into a body corporate under the title of the Dawson Waterworks Co., and granting to said company the exclusive right to construct, maintain and operate a system of waterworks in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens, residents, with water for protection against fire and for domestic, sanitary and other useful purposes, and to make such reasonable rates and regulations for the government of private consumers in the price of water, and to charge such rates therefor as the said company may determine upon: provided, the rates do not exceed those established by this ordinance.

"Sec. 241. The provisions of this ordinance shall be mutually binding upon the city of Dawson and R. L. Bennett and associates, and the company to be organized by them in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties."

For the purpose of obtaining money to construct the waterworks, the waterworks company thereafter issued 80 first mortgage bonds, of \$500 each, aggregating \$40,000, and, to secure their payment, executed to the appellee, as trustee for the holders of the bonds, a mortgage on all its property, franchises, and privileges, and authorized the trustee to collect all amounts to become due by the city of Dawson for water rentals. The city of Dawson, by a resolution of its council duly passed, recognized the right of the appellee, as trustee, "to demand, receive, and collect from the city of Dawson any and all sums of money that may be now due or that may hereafter become due under the aforesaid contract." It also appears that, pursuant to its contract with the city, the waterworks company constructed a system of waterworks, and has up to the present time supplied the city and the inhabitants with water. For the water thus supplied the city has paid the waterworks company the amount due under the contract, to wit, \$2,000 per annum, up to the 1st day of January, 1895, when it refused to make further payments upon the ground that the contract was void, and upon the further ground that the waterworks company had failed to supply the quantity of water required of it by the terms of its contract. The city based its claim of the invalidity of the contract upon the decision of the supreme court of Georgia rendered in the case of *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907. Although the city paid, as before stated, the water rentals due

to the 1st day of January, 1895, yet in June, 1894, an ordinance was passed repudiating and renouncing the contract, as illegal and exorbitant. It is further shown that in October, 1894, the city council passed an ordinance ordering an election for the purpose of determining whether two-thirds of the qualified voters should by their assent authorize the city to issue \$35,000 of 6 per cent. bonds for the purpose of buying or erecting a system of waterworks and an electric light plant. The election was held, and resulted in a vote favorable to the proposition; and in December following another ordinance was passed, declaring the result of the election. The appellants admit in their answer the passage of the various ordinances mentioned, and in reference to the one of June, 1894, it is averred that "the city formally, solemnly, and in good faith repudiated and renounced said contract because the same was illegal and exorbitant." And in the amended answer it is further averred: "Respondents do not deny that, as adjudged by the supreme court of Georgia they had a right to do, they have declined to carry out the alleged contract between a former city council of Dawson and the Dawson Waterworks Company." As to the election ordered for the purpose of determining whether the city should issue bonds to establish a waterworks system of its own, the answer avers as follows: "They also admit that they have held an election for the purpose of authorizing an issuance of bonds, in order with the proceeds thereof, when sold, to buy or erect a new system of waterworks; but said bonds have never been issued, and no attempt has been made to sell the same, and nothing else has been done towards erecting said new system of waterworks."

The appellee claims in the amended bill that the ordinances passed by the city council subsequent to the date of the contract between the city and the waterworks company impaired the obligation of the contract, and attempted to deprive the bondholders and the waterworks company of their property without due process of law, and hence were repugnant to the constitution of the United States. Upon this point it is alleged in the amended bill: "(23) Your orator shows that notwithstanding the validity of the aforesaid contract contained in the aforesaid ordinance of February 21, 1890, and notwithstanding the fact that the bonds were marketed on the faith of said contract, and the waterworks were erected at great expense, and the waterworks company complied with the terms and conditions of the contract, the said city of Dawson has by its ordinances and conduct attempted to impair the obligation of said contract, and has thereby greatly diminished and largely destroyed the value of the property of said waterworks company, which constitutes the security possessed by the bondholders, and has deprived bondholders of the rentals which were to be paid by the said city under said contract; and said action and threatened action of said city are in fraud and destruction of the rights of bondholders, and your orator as their trustee, under said contract with the city, and the protection guaranteed under the constitution of the United States. The aforesaid ordinance passed by said city council of Dawson on June 27, 1894, whereby said city undertook to repudiate said contract, was an attempt on the part of the said city of Dawson to impair the obligation of said contract, in violation of the constitution of the United States, and the protection thereby guaranteed to private rights. The said city has also passed other ordinances and done acts in attempted impairment of said contract, namely, the ordinance passed by said city of Dawson on October 4, 1894, ordering an election for the purpose of determining whether two-thirds of the qualified voters of said city should, by their assent, authorize said city to issue \$35,000 of 6% bonds for the purpose of buying or erecting a system of waterworks and electric light plant for said city, and the ordinance passed by said city of Dawson on November 5, 1894, on the same subject, and to the like effect, and the holding of the election on December 12, 1894, pursuant to the provisions of said two last-mentioned ordinances, and the carrying of said proposition by the requisite two-thirds of the qualified voters of said city, and the ordinance passed by said city of Dawson on the 13th day of December, 1894, whereby the result of said election was declared to be in favor of the issue and sale of bonds for said purposes, as well as the subsequent conduct of the said city in giving effect to said ordinances by refusing to pay the water rentals stipu-

lated in said contract, or to levy a tax for the purpose as required by the contract, and by claiming that it was no longer bound by said contract. All of said ordinances and acts are an effort and attempt on the part of said city of Dawson to impair the obligations of said contract, under color of a claim of authority from the constitution and laws of the state of Georgia, in violation and attempted impairment of the protection guaranteed to said contract under the constitution of the United States. The city of Dawson, in further attempted violation of the obligation of said contract, contrary to the provision of the constitution of the United States that no state shall pass any law impairing the obligation of contracts, under color of the authority given it by its charter to make and adopt all ordinances, by-laws, and rules and regulations necessary or proper for the security, welfare, convenience, and interests of said city and its inhabitants, and for preserving the health, morals, peace, order, and good government of the same, not only adopted the aforesaid ordinances, but recently, and at the time when temporarily restrained by this honorable court, was proceeding to carry into effect said ordinances and the said election, as hereinbefore set forth. All of which wrongs and threatened wrongs are contrary to equity and good conscience, and are irreparable, and can only be relieved against and prevented by the gracious interposition of a court of equity. Your orator shows that the present suit arises under the constitution and laws of the United States, and your orator invokes the jurisdiction of the circuit court of the United States, in order to set up and enforce the protection guaranteed by the constitution of the United States to contract rights, and to defeat and prevent the effort of said city to impair the obligation of the aforesaid contract."

All the defendants except the waterworks company appeared and demurred to the bill for the want of jurisdiction and for other causes. They next filed an objection in the nature of a plea to the jurisdiction of the court, as follows: "That the alleged defendant, the Dawson Waterworks Company, which is a corporation created and organized under the law of Georgia, and resident therein now and at the time of the filing of said bill, namely, in said city of Dawson and county of Terrell, was and is the real complainant, and that the action of the said defendant and of the alleged complainant, set forth and exhibited to said bill, was and is fraudulent and collusive, and was had during the month of April last, and since the judgment of the supreme court of Georgia in the case of the city of Dawson against the said the Dawson Waterworks Company was rendered on said alleged contract, declaring the same void, which judgment, together with the record in said case, is hereafter more fully and specifically pleaded in order to obtain jurisdiction in this honorable court in a new name, and under an alleged new-created right of action, which does not exist, except to the extent created as above stated, and for the purpose of avoiding the said judgment of the supreme court, which is final and conclusive of all the questions decided in that case, and all questions now made by said bill in this case." And, for further cause why injunction should not issue, the defendants objected: "(1) That there is no equity in said bill. (2) That there is no right of action in complainant for the purposes of said bill, even if its allegations are all true, because, according to said allegations, the only right of action existing on behalf of complainant is a suit at law to recover the alleged rentals. (3) That the allegations contained in said bill do not show any valid contract between the said waterworks company and the city of Dawson, or the city council of Dawson, under the constitution and laws of Georgia, but, on the contrary, that said alleged contract was and is void, and that there is no contract at all between complainant and the defendant. For further cause these defendants show that, under the constitution and laws of the state of Georgia, the alleged contract between said waterworks company and the said city was absolutely void ab initio, because the said city had no power to make said contract, and because the making of such a contract by such a corporation as the city of Dawson, or city council of Dawson, was and is expressly prohibited by the constitution of the said state of Georgia, and because, under said constitution and the charter of the city of Dawson, neither the said city nor the city council had or has any legal power to pay the

rentals claimed, or to levy any tax for such purpose. For further cause why said injunction should not issue, these defendants say that heretofore, to wit, on the 14th day of March, 1899, the supreme court of Georgia, in the cause of the Dawson Waterworks Company against the city council of Dawson, in a suit brought by said plaintiff against said defendant in the superior court of Terrell county, Georgia, for alleged rentals under said alleged contract for the year 1895, and which cause was carried to said supreme court by writ of error on the part of said city, decided and adjudged that under the constitution and laws of the state of Georgia, and its settled policy, said alleged contract was, ab initio, void, and that complete performance of such a contract by said plaintiff did not prevent the municipal corporation from pleading want of power or the illegality of the contract, and also decided and adjudged in said case adversely to the plaintiff therein, namely, the said waterworks company, all the questions and contentions now made by complainant in said bill; and these defendants hereto attach a complete record of said cause in said supreme court, including the said judgment of the court, as Exhibit A, praying leave of reference thereto. Wherefore these defendants say that all the questions now made by complainant in said bill are res adjudicata,—the said contract being adjudged void,—and that these defendants were not estopped from so pleading by the said former judgment, as will more fully appear from the said record and judgment." Then followed an answer setting forth the various defenses upon which the defendants relied.

The motion for a preliminary injunction came on to be heard before Judge PARDEE upon the pleadings and proofs, and, as a result of the hearing, an injunction was issued, in the following form: "These, therefore, are to command and strictly enjoin you, under penalty of ten thousand dollars, that you do from henceforth altogether and absolutely desist from erecting, constructing, or installing any system of waterworks in or for the city of Dawson, or other water supply, for fire protection, or furnishing the citizens or inhabitants of said city, for domestic, sanitary, or other purposes; or from entering into any contract or arrangement with any person, firm, or corporation for the construction, lease, operation, or use of any system of waterworks, or for the supply for fire protection or for other municipal purposes, or for laying mains or other waterworks, or permitting the laying of pipes or mains or the construction of waterworks in violation of the contract set out in complainant's bill, or the exclusive rights thereby given; or from selling or otherwise disposing of bonds, and, in particular, from selling or offering for sale, or disposing of, any of the bonds of the city of Dawson mentioned in complainant's bill; or from paying out any moneys for waterworks; or from incurring any obligations for waterworks; or from entering upon or carrying out any contract for waterworks, save and except contract referred to in complainant's bill, or forbidding or preventing any person, organization, fire company, or agency from carrying out the aforesaid contract with the Dawson Waterworks Company; or from placing any obstacle in the way of the due carrying out and performance and fulfillment thereof according to its terms; or from ordering, directing, ordaining, or by corporate act or ordinance, or otherwise, causing, advising, counseling, or procuring the fire department fire companies, or other fire organization or individuals acting as the fire department or company, or using the city's fire apparatus, to desist or refrain from the use of water furnished by the Dawson Waterworks Company; or from levying or enforcing the collection of any city tax or license fee against the waterworks of the Dawson Waterworks Company, stipulated to be paid in water, or by furnishing the water as set forth in the contract. In violation of said contract with said waterworks company; or with doing any other act in violation of the covenant, stipulation, terms, and conditions of said contract, until the further order of said court." From the interlocutory order awarding an injunction, the city of Dawson, the mayor and board of aldermen (composing the city council), and the marshal have appealed to this court.

Du Pont Guerrey and Henry C. Peeples, for appellants.
John I. Hall and Olin J. Wimberley, for appellee.

Before McCORMICK, Circuit Judge, and MAXEY and PAR-LANGE, District Judges.

MAXEY, District Judge, after stating the case, delivered the following opinion:

If the case is properly here on appeal, the merits of the controversy should be considered and determined. If, however, it is not properly in this court, the appeal should be dismissed. The appellate jurisdiction of this court in reference to interlocutory orders made by the circuit courts, refusing or granting injunctions, is limited by the amendatory act of February 18, 1895, to those cases "in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals." Under the fifth section of the act of March 3, 1891, by virtue of which the circuit courts of appeals were established, and their jurisdiction defined (26 Stat. 826), appeals may be taken from the circuit courts directly to the supreme court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. * * * In any case that involves the construction or application of the constitution of the United States. * * * In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States."

By the sixth section of the act the appellate jurisdiction of the circuit courts of appeals is confined to cases other than those provided for in the fifth section. If, then, cases which involve the construction or application of the constitution of the United States, and cases in which the constitution or law of a state is claimed to be in contravention of the national constitution, go by appeal or writ of error directly to the supreme court, it would seem to follow as a logical sequence that they cannot come to this court from final judgments or decrees rendered by the circuit courts. And such appears to be the construction placed upon the act by the supreme court and the circuit courts of appeals in the following cases: *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; *Holder v. Aultman*, 169 U. S. 88, 18 Sup. Ct. 269, 42 L. Ed. 669; *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; *Hastings v. Ames*, 32 U. S. App. 485, 15 C. C. A. 628, 68 Fed. 726; *Wrightman v. Boone Co.*, 31 C. C. A. 570, 88 Fed. 435; *City of Indianapolis v. Central Trust Co.*, 27 C. C. A. 580, 83 Fed. 529.

It was said by Mr. Justice White, as the organ of the court, in the case first cited (168 U. S., at page 694, 18 Sup. Ct., at page 226, and 42 L. Ed., at page 630):

"By the fifth section of the act of March 3, 1891, c. 517 (26 Stat. 826), creating the circuit courts of appeals, jurisdiction is conferred on this court to review by direct appeal any final judgment rendered by the circuit court 'in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.' There can be no doubt that the case at bar comes within this provision. The complainants

in their bill in express terms predicated their right to the relief sought upon the averment that certain ordinances adopted by the municipal authorities of the city of Austin, and an act of the legislature of the state of Texas referred to in the bill, impaired the obligations of the contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the state of Texas and the city ordinances were in contravention of the constitution of the United States. No language could more plainly bring a case within the letter of a statute than do these allegations of the bill bring this case within the law of 1891."

And at page 695, 168 U. S., at page 227, 18 Sup. Ct., and at page 630, 42 L. Ed., the court further said:

"But the words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that the law of a state is in contravention of the federal constitution. Of course, the claim must be real, * * * not fictitious and fraudulent."

In the present case, jurisdiction of the circuit court is claimed by the appellee on the ground that the suit is one arising under the constitution and the laws of the United States. "Your orator shows," employing the language of the amended bill, "that the present suit arises under the constitution and laws of the United States; and your orator invokes the jurisdiction of the circuit court of the United States in order to set up and enforce the protection guarantied by the constitution of the United States to contract rights, and to defeat and prevent the effort of the city to impair the obligation of the aforesaid contract." While it is true that jurisdiction is also claimed on the ground of diversity of citizenship, yet, if the parties be arranged according to their respective interests in the subject-matter of the suit, which may always be done in determining jurisdictional questions, it is extremely questionable whether the circuit court was invested with jurisdiction, except upon the ground that the suit was one arising under the constitution of the United States. It also clearly appears that the appellee relies upon the constitution as a protection and shield of defense against the alleged arbitrary, unauthorized, and hostile acts of the city of Dawson. It is strenuously insisted by the appellee that the ordinance of February 21, 1890, constitutes a valid and binding contract between the city of Dawson and the Dawson Waterworks Company, and that the constitution forbids its obligation to be impaired as the city attempted to impair it, by the passage of the repudiating ordinance of June, 1894, and other ordinances subsequently enacted. "These ordinances," said the supreme court in the case to which reference has already been made, "were but the exercise by the city of a legislative power which it assumed had been delegated to it by the state, and were therefore, in legal intentment, the equivalent of laws enacted by the state itself." *Penn Mut. Life Ins. Co. v. City of Austin*, supra; *City of Walla Walla v. Walla Walla Water Co.*, supra; *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114. Here, then, is a real substantial claim (not fictitious or fraudulent) that the city of Dawson is endeavoring to set aside and repudiate its solemn contract as evidenced by the ordinance of February 21, 1890; and the contract clause of the constitution is invoked by the

appellee to avert the threatened danger. It is also contended by the appellee that the refusal of the city to pay for water according to the requirements of the contract, or to levy taxes, or to be further bound by its contract, and the wrongful conduct of the city in threatening to proceed to erect and operate a rival system of waterworks for fire protection and for supplying the inhabitants of the city with water, would have the effect, unless restrained and prevented, of depriving the waterworks company and the holders of its bonds of their property without due process of law, in contravention of the constitution of the United States. Thus, we have before us a case involving the construction and application of the constitution of the United States, and one in which the ordinances of the municipality of Dawson are claimed to be in contravention of the constitution. That the appeal in such a case should go directly to the supreme court from a final decree of the circuit court, we think has been plainly shown; and that an appeal from an interlocutory order of the circuit court granting an injunction in a like case does not lie to this court will be made manifest by consulting the following additional authorities: *Railroad Co. v. Adams*, 35 C. C. A. 635, 93 Fed. 852; *City of Macon v. Georgia Packing Co.*, 9 C. C. A. 262, 60 Fed. 781; *Holt v. Manufacturing Co.*, 25 C. C. A. 301, 80 Fed. 1; *City of Indianapolis v. Central Trust Co.*, 27 C. C. A. 580, 83 Fed. 529; *Town of Westerly v. Westerly Waterworks Co.*, 22 C. C. A. 278, 76 Fed. 467. In the case last cited it is said by the court:

"At the argument it was urged that the decision of these cases on final hearing may be based on questions entirely apart from the constitutional questions involved. The argument is plausible, but delusive. If the decision were so resting on other than constitutional grounds, still, on any appeal from it, the constitutional questions would remain in the case, and might require determination by the appellate court,—a determination which a circuit court of appeals has no authority to pronounce. When constitutional questions are present, the whole case must go to the supreme court."

In the case of *Wrightman v. Boone Co.*, 31 C. C. A. 570, 88 Fed. 435, Judge Sanborn, speaking for the court, at pages 572, 573, 31 C. C. A., and page 437, 88 Fed., used the following language:

"A careful examination of these sections of the act of congress in *Hastings v. Ames*, 32 U. S. App. 485, 15 C. C. A. 628, 68 Fed. 726, and in *Pauley Jail Bldg. & Mfg. Co. v. Crawford Co.*, 28 C. C. A. 579, 84 Fed. 942, led us to the conclusion that, if it is claimed that a law of a state is void because it contravenes the constitution of the United States, a circuit court of appeals has no jurisdiction of the case, although it may involve the consideration of many other questions."

We are of the opinion that the appeal in this case should be dismissed, and it is so ordered.

MCCORMICK, Circuit Judge. I am unable to concur in the judgment of the court in this case. The complainant invoked the jurisdiction of the circuit court on the ground of diverse citizenship, and on the further ground that its case presented a federal question. The appellants, who were respondents in the circuit court, contended that neither of these grounds existed in fact, and contended further that the case did not show matter within the equity jurisdiction of the circuit

court. The circuit court retained jurisdiction, and passed the decree set out in the opinion of the majority. That decree, being interlocutory, will not support an appeal to the supreme court, and cannot be reviewed at all, in advance of final hearing and decree, unless it can be reviewed by this court. The appellants, not waiving, but insisting on, their objections to the jurisdiction of the circuit court, do not question the jurisdiction of this court to review the interlocutory decree, and the appellee has not questioned the jurisdiction of this court to entertain this appeal. It is by no means clear to me that if no injunction had been granted, and the case had proceeded to final hearing and decree, appeal would lie only to the supreme court. *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; *City of New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; *Green v. Mills*, 16 C. C. A. 516, 69 Fed. 852, 30 L. R. A. 90. It seems to me that the better construction of the statutes and of the adjudged cases of controlling authority requires that we should treat the provisions of section 7 of the act creating the circuit courts of appeals as highly remedial, and intended to afford a speedy review by an appellate tribunal of all interlocutory orders or decrees granting or continuing an injunction. On such an appeal we do not necessarily pass on the merits of the case as presented in the circuit court. Nor are we even required, on such an appeal as this, to pass conclusively on the question of the jurisdiction of the circuit court, where, as in this case, that question is strenuously put in issue. There may be, and there have been, proper cases in which this court, on an appeal like this, would be justified, and perhaps required, to consider and determine the merits of the whole case, but that should not usually be done. It is much safer to wait until the suit has advanced to a final hearing and decree. The practical effect of dismissing this appeal is to affirm the action of the circuit court in passing the interlocutory decree. It may well be that, if we entertained jurisdiction on this appeal, we would find nothing in the record to justify us in reversing that decree; but, whether we reversed it or affirmed it, the suit would proceed under the chancery rules much the same in either case, except that in case of reversal the appellants might, if they were so advised, and subject to their liability to answer in damages, proceed with the work which the injunction has arrested. No question having been made by either of the parties to this appeal as to the jurisdiction of this court in this case, it seems to me that it is not a case in which this court should itself raise that question.

JACK et al. v. STATE ex rel. CUNNINGHAM et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1900.)

No. 316.

APPEALABLE ORDERS—INTERLOCUTORY ORDERS GRANTING INJUNCTIONS.

Appellees by leave of court intervened in a pending cause, and on their petition an order was made conditioned upon their filing a bond restraining the receiver of the court from carrying out a former order requiring him to remove the rails from a short line of railroad. Appellees having failed to give the bond, the receiver proceeded to carry out the former order by dismantling the road, selling the materials, and distributing the proceeds between the parties to the suit, who were the owners of the road. Subsequently a demurrer to appellees' petition was overruled, and an order was entered permitting them to intervene, and to move for a rehearing or review of all former orders made in the cause; suspending the order for dismantling the road; requiring the receiver to retain all money in his hands; and requiring the original parties to give bond to comply with any further order in regard to the funds already paid them by the receiver. *Held*, that such order did not come within the provisions of Act Feb. 18, 1895 (28 Stat. 666), allowing appeals from interlocutory orders granting injunctions, and was not appealable.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This case was begun April 27, 1897, in the United States circuit court for the district of South Carolina, by a bill in equity filed by D. F. Jack, a citizen of Georgia, against James T. Williams and H. C. Beattie, citizens of South Carolina. The bill asked for the sale and partition of certain property formerly owned by the Carolina, Knoxville & Western Railway Company. From the bill and other pleadings it appears that the Carolina, Knoxville & Western Railway Company was chartered by South Carolina in 1887 to construct and operate a railroad of considerable length from Hamburg, in South Carolina, to Knoxville, Tenn. The construction was begun in 1888, and some work was done at various points along the line, but the company became bankrupt and unable to continue the construction, so that only a section of 12 miles was completed, extending northward from Greenville in South Carolina. It appears that a mortgage to secure a very large amount of bonds had been executed by the company in 1888, and, default having been made, a bill to foreclose had been filed in the same United States circuit court for the district of South Carolina, and the said defendant H. C. Beattie had been appointed receiver; that receiver's certificates were thereupon issued to complete the road three miles further, to Marietta, S. C.; that the receiver then operated the 15 miles of road until a foreclosure sale, on July 23, 1896. It appeared that the operation by the receiver resulted in the road barely paying its running expenses, without any compensation to the receiver, and without paying anything upon the receiver's certificates or the bonded debt. After many efforts under the foreclosure decree to sell the mortgaged property, it was finally sold to the defendant James T. Williams for \$15,000, who complied with the terms of sale, and obtained possession and title to the property on August 3, 1896. The bill alleges that the purchase, although nominally made by James T. Williams, was really made for the complainant, Jack, together with said Williams and said Beattie, and the purchase money was supplied by all three, under an agreement that the property should be conveyed to Williams for the benefit of all three. The bill alleges that it had been found impossible to operate the road except at a loss; that the condition of the roadbed and bridges was such that it would cost \$10,000 to make it safe to use it; that the citizens along the line of the railroad had been appealed to in vain for assistance to operate it; and that when it was operated the citizens along the line did not use it. The bill

further recites that an act of the legislature of South Carolina had then recently been passed, approved March 5, 1897, requiring all owners of railroads to reorganize under section 1610 of the Revised Statutes of South Carolina within 60 days, under a penalty of \$50 a day and a forfeiture of their franchises and privileges for neglecting to do so; that it would be impossible for the complainant and his co-owners to comply with said act, as it would be attempting a thing almost impossible and certain of failure. The bill then prayed an order appointing a receiver, and a decree for sale and partition. The defendants, by answer, admitted the allegations of the bill, and submitted to a decree.

The court below thereupon appointed a receiver, who had an inspection of the property made by a skilled railroad supervisor, who reported that there were 22 trestles, and that all but 2 of them needed extensive repairs; that there were over 12,000 new cross-ties required; and that in over 20 places the roadbed for considerable distances was covered with dirt 2 feet deep; and that it would cost over \$10,000 to put the road in proper condition to run for one year. Thereupon the court (Judge Simonton), on May 18, 1897, filed its opinion and decree, adjudging that the complainant was entitled to the relief prayed in the bill, and directed the receiver to remove all the iron rails, and to sell them, together with all the rolling stock, and, after paying the costs, and such compensation as might be agreed to by the parties, and, after setting aside the \$2,000 for a purpose hereinafter explained, directed the receiver to pay the remainder of the proceeds to the parties according to their respective interests as they should appear by a written agreement to be signed by them and filed with the clerk. The court (Judge Simonton) held that as the state of South Carolina might charter a new corporation, and confer upon it a franchise similar to that which the Carolina, Knoxville & Western Railway Company had possessed to construct and operate a railroad over the same route, and might authorize the new corporation to take such of the railroad property of the old corporation as might be necessary for its use, upon paying proper compensation therefor, some provision should be made in its decree for that contingency. And the court held that, as the new corporation would be required to pay the present owners the value of the rails and other property taken, the only damage it could suffer by their removal would be the cost of replacing them, and that \$2,000 would be sufficient to cover that cost, and directed the receiver to reserve and deposit that sum in some savings institution of the state, in order that it might be paid to such new corporation if chartered within a period of two years. The receiver, nearly two years afterwards, on March 7, 1899, filed a report in which he reported to the court that he had not yet complied with the decree of May 18, 1897, directing him to remove the iron from the roadbed, but had delayed at the urgent request of the parties in interest, who had been making every effort to avoid the necessity of dismantling the road, but that all their efforts had failed. He thereupon asked authority to contract with a proper person, upon the terms stated in his petition, to remove all the iron from the roadbed and all other movable property, and deliver it at the Southern Railroad freight depot in the city of Greenville. The court entered an order giving the authority.

On March 27, 1899, two petitions by new parties were filed in the cause. The first was by the state of South Carolina, ex relatione T. B. Cunningham and others. It set out that the relators were citizens of South Carolina, residing in the county through which the railroad passed, who, having established themselves in business while the railroad was in operation, depended upon it for transportation, and would be seriously injured if the railroad was discontinued and abandoned, and the people of that section of the country would suffer hardship and incalculable loss. They stated that neither the state of South Carolina nor the relators knew anything of the proceedings in this cause until on March 17, 1899, when the receiver by his agents began to take up the rails; that the relators were advised that the said railroad, so far as completed, was a public highway, authorized by the legislature of South Carolina; and that neither the parties to the cause nor the receiver had power to take up the rails and dismantle the railroad without the authority and consent of the legislature of South Carolina. The petitioners

asked that they be allowed to intervene, and have their rights and the rights of the state adjudicated; that the parties to the cause be required to answer their petition; that the parties to the cause and the receiver be enjoined from removing the rails or dismantling the railroad; and that the parties to the cause be required to replace the rails already removed. Thereupon the court set the matter of the petition for hearing, and ordered that in the meantime the parties to the cause and the receiver be restrained from further proceeding to remove the rails, provided the relators should give a bond in the penalty of \$5,000 to answer any damages by reason of the restraining order. At this time the rails on about one mile of the road had been taken up. The bond required to make the restraining order effective was not given, and the receiver continued to take up the rails, and on April 21, 1899, reported to the court that he had sold and delivered all the property which he had been authorized to sell by the decree of May 18, 1897, to the Charleston & Western Carolina Railway Company, for \$28,000, the purchaser to pay the cost of removing the rails. That he had deposited as directed the \$2,000 required by the decree to be reserved, and had paid the expenses of the receivership, and distributed and paid to the parties to the suit, according to an agreement of division signed by the parties, the net amount coming to each; and he filed their receipts for the payments. Another petition was also filed March 28, 1899, by John T. Bramlett and N. J. Bramlett, claiming title to a strip of land which had been used as a part of its roadbed by the Carolina, Knoxville & Western Railway as constructed, and asserting that the land had reverted to the petitioners free from said right of way by reason of the forfeiture of the rights and franchises of the railroad company, and that all the iron rails, cross-ties, and other property thereon had reverted to the petitioners with said land, and they prayed an injunction to prevent the parties to the cause from removing the aforesaid rails, cross-ties, and other property. To this petition there was a demurrer and an answer, and on April 26, 1899, the court passed an order granting the petitioners leave to intervene, with leave to apply for a rehearing or review of any order theretofore made in the cause, and further ordered that the receiver hold all the property then remaining in his hands subject to the further order of the court.

To the petition of the state of South Carolina, ex relatione Cunningham and others, the parties to the original cause and the receiver filed their answer, April 26, 1899. They denied the right of the petitioners to intervene, and informed the court that under its previous orders the rails and other property had been removed, sold, and delivered, and the purchase money paid and distributed; that the rails could not be replaced; and that the petitioners had not shown that there was any probability of the road being operated if the rails could be replaced. The answer then recited the proceedings in the case, and claimed that the decree of May 18, 1897, directing the receiver to dismantle the road and sell all the removable property, was final, and could not be opened upon petition filed after the term. The court, by its order entered April 26, 1899, gave leave to Cunningham and the other petitioners, on behalf of the state of South Carolina, to intervene, and to apply for a rehearing or review of any order or decree made in the cause; and further ordered "that the complainant, D. F. Jack, and the defendants James T. Williams and H. C. Beattie, do file with the clerk of the court within twenty days from the date of the order a bond in the sum of \$25,000, with good and sufficient sureties to be approved by the clerk, and conditioned for their compliance, respectively, with any order or orders that may be granted by the court as to the funds heretofore paid to the parties, respectively, by the receiver W. C. Cochrane, Esq., and arising from the sale of rails taken from the roadbed of the Carolina, Knoxville & Western Railway." And it was further ordered that the order theretofore granted allowing the dismantling of the railroad be modified by requiring the receiver to hold all the property then in his hands subject to further order of the court. To this order last above recited, and to the ruling of the court overruling the demurrers to both the foregoing petitions, the appellants, Jack, Williams, and Beattie, have appealed, and the appellees have moved to dismiss the appeal.

T. P. Cothran, B. A. Hagood, and M. F. Ansel, for appellants.

Joseph W. Barnwell and Julius H. Heyward (B. M. Shuman, on the brief), for appellees.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

MORRIS, District Judge (after stating the facts as above). At the threshold of this appeal is the question whether the order of April 26, 1899, overruling the demurrer to the petition, and allowing Cunningham and others, in behalf of the state of South Carolina, to intervene, and requiring Jack, Williams, and Beattie to give bond in the penalty of \$25,000 to comply with the future order of the court with regard to the proceeds of the rails received by them, is appealable. In argument the ground principally relied upon to support the right to appeal from this order, which decides no right and is in its nature interlocutory, is based upon the act of February 18, 1895, allowing an appeal from any interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction. It is argued that the petitioners asked in their petition that the original parties to the cause and the receiver should be perpetually enjoined from taking up and removing the rails, and that a temporary restraining order be granted until the further order of the court, and that the parties be required to replace the rails already removed; that the prayer for a temporary injunction was granted conditioned upon the execution of a bond for \$5,000; that the petitioners failed to give the bond, and thereupon the order for a temporary injunction became inoperative, and the receiver proceeded to execute the original decree of the court; that when on April 26, 1899, the petitioners again invoked the action of the court, the rails had been removed and sold, and the money distributed to the parties to the original cause; that there was then nothing that a formal restraining injunction could accomplish, but that the court indirectly accomplished the same result as was sought by the petitioners in their original petition by requiring the appellants to give a bond to return the money so received, if ordered by any further order of the court; and that it was equivalent to an injunction, in that the order commanded the appellants to do a specified act.

The United States supreme court had occasion to consider a quite similar question in *Highland Ave. & B. R. Co. v. Columbian Equipment Co.*, 168 U. S. 628, 18 Sup. Ct. 240, 42 L. Ed. 627. Mr. Justice Brewer, speaking for the court, thus states the question which that court was called upon to determine:

"Is an interlocutory order appointing a receiver appealable from the circuit court to the circuit court of appeals, and if such an order, standing alone, be not appealable, does it become so by the incorporation into it of a direction to the defendant, its officers, directors, agents, and employes, to turn over and deliver the property in their hands? These questions must be determined by a consideration of section 7, c. 517, Act March 3, 1891, creating the circuit court of appeals (26 Stat. 826), as amended February 18, 1895, c. 96 (28 Stat. 666)."

The opinion then comments upon *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810, and *In re Tampa Suburban R. Co.*, 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589, and continues:

"But each of those cases proceeded upon the fact that there was a distinct order granting, continuing, or dissolving an injunction. In the case at bar there is no such order. It is true, following the order of appointment, there is a direction to the defendant, its officers, directors, and agents, to turn over to Campbell the property of which he is appointed receiver, but that is only incidental and ancillary to the receivership. * * * Indeed, the mere appointment of a receiver carries with it the duty on his part of taking possession, and the further duty of those in possession of yielding such possession. So that as a part of an order appointing a receiver there is something in the nature of a mandatory injunction,—that is, a command to the receiver to take, and to the defendant to surrender, possession; yet such command is not technically and strictly an order of injunction."

And, in conclusion, the opinion declares:

"It would savor of judicial legislation to hold that, although congress has not authorized appeals from orders appointing receivers, the mere fact that in such an order there is a direction of a mandatory character, either expressed or implied, in respect to taking possession, makes it appealable as an order granting an injunction."

The considerations which governed the supreme court in deciding in the foregoing case that the order appointing a receiver, embracing, as it did, within its terms a direction to the defendant in the nature of a mandatory injunction, was not the equivalent of a technical injunction, are, it seems to us, entirely applicable to the present case. The order of the court below overruled the demurrer, and granted the appellees leave to intervene and to move for a rehearing or review of any order or decree made in the cause, and suspended the order theretofore granted allowing the dismantling of the road, and directed the receiver to hold all the property left in his hands until further order, and, in addition, required the parties to the original cause to give bond to comply with any further order with regard to the funds already paid them by the receiver.

Applying the rules of the supreme court above cited, we do not find in the order requiring the parties to the original cause to give bond anything to which the act of February 18, 1895, allowing appeals from orders granting injunctions, is applicable. It may perhaps be said, as all that the receiver and the original parties had done had been by direction and under the authority of the decrees and orders of the court, and after long delays, and after the petitioning interveners had neglected to give the bond required of them as a condition of their obtaining the injunction they had prayed for, that the order requiring the original parties to give the \$25,000 bond, when they were not actors and were asking nothing, is to be regarded, under the circumstances, as an extreme exercise of judicial power. But it does not appear that if the parties affected by the order had represented to the court that the exaction of the bond would result in hardship it would have been insisted upon. At any rate, nothing was done by way of penalty, and the matter is not now before us, for the reason that we are of opinion that the appeal was taken prematurely. Appeal dismissed for want of jurisdiction.

SEEBER et al. v. RANDALL et ux.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 580.

HUSBAND AND WIFE—COMMUNITY PROPERTY—WASHINGTON STATUTES.

Land acquired by a husband in the territory of Washington prior to any legislation regarding community property, and which therefore became his separate property, remained so, nor did such legislation have the effect to vest the wife with a community interest therein because of its subsequent increase in value, or because of improvements made with the proceeds of crops raised thereon, though produced by the joint labor of both husband and wife.

Appeal from the Circuit Court of the United States for the Southern Division of the District of Washington.

T. P. & C. C. Gose, for appellants.

J. L. Sharpstein, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The motion to dismiss the appeal herein is denied. The suit is brought by certain of the children of John F. Seeber and Mary E. Seeber for the partition of a certain 160-acre tract of land situated in the county of Walla Walla, state of Washington; they claiming an interest therein as heirs of their deceased mother. The defendants to the suit are purchasers of the land from the grantee of their father. The suit was commenced in one of the state courts, and on motion of the defendants thereto, who are citizens of the state of Illinois, was transferred to the circuit court of the United States for trial, in which court an amended bill was filed. It is conceded by counsel that at the time the land in controversy was acquired by John F. Seeber the common law prevailed in the then territory of Washington, and that John F. Seeber acquired the title to the land as his separate property. That was in the year 1865. The bill shows that upon the acquisition of the title he went, with his wife and children, to reside on the land, and made it their home until the death of his wife, on the 11th day of March, 1880, after which Seeber continued to live there with his children until the sale by him and one of his children (to whom he had previously deeded the property) to the defendants in the year 1893. The interest claimed by the complainant children as heirs of their mother grows out of certain statutory provisions of the state of Washington as applied to these alleged facts found in the amended bill, to wit:

"That on the 2d day of December, 1869, the said lands and premises were of the value of fifteen dollars per acre, and of no other or greater value; and thereafter the said John F. Seeber and the said Mary E. Seeber, by their joint and common labor bestowed thereon, improved and developed said land and premises, and for that purpose used and expended the rents, issues, and profits thereof, and of their community labor and earnings, continuously up to the time of the death of the said Mary E. Seeber, on the 11th day of March, 1880, and thereafter, and until the said John F. Seeber and the said Katherine Seeber (to whom John F. Seeber had deeded the property) sold their interest

therein as aforesaid, the said children labored upon said lands, and enhanced the value thereof; and that said lands and premises, at the death of the said Mary E. Seeber upon the said 11th day of March, 1880, were of the value of one hundred and fifty dollars per acre, and in 1893, when the said John F. Seeber and the said Katherine Seeber sold and conveyed their interest therein, they were of the value of two hundred dollars per acre,—all of which the said defendants, and each of them, had knowledge of at the time of and before the purchase of the said lands by them as aforesaid."

Besides denying these and other averments of the amended bill, the defendants, by their answer, set up, among other things, that the land in controversy was originally acquired from the government of the United States by one Amos Barnett, through whom John F. Seeber acquired the title, who afterwards, and on the 20th day of July, 1893, conveyed the premises to Catherine M. Seeber; and that on the 24th day of March, 1894, the said Catherine M. and John F. Seeber, for the consideration of \$10,000, conveyed the property to the defendant William Randall. The answer also avers that at the time of the defendant's purchase the complainants, and each of their brothers and sisters whose interest the complainants claim, were present, and well knew that the defendant Randall intended to make the purchase, and to pay for the property the sum of \$10,000, and that neither of them made any claim to any interest in the land, but permitted and encouraged the defendant to complete the purchase, and to pay the said sum of \$10,000 therefor, and to receive a warranty deed for it; that soon after such purchase and conveyance the complainants, and their brothers and sisters whose interests they now claim, surrendered possession of the property to the defendant Randall, who, believing that he had a perfect title to the land, and relying upon the representations and the facts stated, made large, valuable, and permanent improvements thereon, at a cost of \$5,300, with the knowledge of the complainants, and their brothers and sisters whose interests they now assert, without any claim by or on the part of either of them, or notice to the defendant that they claimed any interest in the property; wherefore the defendants aver that the complainants are estopped from maintaining this suit, or claiming any interest in the property. The court below, upon motion made by the defendants upon the pleadings, dismissed the suit, from which judgment the complainants bring the present appeal.

Under the community law of Spain and Mexico, the community property embraced, among other things, the rents, issues, and profits of the separate property of the spouses, and all property, of whatever nature, which the spouses acquired by their own labor and industry. *Schm. Civil Law Spain & Mexico*, art. 44, pp. 12, 13; 6 *Am. & Eng. Enc. Law*, 308, and notes. In the territory, and, subsequently, in the state, of Washington, as in many of the other states and territories of the United States, community property is defined by statute. The first law passed upon the subject by the legislature of the territory of Washington was enacted December 2, 1869 (*Laws 1869*, p. 318), the first, second, eleventh, and twelfth sections of which are as follows:

"Section 1. That all property, both real and personal, of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be her separate property; and all property, both real and per-

sonal, owned by the husband before marriage, and that acquired by him afterward, by gift, bequest, devise or descent, shall be his separate property.

"Sec. 2. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property."

"Sec. 11. In every marriage hereafter contracted in this territory, the rights of the husband and wife shall be governed by this act, unless there is a marriage contract containing stipulations contrary thereto.

"Sec. 12. The rights of husband and wife married in this territory prior to the passage of this act, or married out of this territory, but who shall reside and acquire property herein, shall also be determined by the provisions of this act, with respect to such property as shall be hereafter acquired, unless so far as such provisions may be in conflict with the stipulations of any marriage contract."

By an act passed by the legislature of the territory in 1871 (Laws 1871, p. 67, § 2) it was provided as follows: "All property acquired during the marriage by the joint labors of the husband and wife, or by their individual labors, together with all rents, profits, interest, or proceeds of the separate property of both accruing during the marriage, shall become common property,"—with a proviso not necessary to be mentioned. In 1873 the legislature of the territory enacted (Laws 1873, p. 450), among other things, as follows: "All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property." Section 12 of the act of 1873 also provides, as a condition of residence, that the property acquired by the spouses shall be governed by that act, unless the same conflicts with the stipulations of any marriage contract.

In 1879 the legislature of the territory (Sess. Laws 1879, p. 77, § 1) enacted, in substance, in its first section, that the property owned by either spouse before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is the separate property of such spouse; and by section 2 of the act declared that "all other property acquired after marriage by either husband or wife, or both, is community property, except such as may be acquired as is provided in the first section of this act." The act of 1879 went into effect upon its approval by the governor, on the 14th day of November, 1879.

It is clear that the land, which, prior to the year 1869, was the separate property of the husband, was not converted into community property by either of the acts of the legislature of the territory—First, because those acts apply only to property thereafter acquired, and contain no evidence of any intent to give them a retrospective effect; and, secondly, because, even if so intended, neither of them could have the effect of taking from the one spouse and giving to the other property theretofore acquired, because of the provisions of the constitution of the United States. *Darrenberger v. Haupt*, 10 Nev. 46; *Lake v. Bender*, 18 Nev. 361, 382, 4 Pac. 711, 7 Pac. 74. Nor in the legislation referred to do we find any provision declaring that the increase in the value of the separate property of either spouse shall constitute community property. There is in the act of 1871, above cited, a provision to the effect that all property acquired during the marriage by the joint labors of the husband and wife, or by their individual labors,

together with all rents, profits, interest, or proceeds of the separate property of both accruing during the marriage, shall be common property. But the increase in the value of the separate property of one of the spouses cannot be properly regarded as "property acquired during the marriage by the joint labors of the husband and wife or by their individual labors." *Lewis v. Johns*, 24 Cal. 98, 103. And, assuming that it is competent for the legislature to declare the rents, issues, and profits of the separate property of either spouse to be community property, there is nothing in the present bill to take the case out of the general rule that the skill or labor of either spouse in carrying on farming or other like operations has nothing to do with the question of the ownership of the crops or other proceeds thereof. In such cases the title to the products grows out of the title to the land itself, and belongs to its owner. *Rush v. Vought*, 55 Pa. St. 443, 93 Am. Dec. 769; *Hamilton v. Booth*, 55 Miss. 62, 30 Am. Rep. 500; *Garvin v. Gaebe*, 72 Ill. 448; *In re Higgins' Estate*, 65 Cal. 407, 4 Pac. 389; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74, and numerous cases there cited. The judgment is affirmed.

JOHN et al. v. SMITH et al.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 571.

CHARITIES—VALIDITY OF CHARITABLE TRUST—CERTAINTY AS TO TRUSTEES AND BENEFICIARIES.

A testator devised and bequeathed all his property to his executors in trust to be used in establishing and maintaining free public schools in a certain town. The will provided that the personal property should be sold, and the proceeds, together with the rents from the real estate for 15 years, used in the erection of school buildings and the employment of teachers; that at the end of 15 years the realty should be sold, and the income from the proceeds devoted to school purposes in the same town. It also provided that at the end of the 15 years trustees should be appointed by the judge of the state circuit court and the judge of the United States district court in that district, who should have charge of the estate and the application of the income to the purposes specified. *Held*, that the trust created was not void for indefiniteness or uncertainty as to the plan for appointment of trustees, as in case of a failure of appointment in the manner provided a court of equity would appoint trustees to carry out the purposes of the testator, the trust being a charitable one, favored by the courts; nor was the validity of the trust affected by the failure to designate the beneficiaries any more definitely than to state that the schools to be established should be public, and at all times open to the children of the school district, which should embrace the town.

In Error to the Circuit Court of the United States for the District of Oregon.

Watson & Beekman and Nixon & Dolph (Nathan H. Frank, of counsel), for plaintiffs in error.

Catlin, Kollock & Catlin and Nicholas & Deady, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, delivered the opinion of the court.

The plaintiffs in error were the plaintiffs in an action of ejectment brought against the defendants in error to recover the possession of certain real estate situate in the town of St. Johns, in the state of Oregon. The defendant in error, as the executor of James John, deceased, answered, denying the plaintiffs' title and right of possession and setting up four distinct defenses: First, the statute of limitations; second, that he was in possession as such executor, and under the terms of the will of said James John, deceased; third, that the plaintiffs were estopped by the judgment of the county court of Multnomah county sitting in probate, dismissing the petition of the heirs of James John, deceased, by which they sought to vacate a prior order of said court probating the will, etc.; and, fourth, that said county court had decreed the sale of the particular property in controversy to pay expenses of administration, and that the same had been sold thereunder. A demurrer to the answer was overruled (91 Fed. 827), and the plaintiffs replied. Judgment was then rendered for the defendant upon his motion for a judgment on the pleadings. On the writ of error from this court it is now contended that the trial court erred in overruling the demurrer and in rendering the judgment.

The defense set forth in the answer concerning which the principal argument was had was the second,—that in which the defendant asserted his right of possession as the executor of the estate of James John, deceased. It alleged, in substance, that by the terms of his will James John devised and bequeathed all of his property and money to his executors for the following uses and trusts: First, to convert his personal property into cash, and to lease his real estate upon leases not to extend beyond 15 years from his death, and to expend all moneys from the sale of personal property or from rents of real estate, "in the erection of buildings for school purposes upon block No. 29, in the town of St. Johns, Multnomah county, state of Oregon, and in employing teachers to teach the common-school branches." Next, to sell all his real estate 15 years after his death, except said block No. 29, and such other lots as the executors might deem necessary for school buildings and grounds; and he then provided as follows:

"It is my desire that my estate shall be used in establishing and maintaining free schools or school in the town of St. Johns; and that such schools shall be public, and at all times open to children of the school district which shall embrace the town of St. Johns; and, if my executors shall consider it to be the best interests of the children of said town and district, they may act in concert with the directors of said school district in erecting schoolhouses and maintaining schools; but any and all buildings erected with money belonging to my estate shall belong to my estate, and not to the district, and all moneys expended in maintaining schools shall be expended under the supervision of my executors, as long as they shall continue to act, and until the trustees hereinafter mentioned and provided for shall be appointed and qualify."

Then follows the appointment of three executors named, and this provision:

"It is my will that fifteen years after my death three trustees be appointed as follows: One by the judge of the circuit court of the state of Oregon in whose judicial district the town of St. Johns may be in; one by the person who shall be district judge of the United States in whose judicial district the

town of St. Johns may be; and the third shall be appointed by the two persons acting as such judges; and the three persons appointed as such trustees shall be and constitute a board of trustees, and such board shall have the possession, management, and control of all moneys and property by them received from my executors for the purpose of promoting educational interests in the town of St. Johns, and to that end shall use such money and property so as to establish a permanent fund, the interest only to be used in educational purposes, or so much thereof as shall be necessary. The principal to be loaned only on real estate security. A portion of the principal, which shall be in excess of fifty thousand dollars, in the discretion of such trustees, may be used in erecting buildings for educational purposes, and employing teachers. * * * It is my intention and desire to establish a permanent, perpetual, educational fund, to be forever used in promoting education. Whenever a vacancy shall occur in the board of trustees hereinbefore mentioned, such vacancy shall be filled by appointment to be made by the person occupying the position of judges as aforesaid. Said board to be always kept full, and to consist of three persons, a majority of whom may transact business."

The plaintiffs in error contend that the will of James John is so uncertain and indefinite that it is impossible to ascertain the intention of the testator. It is said that the will embodies two distinct and conflicting schemes,—the one to establish a free school or schools in the town of St. Johns for the benefit of the school district of that town, and to apply testator's personal property and rents of real estate for 15 years following his death, through the agency of his executors, in erecting school buildings and employing teachers, and the other to create a permanent fund from the sale of all his realty at the end of the 15 years to be controlled by a board of three trustees to be then appointed, and to be used in promoting educational interests in the town of St. Johns by the application of the interest of said fund thereto, giving authority to use a portion of the principal over \$50,000, in the discretion of the trustees, for the erection of buildings for educational purposes and employing teachers, but without restriction as to branches of education except that the doctrines of no one more than another religious sect are to be inculcated. It is said that it is impossible to determine whether the testator intended that these two schemes should ever unite. Other features of the will are referred to as presenting difficulties of construction. Upon a consideration of all the provisions of the will we find no such uncertainty as to interfere with its enforcement. It is evident that the testator intended that none of his heirs at law should receive any portion of his property, and that all his property should go, first, to his executors, and thereafter to trustees, to be used in promoting education and in establishing and maintaining free schools in the town of St. Johns, the schools to be public, and at all times open to the children of the school district of the town of St. Johns, giving to the executors power, if they should consider it to be the best interests of the children of said school district, to act in concert with the directors of said school district in erecting school houses and maintaining schools. The whole disposition of the testator's property is made for a charitable purpose. Said the court in *Ould v. Washington Hospital*, 95 U. S. 303, 313, 24 L. Ed. 452: "Charitable uses are favorites with courts of equity. The construction of all instruments, where they are concerned, is liberal in their behalf." We think it may be fairly deduced from the will that there are not two

schemes involved therein, and that it was the intention of the testator to make a temporary disposition of his property by placing it in the hands of his executors for a term of 15 years, and thereafter to transfer the whole thereof to his trustees to carry out the general purposes expressed in his will. But if, indeed, there are two schemes, and certain of his property is to remain in the hands of the executors, the schemes are not necessarily inconsistent, nor will the purpose of the testator fail on that account. It is argued further that the trust is void for the reason that no trustee is named, and that the method prescribed for selecting a trustee is so uncertain and cumbersome as to be incapable of being carried out, since the power to appoint one trustee is vested in the district judge of the United States for the district in which the town of St. Johns may be, and the power to appoint another is vested in the judge of the circuit court of the state of Oregon for that district. It is said that there is no method to compel these judges to act in case they decline, that there are now four circuit judges of the circuit court of the state of Oregon for the county in which the town of St. Johns is situated, and there is no way to determine which of the four is to exercise the power of appointing a trustee, and that, as judges, the said officers have no capacity to accept said trust. This may all be true, and yet it does not follow that the trust must fail. The time has not arrived for the judges to exercise the powers conferred upon them by the will. We have no reason to doubt that, when that time comes, they will consent to carry out the intention of the testator. They will not be prevented from so doing by reason of their official duties. The fact that they may be disqualified from presiding at the trial of any litigation that may hereafter arise concerning the trust is of no moment, and presents no difficulty. But if, indeed, they should decline to accept the trust, and refuse to appoint the trustees, the purpose of the testator in making the charitable disposition of his property would not be thereby frustrated. There can be no doubt that in such an event a court of equity would raise up a trustee or trustees to effectuate the intention of the testator by exercising its ordinary jurisdiction to see that the trust should not fail for want of a trustee. Pom. Eq. Jur. § 1026.

The plaintiffs in error contend that it is impossible to carry out the intention of the testator without invoking the doctrine of *cy-pres*,—a doctrine which does not prevail in Oregon,—and that under the constitution and the statutes of Oregon there is no difference between ordinary trusts and trusts for charitable purposes. The supreme court of Oregon in at least two cases has ruled against this contention, and has recognized a clear distinction between charitable trusts and other trusts. In *Raley v. Umatilla Co.*, 15 Or. 173, 13 Pac. 895, the court said:

"It is also urged by counsel for appellants with much apparent confidence that this trust is void because those who may be its beneficiaries are uncertain or unknown. But this does not belong to that class of trusts where it is necessary they should be known. It is the use to which the property is to be applied, and not the persons benefited, which the law regards in such case. In other words, it is a trust for charitable uses."

—And the court quoted from 2 Perry, Trusts, § 687, in which it was said:

"But, if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain, or incapable of taking, or that the objects of the charity are uncertain or indefinite. Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins."

In *Pennoyer v. Wadhams*, 20 Or. 274, 25 Pac. 720, in construing a will in which the testator had devised a portion of his property to a church to be known as the "First Presbyterian Church of Upper Astoria," it was held that, as a charitable trust, it was valid against the testator's heirs, notwithstanding there was no Presbyterian church organization or society in Upper Astoria at the time of the testator's death. The court said:

"It is also claimed that the devise in this case is invalid because there was no *cestui que trust* in existence capable of taking at the time of the donor's death, nor is there now. In disposing of this question it is well to keep in view the fact that we have a living trustee, in whom the testator vested the property with specific direction as to its disposition. This is not a case where the bequest is for charity generally, or where there is no one in *esse* capable of taking at the time of the testator's death."

The case of *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450, is directly in point. In that case the testator devised certain lots to two trustees named to hold the same as a site for the erection of a hospital for foundlings to be built by any association that might thereafter be incorporated by an act of congress for that purpose, and upon such incorporation to convey the lots to the corporation, but giving the trustees power to withhold the grant until the creation of a corporation which should meet their approval. The court upheld the trust, and in the opinion said:

"The gift was immediate and absolute, and it is clear beyond doubt that the testator meant that no part of the property so given should ever go to his heirs at law, or be applied to any other object than that to which he had devoted it by the devise here in question."

Of similar import are the cases of *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397, and *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401. In the first case the testator had granted lands and personal property to a trustee named, and to his successors, in trust for the purpose of founding an institution for the education of youth in St. Louis county, Mo., for the use and benefit of the Russell Institute of St. Louis, Mo., giving his trustee direction to sell the lands, and pay the proceeds to Thomas Allen, president of the board of trustees of the said Russell Institute of St. Louis, Mo. It was held that this was a charitable gift, and that it was valid against the heirs of the donor, although the institution was never established nor incorporated in the donor's lifetime or the lifetime of Thomas Allen. In *Jones v. Habersham* the court held valid a will which contained several charitable devises. The beneficiaries of some of the bequests were indefinite; as, for instance, "to one or more Presbyterian or Congregational churches in the state of Georgia in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause

of religion among the poor and feeble churches of the state." Another was "to the first Christian church erected or to be erected in the village of Telfairville in Burke county, or to such persons as may become trustees of the same." These were held to be good charitable bequests.

The plaintiffs in error cite and rely upon *Association v. Hart*, 4 Wheat. 1, 4 L. Ed. 499, *Wheeler v. Smith*, 9 How. 55, 13 L. Ed. 44, and *Fontain v. Ravenel*, 17 How. 369, 15 L. Ed. 80. In the first case it was held that a bequest of funds to the Baptist Association "that for ordinary meets at Philadelphia annually," to be used for the education of youths of that denomination who should appear promising for the ministry, was void, for the reason that the legislature of Virginia had in 1792 passed an act repealing all English statutes, and particularly that of 43 Eliz. c. 4, by virtue of which alone, in the opinion of the court, the English courts received their authority to sustain a charity such as that which was intended to be created by the bequest. That conclusion was subsequently shown to be erroneous by the publication of numerous cases in which it appeared that the English courts had upheld such charitable bequests before the enactment of the statute of 43 Eliz. This was subsequently admitted in *Vidal v. Girard*, 2 How. 196, 11 L. Ed. 205, by Mr. Justice Story, who had concurred in the opinion in *Association v. Hart*. In *Russell v. Allen*, 107 U. S. 167, 2 Sup. Ct. 331, 27 L. Ed. 399, referring to the reasoning on which the decision in *Association v. Hart* was based, the court said:

"That theory has since, upon a more thorough examination of the precedents, been clearly shown to be erroneous;" and the court proceeded to remark: "And the only cases in which this court has followed the decision in *Association v. Hart* have, like it, arisen in the state of Virginia, by the decisions of whose highest court charities, except in certain cases specified by statute, are not upheld to any greater extent than other trusts."

One of the cases referred to in the language so quoted was *Wheeler v. Smith*, a case in which decision was controlled wholly by the rule established by the courts of Virginia. The decision in that case is no authority for the construction of a bequest made in Oregon, where, as we have seen, the rule established by the supreme court of the state is the reverse of that of Virginia. In *Fontain v. Ravenel* the testator empowered his executors after the death of his wife to distribute the residue of his estate "for the use of such charitable institutions in Pennsylvania and South Carolina as they might deem most beneficial to mankind." The executors died before the death of the testator's wife. It was held that a court of equity had not the power to carry out the intention of the testator, nor to take the residue of the estate from the next of kin. The court said:

"The testator was unwilling to give this discretion to select the objects of his bounty except to his executors. * * * They died before they had the power to appoint, and now what remains of this bequest on which a court of chancery can act?"

The opinion admits that the bequest would have been executed in England, not as a judicial function of the court of chancery, but under the cy-pres power which the chancellor exercises as the representa-

tive of the sovereign, and by virtue of the king's prerogative as *parens patriæ*. This power, it was said, did not belong to courts of equity in the United States, in the absence of a statute conferring it. The decision has no perceptible bearing upon the question involved in the case at bar. There is in this case no necessity to invoke the doctrine of *cy-pres*. The nature of the uses to which the testator's property is to be devoted is, in our opinion, made sufficiently distinct and clear by the terms of the will.

As the defense so pleaded to the complaint was sufficient in itself to justify the ruling of the circuit court, we find it unnecessary to consider the other defenses which were included in the answer. The judgment is affirmed.

KILLMAN v. ROBERT PALMER & SON SHIPBUILDING & MARINE
RY. CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 145.

2. MASTER AND SERVANT—DEFECTIVE APPLIANCES—INJURY TO EMPLOYE—NEG-
LIGENCE—EVIDENCE.

Plaintiff, who was employed as guy tender aboard a scow, was injured by the breaking of an eyebolt through which led a guy rope used for the purpose of swinging aboard a boom hung from the mast of the scow. The bolt was originally suitable, and, while it had been used about a year or year and a half, plaintiff had not discovered anything wrong about it, though he had observed it in his work every day for six months. After the break, however, an old crack was discovered in the bolt, which was not discoverable without removal from its position. *Held*, that defendant was not negligent in failing to remove the bolt, after so brief a use, for the purpose of inspecting its condition for latent defects, unless its attention was directed to the propriety of doing so.

2. SAME—NOTICE OF DEFECTS.

A statement made to an employer that an eyebolt, through which led a guy rope, was so loose that it would turn around, and failed to lead right, and should be changed, is not notice of a latent defect in the bolt which had no connection with its looseness.

In Error to the Circuit Court of the United States for the Southern District of New York.

T. P. Wickes, for plaintiff in error.

H. G. Hull, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

PER CURIAM. This action is brought to recover damages sustained by the plaintiff by reason of the breaking of an eyebolt, through which led a guy rope to a winch, which rope was used for the purpose of swinging aboard a boom, hung upon the mast of a scow, from the dock, where the load, consisting of deck planks, was attached. The plaintiff was, and for six months before the accident had been, the guy tender. The rope was fastened to a bitt on the port side of the scow, and thence passed through a pulley at the end of the boom; thence through a pulley aft of the bitt on the port side of the scow;

thence to the middle of the scow, and through another pulley attached to an eyebolt, passing through the deck, and fastened underneath by a nut; thence the guy rope passed to the winch, which furnished the power. While attending to his duty, the plaintiff was standing, and was accustomed to stand, with one foot outside and one foot inside the house containing the winch, which brought him facing the mast and eyebolt, and some four feet therefrom. The scow was a comparatively new one, used for transporting lumber and timber, having been built at the yard of the defendant about a year and a half before the accident. There is no sufficient evidence that the bolt in size, make, fitting, or quality of iron, was originally unsuitable; hence the negligence of the defendant, if any existed, arose from failure to use suitable care for the continuance of the eyebolt in proper condition. For several months before the accident the plaintiff had been working in close proximity to it, and stated as follows:

"I did not see anything suspicious about the eyebolt in the deck that looked suspicious or looked wrong. I never took notice of that. I had been working there for six months, right in that very place, looking at that very eyebolt, and the pulley fastened to that very eyebolt, for six months, and I never took notice of anything wrong about it. I never said anything to Mr. Palmer, or anybody else, about that particular eyebolt. I never said anything. I never had reason for saying anything about it to anybody."

From this it is apparent that, if any defective condition of the bolt existed, it was not obvious to a person related to it as was the plaintiff. The plaintiff's brother operated the winch. He testified that after the accident there was an old crack in the eyebolt, and that at the place of the break about one-quarter of it looked bright and the rest looked dark. He further testified:

"The break in the bolt was away down in the wood, and out of sight, about two inches from the top of the woodwork. Nobody could see the break, but it was loose, turning round."

Therefore, so far as the old crack was concerned, the defect was hidden, and was not discoverable without the removal of the bolt. It was not negligence on the part of the defendant to fail to remove the bolt, after so brief use thereof, for the purpose of inspecting its condition, in anticipation of a latent defect, unless its attention was directed to the propriety of doing so. The plaintiff seeks to raise such duty from the evidence of the plaintiff's brother that he had spoken to the proper officer of the defendant respecting it. He states that the bolt was loose; that it had a little play in its socket; and specifically describes it as follows:

"It was a round play. It went right around. It had a little play that way, too [illustrating]."

This witness states that he called the attention of Mr. Palmer, an officer of the company, to the condition of the bolt, as follows:

"I made a complaint to Mr. Palmer—this gentleman here—about the condition of that bolt. I asked him to have it changed. I told him that the bolt was loose on deck, and I told him, 'Mr. Palmer, I wish you would change this bolt,' and he said, 'The first chance we get we will do it.' I said I would like to have it fixed or changed. It was so loose it would turn right around. * * * I told Mr. Palmer the bolt ought to be changed so that the lead would be all right. That would help her. She would lead better,

because she was a little out of the way. It did not reach straight onto the winch. I told Mr. Palmer that the bolt ought to be changed so that it would lead right. I did not tell him anything else."

This conversation is claimed to have occurred about two weeks before the accident. It will be observed that the complaint made to Mr. Palmer was not that the bolt was defective, but that it was loose, and turned around, and should be changed for the purpose of enabling the guy rope to lead more directly to the winch; and it was with reference to this convenience or advantage that Mr. Palmer apparently made the promise to change the bolt, but his attention was not directed to any defect indicated by its loose condition. But, whatever the purpose of the proposed change, it would have been the duty of the master to inspect the bolt, if the looseness itself gave notice of defect. But the looseness of the bolt seems to have had no connection with the defect alleged to have been discovered in it after the accident, and hence a notice to Palmer of such looseness cannot be construed as a notice of defective condition. The plaintiff's proposition must be that the fact that a bolt turned around was notice of its previous breakage, or that it was weakened in its capacity to carry strain. But there is no apparent causal relation between the loosened bolt and the fault subsequently discovered in it; nor does it appear that its loosened condition lessened its resisting power. Therefore the fact is that the defendant provided a suitable bolt. He had used it for about a year or year and a half, and was not bound to remove it in search of hidden defects. Its looseness, of which the defendant is claimed to have had notice, had no causal relation to the accident. This relieves the defendant of liability. In conclusion it should be observed that it seems highly improbable that the bolt was loose to the extent stated by the plaintiff's brother. The plaintiff's connection with the eyebolt was the more intimate, and for six months he had spent his working days with the bolt before his eyes, and had found not even a suspicion of defect. In view of this evidence, the statement of his brother as to the obvious looseness of the bolt should be accepted with sparing credence. To the one, who desired to escape the charge that he assumed the risk, the bolt was immovable, but, to cast the risk on the master, the kinsman testified to continued, pronounced rotary and lateral motions. The judgment should be affirmed, with costs.

TRAVELERS' PROTECTIVE ASS'N OF AMERICA v. WEST.

(Circuit Court of Appeals, Seventh Circuit. June 21, 1900.)

No. 607.

1. ACCIDENT INSURANCE—INJURY—EVIDENCE—RES GESTÆ.

In an action on an accident policy, statements of insured as to the fact, nature, and extent of the injury, which he received in a basement, claimed to have caused his death, made when he came upstairs, a few minutes after the accident, are admissible as *res gestæ*.

2. SAME.

Statements of insured as to the fact and circumstances of the injury made to his niece an hour after receiving it, and to his wife and son later

in the same day, were inadmissible; being mere narrative, and made too long after the injury to be *res gestæ*.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Frank P. Blair, for plaintiff in error.

Spencer Ward, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge. This case was argued at the October session, 1899. The judgment of which a review is sought is for the amount of a policy of insurance against accident issued by the Travelers' Protective Association of America to Henry West, and made payable to his wife, Mary C. West. The declaration charges that Henry West came to his death as the result of bodily injuries caused "by accidentally striking his head against a gas fixture in the basement of a certain building located at the intersection of West Ravenwood Park and Wilson avenue, streets in the city of Chicago." This is alleged to have occurred on December 12, 1894. On December 15th, as the evidence shows, West went to New York City and Washington on business, returned home on the 31st, and on January 6, 1895, died. The testimony of the attending physician is that "the death was caused by pneumonia." There is in the record no direct evidence of the alleged accident, but a number of witnesses testified, over objection and exception, to statements of the insured on the subject. The admissibility of that testimony is challenged. The basement in which the accident is alleged to have occurred was under a drug store, the proprietor of which testified that on a day in December, 1894, Mr. West was in his store, went into the basement, and after a minute or two came up, and putting his hand to his head, said "that he had bumped his head on the gas fixture down there. He said it was very low, and he got an awful bump." A clerk in the drug store testified that: West was in the basement probably "ten or fifteen minutes." "He came up, and said he had struck his head against the gas jet in the basement. It was very low. He took off his hat, and he showed where he had crushed it in striking against the jet, and also felt of his head. He said he struck his head in the basement." The testimony of these witnesses was admitted on the theory that the statements then made were so nearly connected with the occurrence as to be a part of the *res gestæ*, and the ruling seems to be justified by the decision of the supreme court in *Insurance Co. v. Mosley*, 8 Wall. 397, 19 L. Ed. 437. That case does not seem to us to have been overruled by the decision in *Railroad Co. v. O'Brien*, 119 U. S. 104, 7 Sup. Ct. 118, 30 L. Ed. 299. See *Association v. Shryock*, 73 Fed. 774, 36 U. S. App. 659, 20 C. C. A. 3.

Other witnesses were permitted to testify on the same theory, to statements made later and at other places. Mrs. Pleas, a niece of the deceased, testified:

"We started to the city, and as we got to the drug store he was taken sick, and he said: 'Wait for me at the depot. I am going down to Bierstedt's.'"

So I went on to the depot and waited. We were to have taken the 10:27 train, and he did not come at the 10:27; and just before 11:30—right before the train went—he came to the depot. I noticed he looked bad, and I says, 'Where have you been?' He said, 'I was hurt.' I says, 'You have been pretty near an hour.' Mr. Blair: That I object to as irrelevant and incompetent. The Court: Anything he said in respect to the injury I will not permit. Go on. The Witness: He said he was not able to go to the city with me. I said he had been gone nearly an hour, and he said, 'No; I received a severe blow on my head in the basement, from a gas pipe.' Mr. Blair: I object to that,—that he said he received a severe blow from a gas pipe in a drug store. I object to that statement, and move it be stricken out. (Which motion the court denied, and defendant then and there excepted.) The Witness (continuing): He said, 'It took me off my feet.' The Court: I will hear a little more of it, and see what there is in it. The Witness (continuing): I says, 'Was it very bad?' and he took off his hat, and showed me his head. I saw where it hurt his head. Then he said he would not go to the city, and I said, 'Did it hurt you bad?' and he said, 'It knocked me off my feet.' I said, 'What did you do?' I said, 'You have been gone nearly an hour.' He said, 'It is only ten minutes.' I says, 'It is an hour by the watch.' He said, 'I won't go to the city.' I says, 'Do you suffer so?' And he says: 'I can't see. I am afraid to cross the streets until I get better. But don't tell my wife.' And I went down to the city alone. The Court: That whole conversation is so mingled with the nature of the wound that I will let it all stand."

Mrs. West, the defendant in error, testified:

"When he came up that day from the drug store, he said his head was sore. It was quite a lump. He said he had struck his head a terrible blow and it was very sore, and he showed me the lump on the side of his head."

Exception was also taken to the following answers to the fourteenth and sixteenth interrogatories in the deposition of Harry West, a son of the deceased:

(14) "Wishing to address some remark to him, I turned around just in time to see him stumble. I put up my hand to catch him. His reply to me was: 'No; I was dizzy, as I received a blow on the head from a gas pipe while groping around in Bierstedt's basement this morning.' I suggested that he do something for the bump on his head, but he laughingly remarked that he would put some arnica on it, and guessed he would be all right in the morning. After arriving at the billiard hall my father and I started a game of billiards, but my father soon gave it up and sat down; saying that his head hurt him so that he was dizzy, and could not tell a red ball from a white one." (16) "Immediately after the injury, namely, on the evening of the day on which it occurred, I know that my father was suffering a great deal from the effects of this blow that he had received upon the head in the morning, while coming from the water-closet in the basement at Bierstedt's drug store. I know this as my father stumbled and almost fell while coming down the steps of the house. He then told me that he had received this blow, and a little further down the street, while we were discussing the matter, he took off his hat and showed me where he had been struck; remarking at the time how extremely painful it was. After arriving at the billiard hall, the place for which we had originally started, he had to give up the game of billiards after making only two or three shots; remarking that his head hurt him so that he was dizzy, and could not tell a red ball from a white one. We sat around for a few minutes, and then went home. My father immediately retired to bed, I believe; at least, I know I did. There were no other complaints made to me, as I was busy at my office both night and day, and my father left the city almost immediately afterwards."

We are of opinion that the statements of the deceased to these witnesses of the fact and circumstances of his injury were mere narrative, made too far away from and too long after the occurrence to be admissible as a part of the *res gestæ*. In so far as they are

mere repetitions of what was said to the druggist and his clerk, they might perhaps, as urged, be regarded as harmless, but they go much further. To the druggist he said he got "an awful bump,"—an expression which by itself the jury might have regarded as of little significance; but they could hardly have treated lightly the statement to the wife, that it was a terrible blow, and to the niece, that it took him off his feet. The fact that in the testimony of the witnesses these statements were intermingled with others which were unobjectionable did not make them admissible.

It is urged that the grounds of objection to the testimony were not properly stated, but the bill of exceptions shows plainly that the court was under no misapprehension in that respect. The question presented here is identical with that decided below. The judgment is reversed, and the case remanded, with direction to grant a new trial

EMPLOYERS' LIABILITY ASSUR. CORP., Limited, v. BACK.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 574.

1. ACCIDENT INSURANCE—RISK—KNOWLEDGE OF AGENT—CONSTRUCTION OF POLICY.

Where an application for insurance against accident represents the applicant as an importer and dealer in Chinese merchandise and contractor for Chinese labor, and it is agreed in the application and policy that for any injury received in any occupation classed by the company as more hazardous than that named in the application the insured shall be entitled to recover only such amount as the premium paid would purchase at the rates fixed for such increased hazard, the fact that the insured made a full disclosure of the business in which he was engaged to the agent of the company who solicited the insurance, and that the latter had full knowledge of the increased risk when the policy was issued, will not render the company liable for more than the amount of insurance that may be purchased with the premium paid for such increased hazard.

2. SAME—RECOVERY ON POLICY.

Where, in an action on an accident policy, defendant averred in its answer that the business of foreman of Chinese labor, in which insured was engaged at the time of the accident, was classified as a special risk, and was much more dangerous than that described in the application of insured, and that the premium paid would have purchased a less amount of insurance than that agreed to be paid in the policy issued, such averments, if proved, would deprive plaintiff of his right to recover on the policy more than the amount of insurance that the premium paid would purchase in the increased risk.

In Error to the Circuit Court of the United States for the District of Oregon.

Williams, Wood & Linthicum, T. C. Van Ness, and L. A. Redman, for plaintiff in error.

John H. Hall (W. T. Hume, of counsel), for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action upon an accident policy of insurance issued to one Go Boo, a Chinese person, upon his application, made in writing, by the terms of which it is declared that the statements of fact contained in the application are to be considered as warranties. The application for the insurance, signed by the insured, contained, among others, the following declarations and provisions:

"(4) My occupation is that of an importer and dealer in Chinese merchandise and contractor for Chinese labor. (5) The class of risk under my occupation is agreed to be ordinary. (6) I understand that risks are differently classified, according to occupation; and I agree that for any injury received in any occupation or exposure classed by this company as more hazardous than those above stated I shall be entitled to recover only such amount as the premium paid by me would purchase at the rates fixed for such increased hazard. (7) The amount of insurance against accidental death or permanent total disablement hereby applied for is five thousand dollars. (8) The amount of weekly indemnity for totally disabling injuries hereby applied for is twenty-five dollars. (9) The premium for one year's insurance to be \$37.50." "(15) I have not in contemplation any special journey or any hazardous undertaking."

The policy issued upon that application, and accepted by the insured, upon which the present action is based, provides:

"The Employers' Liability Assurance Corporation, Limited, does hereby insure Go Boo, of Astoria, Oregon, engaged in the business or occupation of a merchant, under classification ordinary, for the term of twelve months from April 14, 1898, at noon, against bodily injuries, within the meaning of this policy, subject and according to the agreements and conditions herein contained, including those printed on the back of this policy, in the principal sum of five thousand dollars, and will pay the under-mentioned amounts," etc.

Among the agreements and conditions contained in the policy is the following:

"If the insured is injured in any occupation or exposure classed by this corporation as more hazardous than that herein given, his insurance and weekly indemnity shall be only for such amounts as the premium paid by him will purchase at the rate fixed for such increased hazard."

The complaint alleges the issuance and delivery of the policy to Go Boo, and avers that during the period covered by it, to wit, July 24, 1898, at the cannery of the Fidalgo Island Canning Company, at Anacostes, in the state of Washington, the insured was adjusting a certain windlass, which adjusted to the height of the tide a certain elevator used in the cannery for raising fish from scows to the wash room, and had started to step away from the elevator, when, in some way unknown, the pin holding the windlass in place became loosened, and the arms of the windlass began to revolve very rapidly, striking him violently upon the shoulder and side, thereby inflicting injuries from which he died the next day. The complaint contains, also, the usual averments in respect to the payment of the premiums, proof of death, etc., about which no question is made. The defendant by its answer set up, among others, this defense: That the company undertook to and did insure the life of the said Go Boo as an importer and dealer in Chinese merchandise and contractor for Chinese labor, and not otherwise, the premium therefor being \$37.50, which business, the answer alleges, "is classified and described in said policy, and is classified and known in the business of defendant, and by other firms and corporations engaged in the like business of accident insurance, as an

ordinary risk, and said premium of \$37.50 is and was the regular and customary premium charged by defendant and such other firms and corporations for such insurance as is represented by and in said policy." The answer further avers that a part of the consideration for the policy sued on was the representations made by the insured in his written application therefor relative to the business or occupation in which he was engaged, and that the defendant relied wholly upon those representations, and would not have issued the policy in the sum of \$5,000, except upon payment of a much larger premium, if it had known the true facts and conditions and circumstances as to the occupation and employment of the insured at the time of the issuance of the policy, or that the insured would thereafter engage in a business other and more hazardous than that described in his said application and in said policy. It is further alleged in the answer that after the issuance of the policy, and without the knowledge or consent of the defendant, the insured entered the employment of the Fidalgo Island Canning Company at Anacostes, in the state of Washington, as a foreman of Chinese laborers and as a laborer, and that while engaged in the duties and occupation of such foreman and laborer he met with the accident which resulted in his death. The answer further alleges that the occupation in which the insured was engaged at the time of the accident resulting in his death is much more dangerous than that described in the said application and policy, and that, according to the rules, customs, laws, and rates established by the defendant, and by other firms and corporations engaged in the business of accident insurance, for the government of its and their business, in force long prior to the issuance of the policy in suit, the business of a laborer or a foreman of Chinese labor was and is classified and known as a special risk, and that the premium paid by the insured, to wit, the sum of \$37.50, if he had insured with the defendant, and had been described in said application and in the policy issued thereon as a foreman of Chinese labor, would have purchased from defendant insurance in the sum of \$3,000, and no more, to be paid in the event of the death of the insured under the circumstances mentioned and described in the policy, to wit, as the direct result in 90 days of bodily injuries caused by external and violent and accidental means during the period covered by the policy; and it is further averred that had the defendant, its agents or employes, known at the time of the issuance of the policy in suit that it was the practice or habit or intention of the insured to engage in the occupation of a laborer or a foreman of Chinese labor, the defendant would in said policy have classified and described such occupation of the insured as special, and would have refused to insure him in any greater sum than \$3,000. The answer also contains an offer to pay into court for the representatives of the insured the sum of \$3,000, or to consent to judgment for that sum, but denies the right of the plaintiff to any greater amount. By an amendment to the answer the defendant set up that one Arnold solicited the insurance from the defendant for the said Go Boo, and that Arnold was his agent employed for that purpose, and that Arnold at the time well knew that the said Go Boo had been engaged, and was then engaged, and intended to continue, as an actual working overseer or foreman of

Chinese laborers at the cannery of the Fidalgo Island Canning Company, at Anacostes, Wash., and did not disclose that fact to the defendant, nor had the defendant any knowledge whatever of such fact. The averments of fact in support of these defenses were put in issue by the plaintiff's replication. By stipulation of counsel, the case was tried by the court without a jury. The court below made findings of fact, setting out the citizenship of the plaintiff; the corporate existence of the defendant; the fact of the issuance of the policy of insurance upon the written application of the insured, etc.; and that in the making of the contract of insurance in question Arnold acted as the agent of the defendant corporation, and not as the agent of the insured; and that the insured made full and complete disclosures to the defendant, through the said Arnold as its agent, of the nature and kind of business which the insured purposed to and did engage in, and in which he was employed at the time he met his death; and that on the 24th day of July, 1898, and within the period covered by the policy, the insured was injured at the place and in the manner alleged in the complaint, from which injuries he died on the day alleged; and, having further found that all the rules and regulations of the company for securing the payment of the policy were complied with, the court concluded, as a matter of law, that the plaintiff was entitled to the sum of \$5,000, with interest and costs, for which judgment was awarded him. 93 Fed. 930.

We are of opinion that the fact that Arnold knew that the insured was actually engaged, or intended to engage, in the employment of foreman or overseer of the Chinese laborers working in the cannery, whether he be regarded as the agent of the defendant company or as the agent of the insured, is immaterial to the real question presented by the issues in the case. While the policy insured Go Boo in the sum of \$5,000, the annual premium upon which was \$37.50, as a merchant, it was clearly contemplated, both by the policy and the application upon which the policy was issued, that the insured might engage in an occupation or in occupations more hazardous than that of merchant or of contractor for Chinese labor; for in the insured's application he distinctly stated that he understood that risks are differently classified according to occupation, and he therein expressly agreed that, for any injury received in any occupation or exposure classed by the insurer as more hazardous than that given by him in his application, he should be entitled to recover only such amount as the premium paid by him would purchase at the rates fixed for such increased hazard. And the policy itself, in express terms, provides that if the insured should be injured in any occupation or exposure classed by the company as more hazardous than that specified therein, his insurance and weekly indemnity should be only for such amounts as the premium paid by him would purchase at the rate fixed for such increased hazard. In its answer the defendant company averred, as has been shown, that the occupation in which the insured was engaged at the time of the accident which resulted in his death is much more dangerous than that described in his application or in the policy, and that, according to the rules and rates established by the company and in force prior to the issuance of the policy in suit, the business of foreman

of Chinese labor was and is classified and known as a special risk, against which risk the premium paid by the insured, to wit, the sum of \$37.50, would have purchased from the defendant company insurance in the sum of \$3,000 only. If these averments of the answer, issue upon which was taken by the replication, are true, we think it clear that the plaintiff would only be entitled to recover upon the policy the sum of \$3,000, but upon those issues the court below made no finding. For this reason the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

LOOMIS v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 116.

RAILROADS—PREFERRED STOCK—AGREEMENT TO ACCEPT BONDS IN PAYMENT—PERFORMANCE.

Accompanying the bonds of a railroad company were a stipulation and certificate entitling the holder to a stated number of shares of the company's preferred stock at any time within 10 days after any dividend should be declared and become payable upon said stock, upon the surrender of such certificate, bonds, and unmatured coupons. *Held*, that such agreement did not entitle the bondholder to tender bonds in payment of preferred stock several months after their maturity, and after the railroad company had deposited money for the payment of the bonds at the place of payment designated therein.

In Error to the Circuit Court of the United States for the Southern District of New York.

See 97 Fed. 755.

Howard Van Sinderen, for plaintiff in error.

Wheeler H. Peckham, for defendant in error.

Before LACOMBE, Circuit Judge, and THOMAS, District Judge.

THOMAS, District Judge. This action is for damages for refusal to accept bonds of the defendant in payment of its preferred stock, and the writ of error is to review a judgment entered upon a verdict in favor of the defendant by direction of the court. The charter of the defendant provides:

"Our capital stock shall not exceed, except as hereinafter provided, \$4,200,000, divided into 42,000 shares, which said shares shall be subdivided as follows: An amount not exceeding \$3,450,000, or 34,500 shares, shall be set apart and designated as preferred stock; and the full amount of \$100 per share we hereby declare and acknowledge to be paid thereon, except on so much of this class as is hereinafter designated as scrip preferred stock, and on this scrip stock we hereby declare and acknowledge the sum of one dollar per share to be paid. Of \$3,450,000 preferred stock, an amount not exceeding \$2,200,000 at par, or 22,000 shares, shall be set apart and designated as scrip preferred stock. The scrip preferred stock here named, or hereafter named, shall not at any time exceed the amount of outstanding mortgage bonds hereinafter named. The scrip preferred stock shall not be subject to any assessment, and shall entitle the holder in whose name it stands upon our books to all the rights and privileges of other stockholders, except that it shall not entitle the holder to any dividend or other profit or increase from the income

or assets of this company. It shall be issued in certificates of five and ten shares each, and shall accompany each mortgage bond of the company. The holder thereof shall have the right at any time within ten days after any dividend shall have been declared and become payable on the preferred stock to make the scrip preferred stock attached to his bond full-paid stock, upon the surrender to the company of the mortgage bond named by its number in his scrip certificate; and upon surrendering said scrip certificate and bond he shall be entitled to receive therefor the same number of shares of preferred full-paid stock, and entitled to dividends."

The defendant on July 1, 1867, issued bonds, severally, for the payment to certain persons named therein, or bearer, of \$1,000 at the office or agency of the company, in the city of New York, on July 1, 1897, with interest thereon from the 1st day of July, 1867, at the rate of 7 per cent. per annum, payable semiannually at the company's office on the 1st day of every January and July, upon the presentation and surrender of the coupons annexed to the bond, as they should severally become due. Each bond contained the following stipulation:

"The obligors also agree to transfer to the bearer, at his option, ten shares, of \$100 each, of its preferred stock, at any time within ten days after any dividend shall have been declared and become payable on said preferred stock, upon delivery to them, in the city of New York, of this bond and the unmatured coupons, and upon the transfer to the obligor of the ten shares of scrip stock accompanying this bond."

Certificates, each for 10 shares of the scrip preferred stock, accompanied the issue of each bond, and contained the following provision:

"Upon the surrender of this certificate and mortgage bond No. — of the company, and all unmatured coupons thereon, at any time within ten days after any dividends shall have been declared and become payable on the full-paid stock of the preferred stock of this company, the holder hereof is entitled to receive ten shares of said full-paid preferred stock."

For some 30 years before the trial the defendant paid dividends on its preferred stock, and for a number of years previous thereto the dividend days had been in April and October. On April 28, 1895, the plaintiff became the owner and holder of eight of such bonds, and the certificates for scrip preferred stock that should accompany the same. When the bonds became due on July 1, 1897, the defendant provided and thereafter maintained funds to pay the same at the place where they were payable. No presentation or demand for the payment of the bonds was made; but a dividend on the preferred stock having been declared and become payable on October 21, 1897, the plaintiff on October 22, 1897, presented his bonds and stock certificates at the office of the company, and demanded therefor full-paid preferred stock, which was refused. The preferred stock was then worth \$140 per share. The question is whether the plaintiff was entitled to tender his bonds for preferred stock after the maturity of the bonds, or whether his right so to do expired when the duty of the defendant to pay the bonds accrued.

In *Hotchkiss v. Bank*, 21 Wall. 354, 22 L. Ed. 645, it appeared that three similar bonds, with certificates attached, were stolen from the holder; and the bonds, without the certificates, were accepted by defendants as collateral security for notes discounted by them, without notice of any defect in the title of the holder of the bonds, unless it

were the absence of such certificates. In its opinion the court declared that:

"The agreement respecting the scrip preferred stock is entirely independent of the pecuniary obligation contained in the instrument. The latter recites an indebtedness in a specific sum, and promises its unconditional payment to bearer at a specified time. It leaves nothing optional with the company. Standing by itself, it has all the elements and essential qualities of a negotiable instrument. The special agreement as to the scrip preferred stock in no degree changes the duty of the company with respect either to the principal or interest stipulated. It confers a privilege upon the holders of the bond, upon its surrender and the surrender of the certificate attached, of obtaining full preferred stock. His interest in the right to the full discharge of the money obligation is in no way dependent upon the possession or exercise of this privilege."

This decision is to the effect that the bond is complete without the certificate, and that the certificate confers a privilege, which may be exercised only by a holder of the bond. For the purpose of receiving full-paid preferred stock, the certificate must accompany the bond, inasmuch as the holder of the certificate may not receive the preferred stock without payment therefor, and the stipulation, in effect, is that only the bond may be tendered in such payment. The plan was to issue negotiable bonds, payable in any event at a named place, unless used by the holders to pay for the stock, and to deliver with them certificates of stock carrying a voting power, which should not participate in the profits until made full-paid, and that such full payments should be made only by the surrender of the bond and unmatured coupons. Here certain advantages were given bondholders: (1) To receive an instrument which provided for the absolute return of the principal, with a fixed interest, after 30 years; (2) to participate meanwhile in the management of the company, of which they were creditors; (3) to surrender the bonds, and thereby make the stock full-paid and entitled to participate in the profits. The plaintiff's interpretation of the contract is not permissible. The defendant undertook to pay the bonds, or to accept them in payment of stock. The plaintiff's theory measurably conjoins these alternative duties, and requires the defendant not only to have ready at the place of payment funds to meet the bonds at the date of their maturity, and to continue such provision, but also to be prepared to deliver the preferred stock upon demand, and preserve this dual preparation through the life of the bonds, unless the holder sooner exercised his option. But the defendant's agreement was to pay the bonds, or to accept them in payment of stock, and this agreement was satisfied if the defendant met the duty which first arose; and the duty to pay did in fact arise first, and demanded instant performance. Thereupon the defendant made performance by depositing the money at the place of payment at the time of payment, and by keeping the tender good. This did not discharge the debt, but it fulfilled the contract according to its terms; and no further act was demandable of the defendant, save that of making proof of performance in case of action against it, and of paying the money into court. It was acquitted of all damages and costs that flow from a breach of contract. But the plaintiff contends that, notwithstanding this discharge of the duty first accruing, the alternative

duty of accepting the bonds in payment of stock continued in full force and vigor. In such case, if the bonds were under seal, only the expiration of 20 years from their maturity could abate the plaintiff's rights, or relieve the defendant of all the burdens imposed by the contract. It would follow that during such time the defendant might be required to keep in readiness money to pay the bonds and stock to be given in exchange therefor, and meantime there would rest upon the corporate property the debt which it had gathered funds to discharge, which it was bound to discharge and had a right to discharge, and the use of its stock for the corporate purposes would be suspended while the holders of the scrip would continue their participation in the management of the corporation. A contract so unusual and inconvenient may not be presumed, and certainly there are no words that suggest that the parties contemplated a situation so incongruous. The defendant had done the act it promised to do, and such performance is inconsistent with the claim now presented by the plaintiff. This conclusion is easily reached without discussion of authorities, but a reference to *Denney v. Railroad Co.*, 28 Ohio St. 108, and *Chaffee v. Railroad Co.*, 146 Mass. 224, 16 N. E. 34, has not been overlooked. The judgment should be affirmed, with costs.

POSEY et al. v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. June 1, 1900.)

No. 914.

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate, an extra fireman in the employ of defendant railroad company, was deadheading his way from one station to another, where his run was to commence, in accordance with the custom to allow employes to reach their work in that manner. On reaching a station where switching was to be done, he left the engine and started for the caboose. During the progress of the switching he was run over and killed. There was evidence that the train crew were careless, in using unnecessary violence in making connections between the parts of the train, and there was some evidence that intestate was sitting or standing on the platform of the caboose. *Held*, that a peremptory instruction for defendant was not erroneous, as intestate was guilty of negligence which contributed directly to the accident, since he should have been in the caboose, and not on the platform.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This action was brought to recover damages for negligence causing the death of John Posey, a fireman in the service of the Texas & Pacific Railway Company, who is alleged to have been killed at Barstow, Tex., on or about the 8th day of February, 1897, by the negligence of the agents and servants of the railway company in charge of a freight train upon which Posey was riding. The deceased was the husband of Mattie L. Posey, the son of Lou F. Posey, and the father of Lexie Posey, John B. Posey, and Mabel Claire Posey, who were infants without a guardian, and who sued by their next friend, Mattie L. Posey. By the allegations contained in their first amended petition, the plaintiffs below based their right of recovery against the defendant substantially upon the following grounds: First. That the deceased, John Posey, was at the time of the accident in the service of the defendant as an

extra fireman, returning from Big Springs to Toyah, and was rightfully riding upon the said freight train at the time and place of the said accident. In support of this ground, plaintiffs alleged in detail the circumstances under which the said Posey came to be riding upon the said train, and that his riding thereon was authorized by the superior agents and servants of defendant, who were his vice principals, at Big Springs, Tex., and also by the conductor in charge of the said train. Second. That the death of the said Posey was proximately caused by the negligence of the defendant's servants in charge of said train at Barstow, Tex., on the night of the accident; that, after reaching said place, defendant's agents in charge of said train caused the said train to be cut into two sections, leaving the caboose, and, to wit, six or eight loaded freight cars attached thereto, standing upon the main track at the depot, without brakes set upon said cars or the said caboose; that said agents and servants took the remainder of the said cars, consisting of about ten loaded coal cars, attached to the engine and tender, and proceeded to the work of switching cars from a side track to the main track for the purpose of carrying such cars on their westward journey; that, while performing the work of switching said cars in said yards, the agents and servants of the defendant, with great, unnecessary violence, negligently drove or forced the section of the train attached to the engine against the section of the said train disconnected therefrom, and left standing on the main track; that no warnings or signals of the approach or collision of the said sections were given, and no precautions taken to avoid the danger incident to permitting the said section to come into violent contact; and that the said Posey, who was then either getting into the said caboose, or was in the said caboose, or, at any rate, was lawfully on and about the platform of the said caboose, was by the violence of the said collision thrown from the caboose under the wheels of the cars, run over, and killed. Third. That said defendant was further guilty of negligence in causing and permitting the said sections of said train to come into violent contact, knowing as they did at said time that the said Posey and other employes or persons were on and about the said caboose, and liable to be injured and killed by reason of the violent jamming together of the sections of said train. Plaintiffs further alleged that there were no signals or warnings given to those in and about the caboose of the fact that a collision was about to occur, and that no precautions were taken, such as should have been done, in the way of having brakemen upon the moving section of said train, to set the brakes thereon, and to slow down the said moving section so as to reduce or avoid the danger of the collision and impact with the standing section of the said train. Fourth. That the said Posey was in no wise connected with the operation of the said freight train at the time he was killed, and was not a fellow servant of any of the parties in charge of the said train, and that the employes of the said train owed to him the duty of exercising reasonable care to avoid injuring him while he was upon the said train. Fifth. That, by the negligence of the agents and servants of the defendant in charge of the said train, the said Posey was caused to lose his life. Sixth. The relationship of the parties and the extent of the damages were also alleged. The defendant railway company, by its first amended answer, set up the following defenses: First. A general denial. Second. Contributory negligence of the deceased. Third. That the death of the said Posey, if caused by negligence on the part of any of the employes of the defendant, was the negligence of fellow servants of the deceased. Fourth. That the said Posey was a volunteer on the train, to whom the defendant owed no duty with reference to the exercise of care for his safety. Fifth. That the said Posey was a trespasser upon the train upon which he was riding, and was riding thereon in violation of the rules of the company, prohibiting passengers from riding upon freight trains. Plaintiffs filed their first supplemental petition on March 16, 1899, replying to matters set up in defendant's said answer, and in avoidance thereof, substantially as follows: First. That it was usual and customary for extra firemen, situated as said Posey was at that time, to deadhead back to their work on the first returning freight train; that he was authorized so to do by his vice principals, the foreman of the roundhouse at Big Springs, and also the conductor in charge of said freight train, who had authority under the defendant, and under the usage

and custom prevailing on that division of defendant's railroad, to permit him to ride back to Toyah, Tex., to resume his work as a fireman in the service of the defendant, and that he was riding under and by virtue of such authority, custom, and usage at the time he was killed. Second. That if the defendant had any rule prohibiting employes, such as the deceased, from riding upon its freight trains, the same was a mere paper rule, not enforced, and not brought to the attention of the said Posey, and, further, that the same had been usually and customarily departed from and not enforced on the part of the employes of the defendant upon the division of the said defendant's road upon which the said Posey was then riding, with the knowledge, or at least with the concurrence, and without objection on the part, of the officials of the defendant whose duty it was to insist upon the observance of the said regulation; that the said rule had been waived and abrogated on account of the custom and usage long prevailing on that section of defendant's line, permitting employes, such as John Posey then was, to ride thereon while returning to their work; that in view of the said usage and custom prevailing on defendant's said railroad, and in view of the right given to the said Posey by his vice principals, the roundhouse foreman at Big Springs and the conductor in charge of the said freight train, he was rightfully riding upon the said train as a licensee or quasi passenger at the time of the said accident, to whom the defendant owed the duty of exercising reasonable care to avoid injury. Third. That said Posey's negligence, if any, in being upon the said train at the time he was killed, was prior in point of time, and was merely one of the conditions of the accident, and that the proximate and efficient cause of said accident was the negligence of the operatives of the defendant in the negligent switching of the said freight train at the time of the accident. Fourth. That, if the said defendant had any rule prohibiting Posey from riding upon the freight train, the same had been violated with such frequency, and employes situated as was the said Posey had been so often permitted to ride upon verbal authority given to them by their superior officers while dead-heading back to their work, that such rule, if any there was, was of an ambiguous and doubtful nature; that the said Posey acted in good faith in boarding said freight train to return to his work, and in riding thereon, and had just cause to believe, and did believe, that he was authorized to so ride upon said train in deadheading back to his work; and that if he was mistaken in said belief that he did not become a trespasser upon said train, but was lawfully riding thereon, the agents of the defendant in charge of said train, knowing and consenting to his riding thereon, were under the duty of exercising reasonable care to avoid injuring him. They further averred that the failure of the said agents in charge of the said train to exercise such care was the proximate cause of the death of the said Posey. On the trial, after the introduction of evidence on both sides, the court, at the request of the defendant, instructed the jury that, "under the law and the evidence of this case, the defendant is not liable to plaintiffs on account of the death of the deceased, John Posey, and they will therefore return a verdict in favor of the defendant"; and the court refused some nine specific requests of the plaintiffs to charge with reference to various issues in the case. There was a verdict for the defendant, and the plaintiffs prosecute this writ of error.

R. L. Carlock, for plaintiffs in error.

T. J. Freeman, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

From the view we take of the case, it is only necessary to consider the first assignment of error, which complains of the peremptory instruction of the trial judge to the jury to find for the defendant. The evidence on both sides is all contained in the record, and we have digested it. The evidence showed that the deceased, John Posey, an

employé of the defendant, was on the defendant's train, deadheading back from Big Springs to Toyah; that his so being on the train, while in violation of the rules of the company, was in accord with custom and usage in regard to employés situated as Posey was at the time, and while so on the train he was not subject to the performance of any duties, and therefore was not a fellow servant of the other employés of the defendant, who were operating the train. There was evidence tending to show that the employés of the defendant actually operating the train were careless in switching at Barstow, in that the connections were made with unnecessary violence; but it is doubtful whether there was sufficient evidence to warrant the finding, as an affirmative fact, that the defendant was guilty of negligence in any way contributing to the death of John Posey. The learned counsel for the plaintiff in error very strenuously contend that the evidence warranted the finding by the jury that John Posey was a lawful passenger on the defendant's train, and that the defendant was guilty of negligence which caused the death of said John Posey, and that there was evidence on these points justifying the submission of them to the jury. Conceding this to be the case, on this review it still remains that the peremptory instruction given by the judge to find for the defendant was correct, because the said John Posey was himself guilty of negligence which contributed directly to the accident resulting in his death. As a passenger on the train, or even as an employé of the defendant, going from one place of duty to another, but not engaged in operating the train he was traveling on, his place on the train was in the caboose. It is perfectly clear that, if he had been in the caboose, he would not have suffered any serious injury from any of the unnecessary violence used in switching at Barstow. The evidence is undisputed that from Big Springs to Barstow, the said John Posey rode upon the engine, and that when the train reached Barstow, between 2 and 3 o'clock in the morning, the said Posey, learning that switching was to be done at that place, left the engine, with the avowed purpose of going to the caboose. What route he took, and whether he was run over and killed in crossing between the cars, or in endeavoring to climb on some car or the caboose, does not appear. What is certain is that, as a passenger or quasi passenger on the train, and while the train was switching in the nighttime at Barstow, he was guilty of negligence in going around, about, or through the train. We note that there was some evidence tending to show that he was standing by or sitting on the railing of the platform of the caboose at the time a coupling was being made, and that by the coupling he was knocked over onto the track, where three cars passed over him. We think this merely conjecture, but, if it be taken as a fact, it is still clear that John Posey was in fault, contributing to his own injury, because the place was dangerous, particularly with reference to the switching operations going on, and he voluntarily took it, and with it all the risks and damages accompanying. The judgment of the circuit court is affirmed.

BATAVIA v. WALLACE.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,287.

1. FRAUDULENT CONVEYANCES—QUESTIONS FOR JURY—RIGHT TO INFER FRAUD.

In the whole range of the law there is no class of cases in which a jury should be allowed greater latitude in forming an opinion based upon inference than in cases of fraudulent conveyances involving the question of fraudulent intent, and knowledge thereof on the part of another, and such cases should be submitted to the jury if there are any badges of fraud, or circumstances which are calculated to excite a suspicion in the mind of a reasonable person that the transaction was not entirely fair and honest.

2. SAME—PROOF OF KNOWLEDGE OF GRANTEE.

Under the rule in Missouri that notice to a grantee of facts and circumstances sufficient to put him on inquiry as to the fraudulent intent with which the conveyance was made by his grantor is not equivalent to actual knowledge of such intent, which must be found as a fact when in issue, yet such notice will warrant an inference of knowledge unless it is shown that the inquiries suggested thereby were made, and proved unavailing.

3. SAME—TRUST DEED—EFFECT OF KNOWLEDGE OF TRUSTEE.

It is the rule of law in Missouri that if a trustee in a deed of trust given to secure creditors is privy to, or has knowledge of, a fraudulent intent on the part of the grantor in executing the instrument, such knowledge will invalidate the instrument as to the beneficiaries, and generally he is the agent of his cestui que trust in all matters pertaining to the management and control of the trust property; and if he has any active duties to perform with respect thereto, and is not merely the repository of the title, having no previous connection with the property, whatever knowledge or notice impairs his legal title also impairs the equitable title of the beneficiaries.

4. SAME—ACTIONS—RIGHTS OF TRUSTEE.

Where the trustee in a trust deed conveying personal property intervened in an attachment suit against his grantees, gave bond for the release of the property without assistance from the beneficiaries in the deed, and asserted his right to the property thereunder, his right to recover rests upon the validity of his title, and he cannot invoke the equities of any of the beneficiaries who are not parties to a suit.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Theodoric B. Wallace, as receiver of the Missouri National Bank of Kansas City, Mo., who is the present defendant in error, on January 5, 1897, brought an action against Morris Loewen and Louis Loewen, who were co-partners doing business under the name of Loewen Bros., to recover the sum of about \$4,800, which was alleged to be due from said firm to the insolvent bank, of which Wallace was receiver, on certain notes theretofore executed by the firm of Loewen Bros. In aid of said suit he sued out a writ of attachment. This writ was levied upon a stock of hardware situated in a store Nos. 1209 and 1211 on Grand avenue, in Kansas City, Mo., which was claimed to be the property of Loewen Bros. On February 3, 1897, Eugene Batavia, the interpleader, and the present plaintiff in error, as trustee in a deed of trust which covered the stock of hardware, executed a forthcoming bond in favor of the United States marshal for the Western district of Missouri, by whom the writ of attachment had been levied, and by that means was enabled to regain possession of the attached property. At a later date he also filed an interplea in the aforesaid attachment suit, wherein he claimed to be the owner of the attached property under and by virtue of the aforesaid deed of trust which was executed by the firm of Loewen Bros. on January 4, 1897, in favor of said

Batavia, as trustee, to secure the payment of the following notes: Three notes, aggregating \$7,000, which were executed by Loewen Bros. in favor of the National Bank of Commerce of Kansas City, Mo., all of which were dated December 3, 1896; one note in the sum of \$1,500, which was executed by Loewen Bros. on March 14, 1894, in favor of Mrs. J. Rodecker, and was due one year after date; and one note in the sum of \$2,500, which was executed by Loewen Bros. on December 22, 1896, in favor of C. A. Stavnow, and was due 60 days after date. Wallace, as receiver, replied to this interplea by alleging in substance that the deed of trust under which Batavia claimed as trustee was conceived in fraud, and was executed by Loewen Bros. with intent to hinder, delay, and defraud their creditors, and that such fraudulent intent was well known to Batavia, and to each and all of the beneficiaries named in said deed of trust who held the aforesaid notes that were secured thereby. On this issue there was a lengthy trial to a jury, which resulted in a verdict in favor of Wallace as receiver, and a judgment that the interpleader was not entitled to the property claimed. The case is brought to this court on a writ of error which was sued out by the interpleader.

Elijah Robinson (I. J. Ringolsky, on the brief), for plaintiff in error.
J. McD. Trimble (C. A. Braley and William Wallace, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is claimed in behalf of Batavia, the interpleader, that the trial court, at the conclusion of all the testimony, should have directed a verdict in his favor, as it was requested to do, upon the ground that there was no evidence tending to show that at the time he accepted the deed of trust in controversy and consented to serve as trustee therein he had any knowledge of the fraudulent purpose that had actuated the firm of Loewen Bros. by whom that instrument was executed. In the brief of counsel for the interpleader this is said to be the one question in the case "of highest importance" which demands "the most consideration." It is not claimed apparently, nor is there reasonable ground for the contention, that there was any want of testimony to establish a fraudulent intent on the part of Loewen Bros., the grantors in the deed of trust; but it is said that Batavia, the trustee, had no knowledge of the scheme to defraud, and was not a participant therein, and that there was no proof of facts or circumstances from which knowledge on his part could be inferred. We shall accordingly assume, in accordance with the finding of the jury, that the deed of trust was conceived by the makers thereof in bad faith, with a view of defrauding their creditors. The principal point to be determined, therefore, is whether there was substantial evidence that Batavia was cognizant of the fraud; or, to state the question in a different form, was there proof of any fact or circumstance from which knowledge on his part could be legitimately inferred by a jury? The attaching creditor claimed, and sued out a writ of attachment upon that theory, that the money obtained by Loewen Bros. on their notes in favor of the National Bank of Commerce of Kansas City, which were secured by the deed of trust, was obtained from that bank by the members of said firm for the purpose of concealing it, and withdrawing that much of their property from the

reach of their creditors. The attaching creditor also claimed that the other notes secured by the deed of trust, which were executed in favor of Mrs. J. Rodecker, who was a sister of the Loewens, and in favor of C. A. Stavnow, who was an intimate friend and associate of theirs, were not founded upon any consideration, but were fictitious and fraudulent obligations. The attorney who drew the deed of trust in controversy was related by marriage to the Loewens. Batavia, the trustee, occupied an office with this attorney, was very intimate with him, acted as his confidential assistant in many transactions, and seems to have been in a measure dependent upon him for employment. The deed of trust was drawn in this attorney's office, and Batavia was asked by one of the Loewens to become the trustee therein, and, upon such request being made, accepted the office without reading the instrument, and without consulting any of the beneficiaries for whose benefit it was made. When the deed of trust was executed, he also placed the same on record, as he says, without reading it fully, and took formal possession of the stock of merchandise thereby conveyed, without having had any prior conference with the beneficiaries in whose behalf he assumed to act. After the stock of merchandise was attached, the trustee requested one of the beneficiaries in the deed of trust, to wit, the National Bank of Commerce, to become his surety on a forthcoming bond to enable him to retain the possession of the attached property; but it declined to do so, whereupon the trustee, at his own expense, and of his own volition, procured a surety company to execute such a bond as his surety. On the day after he had thus regained possession of the attached property by giving a forthcoming bond to the marshal, a man by the name of Hoffman appeared on the scene without any previous correspondence with the trustee, and immediately purchased the attached property from the trustee for the sum of \$8,000. This man Hoffman, who was a relative of one of the Loewens, resided in the state of Colorado, and was a wholesale or retail liquor dealer, who had no acquaintance with the hardware business. He came to Kansas City at the request of his relative, Louis Loewen, and, immediately after making the alleged purchase from the trustee, he returned to Colorado, leaving said Loewen to settle with the trustee for the unpaid portion of the purchase price, and at full liberty to deal with the purchased property and to dispose of it as he thought best. From that time forward the attached property was in the custody and control of Louis Loewen, who eventually disposed of the same at a considerable advance over and above the sum which was realized by the trustee. From the time the trustee accepted that office he does not appear to have conferred with any of the beneficiaries in the deed of trust with respect to the management of the mortgaged property, but appears rather to have acted in accordance with suggestions and advice which were from time to time received either from Loewen Bros. or from their attorney. These are, in substance, the material facts which the evidence discloses, and concerning which there is no substantial controversy.

It would be unreasonable to expect, in a case like the one now in hand, where a person is accused of having accepted a conveyance of

property with knowledge that the conveyance was made by the grantors therein with a fraudulent intent, that there would be found in the record any direct evidence of such knowledge. Persons who are concerned in or are privy to fraudulent transactions usually take the utmost pains to conceal their connection therewith, and to give them the appearance of being fair and honest. Hence, it is not to be expected in the present case that the knowledge which Batavia may have had of the fraudulent designs of Loewen Bros. will be disclosed otherwise than by inference from the circumstances of the case and the relations of the parties. And no fact or circumstance that is disclosed by the testimony can be regarded as insignificant or unimportant in determining what inference, as respects Batavia's knowledge of the fraud, might or ought to have been drawn by the jury. Every detail of the transaction is entitled to careful consideration which serves to give it tone or color. The trustee's intimate association with the persons by whom the fraudulent scheme was concocted; the fact that he occupied a position which afforded him ample opportunity to become acquainted with their designs; the fact that he was chosen by Loewen Bros. to execute the trust, and had no previous conference or acquaintance with the beneficiaries therein; the fact that he gave a forthcoming bond to obtain the release of the attached property after the principal beneficiary had declined to become a surety in such bond, and when there were other adequate remedies within his reach; also the fact that the property passed back into the custody of the Loewens, or one of them, immediately after the forthcoming bond was given, and that the trustee acted apparently in close alliance with the fraudulent grantors or their attorney,—are each and all circumstances which a jury would probably regard as quite significant, and from which it would be their privilege to infer that he was fully cognizant of the object which the grantors in the deed of trust were endeavoring to accomplish, and that he acted throughout the transaction merely as their agent. In the whole range of the law there is no class of cases in which a jury should be allowed greater latitude in forming an opinion based upon inference than in cases like the one at bar, because of the inherent difficulty of proving a fraudulent intent and knowledge thereof on the part of another, and because of the great care usually taken by those concerned to conceal and suppress the evidence of such facts. A jury will not ordinarily go far astray in divining the motives of men who have been engaged in a business transaction like the one now under consideration; and such cases, when they arise, should be submitted to a jury, if there are any badges of fraud or circumstances which are calculated to excite a suspicion in the mind of a reasonable person that the transaction was not entirely fair and honest. *Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co.*, 56 U. S. App. 355, 29 C. C. A. 239, 85 Fed. 417, 420; *Warner v. Norton*, 20 How. 448, 460, 15 L. Ed. 950; *Snyder v. Free*, 114 Mo. 360, 376, 21 S. W. 847; *Massey v. Young*, 73 Mo. 260, 273; *Rennet v. Williams*, 89 Mo. 139, 145, 1 S. W. 227. Without pursuing this branch of the subject at greater length, it will suffice to say that, upon the facts disclosed by the record, the case was not one in which the trial court was required

to assume the responsibility of directing a verdict in favor of the trustee upon the ground that there was no evidence from which it could be inferred that he was concerned in the alleged fraud. That issue, we think, was properly left to be determined by the jury.

It is further urged by counsel for the interpleader, although as much stress is not laid on this assignment as on the former, that the jury were misdirected with respect to what constitutes notice to a vendee or a trustee of the fraudulent intent of the vendor or grantor under whom he claims. The supposed error in this respect inheres in the following excerpt from the charge:

"If you are satisfied, gentlemen, from all the facts and circumstances in evidence, that it was the intent and purpose of Loewen Bros. in making this deed of trust to hinder and delay their other creditors, and to secure thereby a use and benefit to themselves, then you will proceed to the other inquiry in the case as to the relation of the trustee, Batavia, to this transaction, as to whether or not he had notice of the alleged fraudulent intention and purpose of the Loewen Bros. The supreme court of this state in *Rhodes v. Outcalt*, 48 Mo. 370, speaking of what constitutes notice, employed this language as expressive of the law: 'A notice is regarded in law as actual when the party sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information. Actual notice embraces all degrees and grades of evidence from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. Where the party taking has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of negligence equally fatal to his claim to be considered a bona fide purchaser.' *This presumption is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right or other thing in conflict with that that he was taking.* So, gentlemen, in considering the question of whether or not Batavia was privy to the fraudulent purpose on the part of Loewen Bros., * * * you can consider the relation, whatever that was, of Batavia to the office of Ringolsky, where this deed of trust was executed, his opportunities of knowing, and from the relation between them, and all the circumstances attending the making of the deed, as to whether he had notice of any combination or scheme in making this deed to defraud or not."

The criticism of this excerpt from the charge is that it made knowledge of facts or circumstances which were sufficient to put Batavia upon inquiry as to the motives of his grantors equivalent to actual knowledge of their motives, and did not require the jury to find the existence of actual knowledge. It may be conceded that it is the law in the state of Missouri, and in some other states, that, while knowledge of a fraudulent intent or of an outstanding equitable right or title may be inferred from facts or circumstances which are sufficient to put one on inquiry and lead to a discovery, yet when want of notice is averred or is invoked as a defense, and it becomes the duty of a jury or a chancellor to make a finding thereon, actual knowledge must be found, such facts and circumstances as are adequate to put one on inquiry being nothing more than evidence from which knowledge—the ultimate fact—may be inferred. *Van Raalte v. Harrington*, 101 Mo. 602, 611, 612, 14 S. W. 710, 11 L. R. A. 424; *Parker v. Conner*, 93 N. Y. 118, 124; *Williamson v. Brown*, 15 N. Y. 354; *Carroll v. Hayward*, 124 Mass. 120; *Knower v. Clothing Co.*, 57 Conn. 202, 221,

17 Atl. 580; *Seavy v. Dearborn*, 19 N. H. 351; *Coolidge v. Heneky*, 11 Or. 327, 8 Pac. 281; *State v. Mason*, 112 Mo. 374, 380, 20 S. W. 629; *Bisp. Eq. § 268*. But, even if it be conceded that the rule of law as respects notice be as last stated, and as counsel for the interpleader contends, still we think that the supposed error in the excerpt from the charge is cured by that paragraph which we have placed in italics. In that clause, after quoting the language of the supreme court of the state of Missouri in an early case, the learned trial judge clearly advised the jury that knowledge of facts sufficient to put one on inquiry is not tantamount to actual notice, such as will serve to defeat a right or title, but that it simply warrants an inference of actual notice, which inference may be rebutted by proof that actual knowledge was not acquired. Besides, in another part of the charge, where the issues to be determined by the jury were finally summarized, the trial court instructed the jury to determine, so far as *Batavia* was concerned, whether he was privy to the alleged fraud of *Loewen Bros.*, and participated therein; and in that connection it also directed them to return a verdict for the interpleader if they found that he was not privy to the alleged fraudulent scheme of the grantors in the deed of trust, and did not aid or abet them therein. Looking at the charge as an entirety, and reading it as it was doubtless understood, and as we understand it, we are satisfied that the jury were not misled with respect to the question of notice, but that they were in fact required to determine whether the interpleader was an actual participant in the fraud.

It is finally urged that, even if the deed of trust in controversy was fraudulent by reason of the motive which actuated *Loewen Bros.* in executing the same, and that even if *Batavia*, the trustee, was cognizant of that fact, and participated in the fraud, nevertheless the *National Bank of Commerce*, one of the beneficiaries in the trust, may claim the benefits accruing to it under that conveyance, because it was not itself a party to the intended fraud. With respect to this contention it is to be observed, however, that none of the beneficiaries under the deed of trust are parties to this proceeding. They have not intervened in the cause, and asserted rights of their own, as distinguished from those of their trustee, but have left him to prosecute the action as he thought best, and are apparently content to rest their case on such title as he may succeed in establishing. In short, this is a proceeding at law, in which the interpleader alone takes issue with the attaching creditor, and seeks to maintain that his legal title to the attached property derived under the deed of trust is superior to that acquired by the attaching creditor by virtue of the writ of attachment. It has been held in the state of Missouri that, where there are several debts secured by a deed of trust, one of which is fictitious and fraudulent, the conveyance may nevertheless be upheld as to bona fide creditors who are secured, provided the trustee acted in good faith, and was ignorant of the fraudulent nature of one of the claims. *Woodson v. Carson*, 135 Mo. 521, 526, 35 S. W. 1005, and 37 S. W. 197. The rule is in that state, however, that if a trustee in a deed of trust given to secure creditors is privy to or has knowledge of a fraudulent intent on the part of the grantor in executing the instrument, such knowledge

will invalidate the instrument as to the beneficiaries. *Crow v. Beardsley*, 68 Mo. 435, 439; *Ross v. Ashton*, 73 Mo. App. 254, 257. It is also a general rule that a trustee is the agent of his *cestui que trust* in all matters pertaining to the management and control of the trust property, and that whatever knowledge or notice impairs the legal title of the former to the trust property will also impair the equitable title of the latter. The only limitation upon this rule is that a beneficiary will not be affected by notice to the trustee, or by his acts, where the latter is merely the repository of the legal title, and has had no previous connection therewith, and has no active duties to perform with respect to the trust property. *Fidelity Ins., T. & S. D. Co. v. Shenandoah Val. R. Co.*, 32 W. Va. 244, 259, 9 S. E. 180; *Pierce v. Emery*, 32 N. H. 484, 521; *Miller v. Railroad Co.*, 36 Vt. 452, 483; *Columbian Bank's Estate*, 147 Pa. St. 435, 23 Atl. 625, 626, 628; *Bisp. Eq. § 268*; *Jones, Corp. Bonds*, § 299. But, if this were not the local, as well as the general, law applicable to the question under consideration, we should nevertheless be of the opinion that the trustee could not prevail in this proceeding in the teeth of a finding by the jury that he was a party to the alleged scheme to defraud, which was concocted by *Loewen Bros.*, and that he does not come into court with clean hands. This finding ought to bar the way to a recovery by the interpleader himself, or by any one who seeks to recover upon his title. If either one of the beneficiaries under the deed of trust has an equitable claim to the property in controversy which is unaffected by the fraud of the trustee,—as to which point we express no opinion,—they should prosecute it in their own name, and by that means avoid responsibility for the alleged fraudulent conduct of the trustee. In conclusion it may be said that some exceptions were taken during the trial to the admission of evidence, which exceptions have not been overlooked. But, as the case is one in which wide latitude is ordinarily allowed in the examination of witnesses and in the admission of proof of collateral facts which have any tendency to develop the intent of the parties, we are not prepared to hold that any of the exceptions were well taken. The judgment below is accordingly affirmed.

MARANDE et al. v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 149.

1. CARRIERS—BILL OF LADING—CONSTRUCTION—PLACE OF DELIVERY.

Defendant undertook to transport plaintiffs' cotton from a point in Texas to the port of New Orleans, and deliver it there to a steamship company for transportation to Europe. By the terms of the bill of lading defendant was not to be liable for any loss by fire, nor in any other respect than as a warehouseman, while the cotton was awaiting further conveyance by steamship carrier. The cotton was destroyed by fire while in defendant's cars at West Wego, the terminus of a branch of its railway line on the west bank of the Mississippi opposite the city of New Orleans, where defendant had a wharf, and where it usually delivered cotton for export to the steamship carrier. *Held* that, West Wego being the point where the steamship companies rightfully expected to receive

cotton from Texas for transportation to Europe, defendant was not liable for the value of the cotton, notwithstanding the exemption in the bill of lading, because of the deviation from the point of delivery named in the bill.

2. SAME—NEGLIGENCE—EVIDENCE.

Evidence that there were evil-disposed persons in the vicinity of the defendant's wharf, who might have set fire to the cotton, and that the defendant, by keeping a larger force of watchmen in attendance, might have more efficiently protected the property from risk, does not establish a cause of action for a negligent loss of the cotton, in the absence of any evidence tending to prove that the fire actually was the work of an incendiary.

3. SAME.

That one of defendant's locomotive engines was allowed to stand near the cotton is not evidence that the fire was negligently set thereby, where it is not shown that the locomotive emitted any sparks or dropped any coals, and the fire occurred seven or eight hours after the locomotive had been taken away, and originated in a part of the cotton not stored in the vicinity of the locomotive.

4. SAME—DILIGENCE IN EXTINGUISHING FIRE.

Where a fire broke out among cotton stored on defendant's wharf, and could have been extinguished before it spread to the cars containing plaintiffs' cotton, if defendant's watchman, in his excitement, had not failed to fully uncoil the hose before turning on the hydrant, such facts were not sufficient to show that defendant was negligent in not providing proper appliances and in exercising reasonable diligence for the extinguishment of the fire.

5. SAME.

Evidence that West Wego was not, in commercial and business understanding, a part of the port of New Orleans during the year previous to the shipment by plaintiffs, and before it was claimed to be such by defendant, was irrelevant.

In Error to the Circuit Court of the United States for the Southern District of New York.

Treadwell Cleveland, for plaintiffs in error.

Rush Taggart, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiffs brought this action to recover the value of 65 bales of cotton, their property, which was destroyed by fire while in the cars of the defendant, a railway carrier, which, pursuant to the terms of a bill of lading, had undertaken to transport the cotton from Greenville, Tex., to the port of New Orleans, and deliver it there to a steamship carrier for transportation to Havre. By the bill of lading the defendant was not to be liable for any loss by fire, nor in any other respect than as a warehouseman, while the property was awaiting further conveyance by steamship carrier. The cotton had arrived at West Wego, the terminus of a branch of the defendant's line of railway on the west bank of the Mississippi river opposite the city of New Orleans, where the defendant had a wharf, and customarily delivered cotton for export to the steamship carrier, but had not been unladen, owing to the accumulation of cotton upon the wharf when the fire occurred. There were two covered sheds upon the wharf distant from one another about 100 feet, each shed being about 250 to 300 feet long and of about the

same width, and these sheds and a considerable part of the intervening space were filled with cotton in bales. The fire occurred November 12, 1894, about 6:30 p. m. It originated near the center of shed No. 2, and was discovered immediately, but spread so rapidly that all efforts to extinguish it were unavailing; and not only the cotton upon the wharf, but also that in the cars in the vicinity of the wharf, was consumed.

Upon the trial the plaintiffs sought to recover upon the theory that West Wego was not a part of the port of New Orleans, and, because of a deviation by the carrier in taking the cotton there, contended that the exemptions of liability contained in the bill of lading did not relieve the defendant. The plaintiffs also sought to recover upon the theory that their loss was caused by the negligence of the defendant; and offered evidence in support of two issues: (1) That the cotton was exposed to danger of fire from incendiaries, and from a locomotive which during the forenoon had been on the tracks of the wharf; and (2) that the fire could have been extinguished before their cotton was burned if the defendant had provided proper appliances and exercised reasonable diligence. The trial judge directed a verdict for the defendant, and refused to submit the question of the negligence of the defendant to the jury. Error is assigned of this ruling.

We had occasion to consider the first ground of recovery in *Reiss v. Railway Co.* (C. C. A.) 98 Fed. 533,—an action similar to this, and growing out of the same fire,—and, for the reasons stated in the opinion in that case, do not regard it as tenable. The supplementary evidence does not change the facts or distinguish them in any material particular from those in the *Reiss Case*.

As to the second ground of recovery, the case as to the first issue hardly merits discussion. That there were evil-disposed persons in the vicinity who might have set fire to the cotton, and that the defendant, by keeping a larger force of watchmen at its wharf, might have more efficiently protected its property from risk, are facts that may be assumed to be proved by the evidence. But these facts did not prove, or tend to prove, that the fire actually was the work of an incendiary, and there was not a scintilla of evidence to prove this. On the other hand, the place where it was shown the fire started raised a persuasive inference against the theory of an incendiary origin, because it started at the most unlikely and dangerous place for the operations of an incendiary. There was not a particle of evidence to connect the locomotive with the fire. If the fire had started in the cotton which was stored in the vicinity of the locomotive, there would have been one fact of value; but it did not. It does not appear that the locomotive emitted any sparks or dropped any coals; no fact was elicited to prove that the locomotive engendered risk beyond its mere presence; and seven or eight hours had elapsed after the locomotive was taken away. The case for the plaintiffs as to the negligent origin of the fire rested wholly upon conjecture and speculation. The evidence upon the second issue, introduced for the purpose of showing that the fire should have been extinguished earlier, merely tended to prove that it could, and probably would, have been extin-

guished earlier if an employé of the defendant had not, in a moment of excitement and peril, failed to exercise the good judgment of a deliberate occasion. The fire started, as has been said, near the center of the building, and close by one of the three or four gangways running across the building, left for access to the bales. There was a hydrant with hose attached close at hand, the hose being coiled about a post. The watchman who discovered the fire immediately ran to the hydrant, turned on the water, uncoiled part of the hose, clambered up on top of the bales, carrying the end of the hose, and directed the hose upon the fire, but the water would not run from the nozzle. Supposing he had not opened the valve, he called to another watchman, who in the meantime had come to his assistance, to open the valve; and the latter, finding it had been opened, tried to aid the first watchman in straightening out the hose. Before this could be accomplished, and in the space of a few seconds, the fire had spread so rapidly that it was beyond control. The evidence indicates that the hose had become kinked while the watchman was carrying it to the place of the fire, and that the water in it made it so heavy and cumbrous that it could not be straightened out in the few seconds available, so as to permit the water to escape. This probably would not have happened if the requisite length of hose to reach the fire had been unwound from the post and straightened out before the water was turned on. This, however, would have involved delay, and seconds were precious. There was a chance that what did happen would happen, but we do not think a jury would have been justified in finding that the watchman was in fault for not anticipating and providing against the contingency. He was laboring under the excitement of imminent peril, and did what any ordinarily prudent man trying to save his own property from destruction would have been likely to do under the same circumstances. The law does not exact the same measure of prudent judgment from those who have to act in the sudden emergency of a great peril as upon ordinary occasions. In *Thurber v. Railroad Co.*, 60 N. Y. 336, the court declared it to be "the well-established rule that persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases," and this statement of the law is quoted with approval in *Railroad Co. v. McDonald*, 152 U. S. 281, 14 Sup. Ct. 626, 38 L. Ed. 442. See, also, *Wynn v. Railroad Co.*, 133 N. Y. 575, 30 N. E. 721; *Bittner v. Railway Co.*, 153 N. Y. 76, 46 N. E. 1044; *Stabenau v. Railroad Co.*, 155 N. Y. 511, 50 N. E. 277.

Error is assigned of the exclusion by the trial judge of evidence offered by the plaintiffs for the purpose of showing that in 1893 West Wego was not, in commercial and business understanding, a part of the port of New Orleans. The issue upon this branch of the case related wholly to the situation after the erection of the wharves at West Wego, and it was not claimed by the defendant that as early as 1893 West Wego had been regarded as a part of the commercial port. The evidence offered would not have thrown any light upon the issue involved, and we think it was properly excluded.

We find no error in the record, and the judgment is affirmed, with costs.

MYERS v. BROWN et al.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 569.

1. APPEAL AND ERROR—REVIEW OF ISSUES OF FACT.

The question whether the verdict of a jury is against the weight of the evidence cannot be reviewed on writ of error to the circuit court of appeals.

2. SAME—ADMISSION OF EVIDENCE—RECORD.

In an action for an alleged infringement of a patent, error in refusing to admit in evidence the judgment roll in another case in which the validity of the same patent was involved cannot be reviewed on appeal, where the judgment roll in question is not embodied in the bill of exceptions, nor anywhere set out in the record.

3. PATENTS—INFRINGEMENT—EVIDENCE.

Evidence of a patent issued to one not a party to the suit, prior to the issuance of the patents to plaintiff, was properly admitted for the purpose of showing the prior state of the art.

In Error to the Circuit Court of the United States for the Northern District of California.

W. H. Jordan and John L. Boone, for plaintiff in error.

John H. Miller, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action at law for the alleged infringement of two patents,—one a mechanical patent, reissue No. 11,383, and the other a design patent, No. 22,911,—both issued to the plaintiff in error for a lamp stove. The validity of these patents was involved in the suit of Gaskill v. Myers, 26 C. C. A. 642, 81 Fed. 854, and there sustained. In the present action the sole defense interposed by the defendants was noninfringement, and based upon the claim that the stoves sold by them constituting the alleged infringement were of a different make, style, pattern, and appearance from the stove of the defendants involved in the case of Gaskill v. Myers. By agreement of counsel, the issues respecting the mechanical patent were first tried by a jury, resulting in a verdict for the defendants, and immediately thereafter the issues in respect to the design patent were tried before the same jury, resulting in a similar verdict. It is urged on the part of the plaintiff in error that each verdict was against the weight of the evidence. The conclusive answer to this suggestion is that upon a writ of error the appellate court does not review controverted questions of fact. *Insurance Co. v. Ward*, 140 U. S. 91, 11 Sup. Ct. 720, 35 L. Ed. 371; *Wilson v. Everett*, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286.

It is next urged on the part of the plaintiff in error that the court below erred in refusing to admit in evidence the judgment roll in the case of Gaskill v. Myers. It is a sufficient answer to this point to say that that judgment roll is not embodied in the bill of exceptions nor does it appear anywhere in the record.

The next alleged error is that the court below erred in admitting in

evidence a patent numbered 396,575, issued to one Ketchum prior to the issuance of the patents of the plaintiff in error. The Ketchum patent was not offered or allowed in evidence for the purpose of showing anticipation, for there was no such defense pleaded by the defendants. It was offered and properly admitted for the purpose of showing the prior state of the art. *Myers v. Sternheim*, 38 C. C. A. 345, 97 Fed. 625. In support of this alleged error counsel say that "the judgment roll showed that in the former litigation that same patent had been passed upon by this higher court, and that said Ketchum patent had been exhausted of its influence upon the patent sued on by the decision of this court." We do not find the Ketchum patent in express terms referred to in the opinion of this court in either of the cases above cited. Whether it was embraced by any language used in the opinion of this court in either of those cases cannot be determined from the present record. The other alleged errors do not merit special notice. The judgment is affirmed.

KANSAS CITY, P. & G. R. CO. v. SPELLMAN.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1900.)

No. 917.

1. INJURY TO EMPLOYEE—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Where the evidence in an action for injury sustained by reason of the alleged negligence of defendant in using on its engine a defective pilot bar shows that the pilot bar of the engine was bent at the time of the accident, that it is very dangerous to attempt to make a coupling with such a pilot bar, and that plaintiff was acting within the scope of his regular employment, there is sufficient to go to the jury on the question of defendant's negligence.

2. CONTRIBUTORY NEGLIGENCE—PATENT DEFECT.

Where, in an action for injury sustained by reason of a defective pilot bar on defendant's engine, the defendant pleaded contributory negligence on plaintiff's part, and the evidence tended to show that the defect was not a patent one, a charge that to make plaintiff guilty of contributory negligence it must appear that the defect was so visible that a man could not overlook it, except by gross negligence, is not erroneous.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action by John Spellman against the Kansas City, Pittsburg & Gulf Railroad Company for injuries sustained by plaintiff while in defendant's employ. From a judgment in favor of plaintiff, the defendant brings error. Affirmed.

H. Glass, W. L. Estis, and J. J. King, for plaintiff in error.

Dan T. Leary, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. John Spellman, the defendant in error, brought his action in the state district court of Bowie county, Tex., against the Kansas City, Pittsburg & Gulf Railroad Company, the plaintiff in error, to recover damages for personal injuries received by him, and caused by the negligence, as he alleged, of the

railroad company. He alleged that on December 7, 1897, he was engaged in the employment of the railroad company as a brakeman on one of its freight trains, and was injured in attempting to couple the pilot bar of the engine to a flat car on the track, in doing which his right foot and leg were caught between the pilot on the engine and the brake beam on the flat car, and so crushed as to necessitate amputation; that the end of the pilot bar with which he attempted to make the coupling was in a defective condition, being so bent that it would not enter the drawhead of the flat car; that he had no knowledge of the defective condition of the pilot bar until just as he went to make the coupling, when it was too late to prevent the injury; that he had been on that train only an hour prior to the time he was hurt, and had not had occasion to use the pilot bar prior to the time when he received his injury; that the railroad company knew of the defect, or by proper inspection could and should have known of it; that the injury caused him great pain and permanent disability to work in the calling, and to the extent that he had theretofore done. He alleged his damages at \$25,000. The railroad company, by due proceedings, removed the cause from the state district court of Bowie county, Tex., into the circuit court of the United States for the Eastern district of Texas. The defenses pleaded were—First, a general denial; and, second, contributory negligence. The trial resulted in a verdict in Spellman's favor for the sum of \$4,012.50, on which judgment was duly entered.

Of the errors assigned two require notice. These are as follows:

"(2) The court erred in overruling the motion made by defendant after the conclusion of the argument, and before the court had charged the jury 'that the court instruct the jury to find a verdict for the defendant.'"

"(10) The court erred in instructing the jury as he did in his main charge upon the subject of patent defect, and over the objection and specifications of the defendant, as follows: 'In other words, the rule is, if the bar was defective, so patently defective that anybody could not have failed to see it, why the party using it is charged with notice of its condition. Now, the employé, as I understand in regard to machinery, is not charged with any duty of inspection. He is not charged with that duty. He is not charged with the duty to go and see that the machinery is in proper condition in the first instance; but if the machinery is so openly and visibly defective that a man could not fail to observe it, why, then, if it was in that condition, it would debar the plaintiff from a recovery, but upon that point it must be so open, so patent, so visible, that a man could not overlook it except by gross negligence. That is what is meant by a patent defect.'"

James Baker, a witness for the plaintiff, said that he was braking on the same train with Spellman at the time he was hurt, on December 7, 1897; that he (the witness) knew positively that the end of the pilot bar on that engine was bent before it left Shreveport that morning; that the end of the bar was bent two inches or more from a straight line from the heel to the point; that it is very dangerous to attempt to make a coupling with a pilot bar to a Janney coupler when the end of the pilot bar is bent; that it is very dangerous and unsafe, for the simple reason that the slot of the knuckle in the drawbar is not over three inches wide,—that is, in the face of the slot,—and the end of the bar is two inches, which would leave a half inch play on each side, and, if the bar was bent, of course if it ever struck

the top or bottom it would throw it out. On recross-examination he said that in going around the train he found the necessity to use a small pin, and went to the pilot of the engine and got one; that while he was there he discovered that the pilot bar was bent; that the bend was not noticeable while the bar was lying down in its socket; that there is a slot there for the bar to lie in, and he had to raise the bar because the pin was run through that way, and rested in there; that he intended to tell Spellman about its being bent, but that he had so many other duties to attend to that he overlooked telling Spellman.

Spellman, testifying on his own behalf, said that he was head brakeman on the train; that it was the duty of the head brakeman to do what work is required at the head end of the train, to throw switches to go into side tracks, and let the engine into side tracks, and make couplings on the engine; that this engine had a pilot bar; that pilot bars are very heavy, weighing from 130 to 165 pounds; that the head brakeman when he undertakes to go in a side track after cars controls the movement of the engine by his signals to the engineer; that when the train reached Mooringsport, where the injury occurred, it was to go on the side track and couple on two flat cars loaded with gravel; that they were heavy; that there he (Spellman) got out and threw the switch while the train was moving slowly on towards the flat cars at the rate of about three miles an hour, and when it reached him, about 30 feet before it reached the flat car with which the coupling was to be made, he got on the engine, and when it was within 15 or 16 feet of the car that was to be coupled he began to pick up the pilot bar with which the coupling was to be made; that he was watching the distance between the car and the engine so as to be ready and have the bar up in time; that he did not look particularly at the end of the bar until he was very near the coupling, when there was no time or opportunity to do anything except to attempt to make the coupling with the bar in its defective condition and the train in its then present movement; that such couplings were difficult to make, but that he had frequently made them, and did not doubt that if the pilot bar had been in proper condition he would have made it safely; that after he received his injury, and the defective condition of the bar was known, the coupling was made with this same pilot bar by taking care to bring the train up "so easy that it would not break an eggshell."

Witnesses offered by the defendant gave evidence tending to show that the bar was not bent when the train left Shreveport. Numerous witnesses were examined, cross-examined, and re-examined at great length, and their testimony, given in narrative form, covers nearly 50 pages of the printed record. So much as we have recited is not quoted with literal accuracy, but is given substantially as we digest it from the testimony of the witnesses referred to, and we think is sufficient to show that the assignment of error numbered 2, given above, is not well taken.

W. J. Miller, a witness for the defendant below, among other things, testified, substantially, that as division master mechanic he had charge of the engine at that time from Mena to Port Arthur; that

it was the duty of an engineer on the arrival of an engine at the terminal to inspect it from one end to the other, and after making the inspection to report any work necessary to be done, to make an entry thereof on a register or book kept in the roundhouse for that purpose, and when an engine is in the roundhouse it is customary for the roundhouse foreman also to inspect it, and that the man who is assigned to do the work on the engine also examines it; that after the work has been done the engineer who is to go out on the engine goes around and examines the parts that have been repaired; that he looks over it in a general way; that, if there is a different man that goes out on the engine from the one who came in on her, he always goes and looks at the book to see what was reported; that he (the witness) inspected the engine whenever he had an opportunity; that he saw the engine in question on the morning of December 7, 1897, walked around it, took a casual glance at everything, looked at the pilot, as he always does, and did not notice anything the matter with it whatever; that if the pilot bar had been cupped up or bent up he would certainly have noticed it.

This evidence as to the duty and method of inspection of this particular class of machinery, taken in connection with the closing paragraph recited from the testimony of the witness Baker, sufficiently explains and fully justifies that part of the charge of the trial judge to which the tenth assignment of error levels its criticism. The whole of the charge given by the judge is shown in the record, and, when the portion criticised is considered with reference to the charge as a whole, we are not able to see that even the last clause of that portion of the charge to which objection is made is justly subject to criticism. The charge of the court, to be instructive, must have relation to the pleadings and the proof, and, in the very nature of the case, takes color more or less from the character of the contention as pressed in oral argument by learned and experienced counsel in pressing the issue of contributory negligence. Upon a careful consideration of the whole record, of the very able brief submitted by the attorneys for the plaintiff in error, and of the interesting oral argument presented by the attorney who appeared before us at the hearing, we find no error in the action of the circuit court for which the judgment should be reversed, and it is therefore affirmed.

CITY OF PHILADELPHIA v. ATLANTIC & P. TEL. CO.

(Circuit Court of Appeals, Third Circuit. May 25, 1900.)

No. 2.

1. VALIDITY OF CITY ORDINANCE—LICENSE CHARGES.

Where defendant is contesting the validity of a city ordinance requiring it to pay a license on its poles and wires within the city, on the ground that the amount of the license is unreasonably high, an instruction that the jury must find for the plaintiff if they find the amount reasonable for the purpose of coercing companies to place their wires underground, is properly refused; for it asserts a city's right to impose license charges in excess of all the expenses incurred by reason of the poles and wires.

2. EVIDENCE—INSTRUCTIONS.

The actual cost incurred by a telegraph company in making repairs on notice of defects, and the fact that the wires of companies other than defendant are principally responsible for the additional expense to the city, are of little importance in determining the reasonableness of license charges imposed on those companies; and it is error to refuse instructions to this effect.

3. EVIDENCE—DIRECTING VERDICT.

Where defendant contests the validity of a city ordinance on the ground that the license charges imposed by it are unreasonably high, and the evidence of plaintiff shows large additional expenses incurred by the fire and police bureaus and other branches of the city government by reason of the presence of defendant's poles and overhead wires in the city, and this evidence is not in any way answered by defendant, the court should direct a verdict for plaintiff.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

E. Spencer Miller, for plaintiff in error.

Silas W. Pettit, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action brought by the city of Philadelphia against the Atlantic & Pacific Telegraph Company to recover license charges payable under ordinances of the city enacted January 6, 1881, and March 30, 1883, relating to the maintenance of poles and wires in the streets of the city. The charges imposed by these ordinances are \$1 per annum for each pole, and \$2.50 per annum for each mile of telegraph or telephone wires strung overhead, and the charges are imposed upon all corporations, firms, and individuals so using the streets. The underlying question here was before this court in the case of *City of Philadelphia v. W. U. Tel. Co.*, 32 C. C. A. 253, 89 Fed. 454, 461, in which the opinion of the court was delivered by Circuit Justice Shiras. It was recognized there as settled that a city may lawfully impose by ordinance such license charges, but subject to the limitation that whether the ordinance is reasonable in respect to the terms and amount of the charges can be judicially inquired into. It was, however, declared by the court that there is a presumption in favor of the validity of such city legislative action, and that the evidence to justify a contrary holding must be clear and convincing. It was there further said that, in determining the question of the validity of such ordinances, a wide latitude should be allowed in the introduction of evidence going beyond the expenses attending direct regulations and oversight; and it was specifically held that testimony to show increase in the force and apparatus of the fire department rendered necessary by the maintenance of such poles and wires is proper to be considered, as well as evidence that extra meetings of the councils were required for the purpose of regulating their erection and maintenance. This court there laid down, as governing this class of cases, these principles, namely:

"Not only is there a presumption in favor of the validity of the action of the legislative body, but the facts upon which that action proceeds are so numerous, and so liable to frequent changes, courts should act cautiously in deal-

ing with such a case, and admit evidence of all facts and circumstances that seem to bear even remotely upon the issue. As was said by the supreme court of Pennsylvania in *City of Allentown v. W. U. Tel. Co.*, 148 Pa. St. 119, 23 Atl. 1070, the amount of the license charges rests with the city councils in the first instance; and it is only when such discretion has been manifestly abused that the courts are justified in interfering."

Upon the trial of the present case the plaintiff put in evidence the ordinances in question, and the returns made by the defendant, showing the number of poles and miles of overhead wire it had maintained in the streets of the city during the years covered by the claim in suit, and rested. Undoubtedly the plaintiff thus made out a prima facie case, under the ruling of this court referred to, and also under the decision of the supreme court of Pennsylvania in the cases of *W. U. Tel. Co. v. City of Philadelphia*, 12 Atl. 144; *City of Allentown v. W. U. Tel. Co.*, 148 Pa. St. 117, 23 Atl. 1070; *Chester City v. Same*, 154 Pa. St. 464, 25 Atl. 1134; *City of Philadelphia v. American Union Tel. Co.*, 167 Pa. St. 406, 31 Atl. 628. The first and last of these state cases involved charges the same in kind and in amount as here, and the charges were sustained. To show that the license charges in question were unreasonable, and the ordinances therefore void, the defendant, in answer to the plaintiff's prima facie case, introduced evidence tending to show that the supervision of poles and wires by the city was exercised through its electrical bureau only, and that, measured by the expenditures of that bureau of the city government, the license charges were excessive and unjust. In rebuttal the plaintiff introduced evidence showing that, because of the presence of poles and overhead wires in the streets, and to protect the public from perils incident thereto, the policemen were required to render, and did render, to a considerable extent, additional services, and thereby increased expense was incurred by the police bureau; that the work of extinguishing fires was seriously hindered by the suspended wires, and extra calls for fire engines thereby necessitated, thus imposing upon the fire bureau additional expense; and that the city incurred expense by reason of necessary legislation by city councils in regulating and otherwise governing electric wires overhead in the streets of the city. To all this the defendant offered no counter proofs whatever, and the plaintiff's rebuttal evidence was not contradicted or impeached in any particular.

The jury, under the charge of the court, rendered a verdict, upon which judgment afterwards was entered, for \$3,375.35, which is about one-half of the claim in suit. No complaint is here made in respect to the general charge of the court, but the city, the plaintiff in error, complains of the refusal of the court to affirm certain of its points or prayers for instruction, and of the answers made by the court thereto. The assignments of error are:

"(1) In refusing plaintiff's first point for charge, which was as follows: 'The jury must find for the plaintiff.'

"(2) The learned judge erred in refusing plaintiff's second point for charge, which was as follows: 'If the jury find that the ordinance in question in this case may be considered reasonably as having been passed with a view to coercing the companies to place their wires underground, rather than maintain them overhead, in the streets of the city, then the jury must find for the plaintiff in this case for the full amount of its claims, even if the aggregate

of the charges imposed is greater than all the expenses incurred by the municipality because of the presence of the poles and wires.'

"(3) The learned judge erred in refusing plaintiff's fourth point for charge, which was as follows: 'The jury must find for plaintiff for the full amount of its claim.'

"(4) The learned judge erred in refusing plaintiff's sixth point for charge, and in answering the same as follows: Point. 'If the jury believe the testimony offered on behalf of the city to the effect that the police bureau, the fire bureau, and other branches of the city government in addition to the electrical bureau, incur expense as a natural consequence of the presence of the poles and electrical wires overhead in the streets of the city, they must find for the plaintiff in the full amount of its claim. There has been no evidence upon which the jury could find that the increased expenditures by the city for those branches of the government, on account of the extra expense due for the presence of poles and wires, is not sufficient to justify the amounts of the charges.' Answer. 'I refuse the sixth point because it asks the court to decide on the effect of the evidence. It is for the jury, and not for the court, to determine whether the license charge is unreasonable, under all the evidence.'

"(5) The learned judge erred in refusing plaintiff's seventh point for charge, and in answering the same, as follows: Point. 'It is of little importance in this case that the wires of other companies than the Western Union Telegraph Companies are generally at fault for the defects occurring among overhead wires, even if the jury find that this is the case, and that the wires of the Atlantic & Pacific Company have not been the origin of any trouble. The city of Philadelphia is justified in imposing a general charge upon all companies maintaining poles and overhead wires, to repay the aggregate charges which the city may be at because of the general expenses imposed upon it by the presence of all such poles and wires.' Answer. 'I refuse the seventh point as a whole. The scope of the instruction asked is too broad, especially in the second sentence.'

"(6) The court erred in not affirming and in answering as follows plaintiff's eight point for charge: Point. 'The cost to the Western Union Telegraph Company of such works as the company may be in the habit of doing, upon its poles and wires throughout the district in which Philadelphia is situated, or throughout the city of Philadelphia, has little bearing upon the question of the proper amount of license charges to be imposed by the city. If the jury find that the city authorities do provide for the patrolling of the street, the proper charges therefor cannot be gauged by the cost to the company of repairing its wires on notice of defects having occurred.' Answer. 'I answer that as follows: The cost of inspection, whether by the company or by the city, is one item to be considered by the jury, and the jury must decide what weight should be given to the evidence upon this subject.'"

Before taking up the first, third, and fourth assignments, which go to the root of the case, we will briefly consider the other assignments. We are not prepared to say that the court erred in refusing the plaintiff's second point. That proposition, it will be perceived, does not touch the right of the city, by direct legislation, to compel all private persons and corporations to place their wires underground, but asserts the right of the city to impose license charges in excess of all the expenses incurred by the municipality because of the presence of poles and overhead wires in the streets, although they are lawfully there. We are not convinced that the decisions cited in support of this assignment are applicable here. At any rate, in disposing of this case it is our purpose to follow and keep within the principles laid down by this court in the case of *City of Philadelphia v. W. U. Tel. Co.*, supra. The plaintiff's seventh and eighth points, we think, are within those principles, and should have been affirmed. The license charges must be uniform as to all such users of the streets, and fixed with reference to the general aggregate amount of expenses

to the city resulting from the presence of all the poles and overhead wires; and we are not able to see that the charges by the city for patrolling the streets are to be measured by the cost to the defendant of repairing its wires on notice of defects having occurred.

The first, third, and fourth assignments may be considered together. The plaintiff's sixth point, as we have seen, requested an instruction to the effect that if the jury believed the evidence introduced by the plaintiff that the police bureau and fire bureau, and other branches of the city government besides the electrical bureau, incurred expenses as a natural consequence of the presence of poles and electrical overhead wires in the streets of the city, the verdict should be for the plaintiff for the full amount of the claim; the point adding, as ground for such instruction, that there was no evidence in the case upon which the jury could find that the increased expenditures by the city for those branches of the government on account of the extra expense due to the presence of poles and wires is not sufficient to justify the amounts of the charges. There was abundant evidence to warrant the presentation of this point, and we think it should have been affirmed. The defendant's case rested wholly upon its alleged showing that, measured by the services and expenses of the electrical bureau only, the license charges were excessive. The evidence as to the services rendered and the expenses incurred by other branches of the city government because of the presence of the poles and suspended wires came, indeed, from the plaintiff in rebuttal. It was, however, uncontradicted, and therefore the jury was not at liberty to disregard it. The burden of proof here was upon the defendant from first to last. It must be borne in mind that a strong presumption exists in favor of the validity of these ordinances. To quote the language of Judge Shiras in speaking for this court in the former case:

"The amount of the license charges rests with the city councils in the first instance, and it is only where such discretion has been manifestly abused that the courts are justified in interfering."

Having regard to the entire evidence, it cannot, we think, be affirmed that in the passage of the ordinance in question there was manifest abuse of legislative discretion by the city councils. The evidence here did not warrant such a finding by the jury. These views, of course, require us to say, not only that the court should have affirmed the plaintiff's sixth point, but also the plaintiff's first and fourth points.

It is no small satisfaction to us that our conclusion is in harmony with the views of the supreme court of Pennsylvania as expressed in the cases above cited. Although the decisions there may not be conclusive upon us, yet agreement between the federal and state courts upon such a question as that involved here is most desirable. *Burgess v. Seligman*, 107 U. S. 20, 34, 2 Sup. Ct. 10, 27 L. Ed. 359; *O'Brien v. Wheelock*, 37 C. C. A. 309, 95 Fed. 883. The judgment of the circuit court is reversed, and the case is remanded to that court, with directions to award a new trial.

PORT BLAKELY MILL CO. v. SHARKEY.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 563.

CARRIERS—TRANSPORTATION OF FREIGHT—CONTRACT—BREACH—MEASURE OF DAMAGES—PROFITS.

At the time of an agreement to transport certain horses to Alaska, and to deliver them not later than a day named, defendant was informed that the purpose in shipping the horses was to use them in freighting goods over the Chilcoot Pass; that there was a great demand at that point for horses of the kind to be shipped, and that plaintiff could make from \$450 to \$500 per day from such use of them. Plaintiff had not, however, entered into any contracts for freighting with said horses, but was depending upon the condition of business for securing such contracts when the horses were delivered. The horses were not delivered until 27 days after the time agreed to, and there was evidence that during the interval between the time when said horses were to arrive under the contract and the date of their arrival a two-horse team could earn from \$50 to \$75 a day in freighting, and that single horses could have been rented for that purpose at \$20 a day. *Held*, that in estimating plaintiff's damages the jury might consider what might have been earned by the horses during the time of the delay.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

See 92 Fed. 425.

The defendant in error brought an action against the plaintiff in error, the Port Blakely Mill Company, as the owner of the bark Prussia, to recover damages caused by delay in the delivery of horses shipped on said bark from Seattle, Wash., to Dyea, Alaska. The complaint alleged, and the evidence tended to show: That on February 17, 1898, the defendant in error made a verbal contract with the plaintiff in error, in which the latter agreed to ship for him on the bark Prussia 25 head of horses, and that said bark would sail from Seattle not later than February 19, 1898, and arrive at Dyea not later than seven days thereafter; and that, relying on said contract, he loaded the horses on said bark for shipment, but that the Prussia did not sail from Seattle until February 24th, and did not arrive at Dyea until March 18, 1898. That the purpose of shipping said horses to Dyea was to use the same in freighting goods over the Chilcoot Pass for hire, and that the plaintiff in error was informed of such purpose at the time of making the contract, and was informed that there was a great demand for horses such as those which were shipped for that purpose. There was testimony that the plaintiff in error was told by defendant in error that he could make from \$450 to \$500 per day out of the horses, and that the plaintiff in error made a positive agreement to deliver said horses at Dyea in seven days after February 19, 1898. There was evidence that from February 26, 1898, there was a large amount of freight to be transported across Chilcoot Pass, and horses were in great demand, and that said condition of affairs existed up to and subsequent to the arrival of the Prussia at Dyea; that one of the horses shipped died on the voyage, without any fault on the part of the plaintiff in error, and that the remainder of the horses would have been worth the sum of \$3,200 if they had arrived at the time agreed upon in said contract. It was admitted that the defendant in error had not entered into any contracts for freighting with the said horses, and had not contracted for any employment therefor, but was depending upon the condition of business at Dyea for securing such contracts and employment. There was testimony that during the interval between the time when said horses were to arrive under the contract and the date of their arrival a two-horse team could earn from \$50 to \$75 a day in freighting, and that single horses could have been rented for freighting at \$20 a day. Upon the trial the court instructed the jury that in estimating the damages sustained

by the defendant in error through the delay in shipping the horses they might take into account what might have been earned by the horses at Dyea during the time of the delay. The jury returned a verdict assessing the damages at \$6,670.

Preston, Carr & Gilman, Gorham & Gorham, and John K. Brown, for the plaintiff in error.

Fred H. Peterson, for the defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question presented in this case is: What is the measure of damages for breach of contract by a carrier whereby the delivery of goods at the place designated in the contract of affreightment is delayed in a case in which profits would have been earned but for the delay, and where the carrier had notice at the time of making the contract of the necessity for prompt delivery and of the prospective profits? May such profits be taken into consideration in estimating the damages? The general rule is thus stated:

"No recovery can be had for loss of profits in contracts of sale made or contemplated by the shipper, unless the facts and circumstances of such sale are communicated to the carrier upon shipment."

5 Am. & Eng. Enc. Law (2d Ed.) 396; *Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639; *Railway Co. v. Gilbert* (Tex. Civ. App.) 23 S. W. 320; *Brown v. Hadley* (Kan. Sup.) 23 Pac. 492; *Brownell v. Chapman*, 84 Iowa, 504, 51 N. W. 249; *Railroad Co. v. Ragsdale*, 46 Miss. 458; *Manufacturing Co. v. Pinch* (Mich.) 51 N. W. 930; *New Market Co. v. Embry* (Ky.) 48 S. W. 980; *Grindle v. Express Co.*, 67 Me. 317; *Illinois Cent. R. Co. v. Cobb, Christy & Co.*, 64 Ill. 128.

The reason of the rule is that the contract of affreightment is presumed to have been made in view of the results which, to the knowledge of both parties thereto, would naturally follow its breach. While there is respectable authority for holding that profits are never in any case recoverable, since it may never certainly be known that profits might have been earned, the weight of authority, both English and American, sustains the rule that the party injured is entitled to recover all his damages, including gains that he might have earned as well as losses that he sustained, provided that they are certain, and that they are such as might naturally have been expected to follow the breach.

In *Hadley v. Baxendale*, 26 Eng. Law & Eq. 398, in an action against a common carrier for negligent delay in delivery, Alderson, B., said:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally,—i. e. according to the natural course of things from such breach of the contract itself,—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

In *Simpson v. Railroad Co.*, 1 Q. B. Div. 274, Cockburn, C. J., said:

"The principle is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object."

In that case the plaintiff was allowed damages for loss of time and loss of profit on the ground that "loss of profit was a natural and probable result of the failure" of his purpose.

The plaintiff in error relies upon certain decisions, which, it is contended, sustain a contrary doctrine; such as *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Railroad Co. v. Hale*, 83 Ill. 360; *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640; *Machine Co. v. Bryson*, 44 Iowa, 159; *Harvey v. Railroad Co.*, 124 Mass. 421; *The Golden Rule (C. C.)* 9 Fed. 334.

In *Howard v. Manufacturing Co.* it is true that the court said that the grounds upon which the rule of excluding profits in estimating damages in certain cases rests "are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the nonfulfillment of the contract." The case was one which involved the question whether damages were recoverable for loss of anticipated profits to the defendant from the plaintiff's failure to construct a flouring mill at a date specified in the contract. From the record it would appear that time was not made of the essence of the contract, and, as the court said, there were no "special circumstances attending the transaction from which an understanding between the parties could be inferred that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery according to the terms of the contract." It was upon that ground that damages on the basis of profits that might have been earned were denied. But the court in that case proceeded, after the language above quoted, to express the general doctrine, which is applicable to the present case:

"But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness; or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

In *Railroad Co. v. Hale* it was not averred or proved that the carrier had notice of the intended use of the property. The remarks of the court as to the uncertainty of the expected profits in that case were directed to a subject that was not necessarily involved. In *Allis v. McLean* it was held that profits which might have been earned by the use of a sawmill if the machinery therefor had been furnished within the time specified in the contract could not be considered in

estimating damages, for the reason, as stated by Judge Cooley, "that they are commonly uncertain and speculative, and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of contract." The learned judge, however, proceeded to say:

"But in some cases profits are the best possible measure of damage, for the very reason that the loss is indisputable, and the amount can be estimated with almost absolute certainty."

A later decision by the same court may be regarded as favoring a more liberal doctrine. *Manufacturing Co. v. Pinch*, 51 N. W. 930. In that case it was held that in a suit to recover for machinery and repairs furnished for defendant's flouring mill he was entitled to show, in reduction of plaintiff's claim, the value of the use of the mill while it was compelled to lie idle by the failure of plaintiff to complete the contract to repair within the time specified. The court quoted from *Sedg. Dam.* (8th Ed.) par. 174:

"As a general rule, the expected profits of a business cannot be proved, and therefore cannot be recovered. They might have been made and they might not. Hence, in such cases, the measure of damages is not the expected profits, but the value of the use of the property or business."

And quoted further from the same authority (paragraph 186):

"Rent is given, not as a specific damage, but as a fair average measure of compensation."

So the ruling in *Machine Co. v. Bryson*, in which it was held that one who had made a contract with a sewing-machine company to rent a room, procure a team, and other necessary means for selling their machines, and devote his time thereto, could not recover for a breach of the contract the profits that he might have earned had the same been carried out, is modified by a later decision of the supreme court of Iowa in *Brownell v. Chapman*, 51 N. W. 249, in which it was held that in a claim for damages caused by failure to deliver boilers for a pleasure boat at a summer resort at the time agreed the measure of damages for the breach was the rental value of the boat, and not the interest on the capital invested therein for the time the defendant was deprived of its use; and that the objection that the rental value of the boat could not be taken as a measure of damages, because the boat had never been rented, and therefore had no established rental value, was untenable; and that the owner was entitled to damages for losses he sustained by enforced idleness of persons employed by him to insert the boilers. The opinion cites with approval the rule in *Brown v. Foster*, 51 Pa. St. 165, in which the trial court had said "that the measure in such a case is the ordinary hire of such a boat for the time in question for the time plaintiff was in default." The case of *The Golden Rule* was one in which damages were sought for the failure of the carrier to deliver 140 wheelbarrows at a place where the libellant had a contract to repair a levee, and had 125 men in waiting. The court said:

"A statement of libellant's claim seems to decide it against him, particularly as there is no showing whatever that the defendant's boat was in any wise advised of the circumstances rendering the delivery of the wheelbarrows a matter of urgency. These damages claimed are consequential."

It will be seen that the decision was placed upon the ground that the carrier had no knowledge of the facts that would have charged it with notice of the damage to ensue from a breach of the contract.

In *Harvey v. Railroad Co.* it was held in an action against a carrier for failure to carry that the measure of damages is the market value of the goods at the place where the carrier agreed to receive them, less the freight. In that case the owner informed the carrier at the time of making the contract that he did so because he wished to make contracts with third persons for the sale of goods to them. He subsequently made such contracts. It was held, in estimating the damages, that he was not entitled to the profits which he would have made; that the damages for which a carrier is liable from failure to perform his contract "are those which result from the ordinary and natural consequences contemplated at the time of making the contract"; and that the mere knowledge on the part of the carrier that the plaintiff intended to make contracts for the sale of the ties cannot impose a liability for loss of profits on such contracts. The court said: "Whether there would be a loss of profits, it was, of course, then impossible to determine, and probable profits would be incapable of estimation." In these words of the opinion may be found the features which distinguish that case from the case at bar. In that case there was no notice to the carrier of the amount of anticipated profits, or of the fact that profits were expected to be made. In the present case distinct notice was brought home to the carrier of the nature of the employment which the defendant intended to enter into, and the amount of the earnings which he could make with his horses in that employment.

It is said that the profits to be earned by the use of the horses in freighting over a mountain pass in the Arctic region, where they would have been subject to injury and death from exposure and from the dangerous nature of their work, where all the horses might have been lost in a single day, are too uncertain and speculative to have entered into the contemplation of the parties when making the contract. To this it may be said that the record is silent as to the hazards of using horses in the work for which these were intended. The only information we have is that the horses could have been used during the period of delay for the purpose of carrying freight, and that the value of their use would have been as stated in the evidence. As so stated, the profits which might have been realized are not more speculative or uncertain than those which have generally been allowed in the estimate of damages in the cases above cited. In *Simpson v. Railroad Co., Cockburn, C. J.*, said:

"As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility. To some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all."

The lowest estimate of the profit of the horses was \$20 per day for each horse. The jury, by their verdict, allowed profits at \$11.60 per day. We find no error in the ruling of the court. The judgment is affirmed.

MEXICAN CENT. RY. CO., Limited, v. MURRAY.

(Circuit Court of Appeals, Fifth Circuit. May 8, 1900.)

No. 892.

1. TRIAL—INSTRUCTIONS TO JURY—DIRECTING VERDICT.

Where the court is in doubt as to whether a general charge to the jury to return a verdict for defendant upon the evidence should be given, the doubt should be resolved in favor of the submission of the case to the jury.

2. MASTER AND SERVANT—INJURY TO EMPLOYEE—ASSUMPTION OF RISK—DEFECTIVE APPLIANCES—DIRECTING VERDICT.

While plaintiff was assisting in raising the span of a bridge, by hanging loops of track steel around the corner of the span, passing timber through the loops, and then elevating same by means of jackscrews, one of the loops broke, thereby causing a timber to fall against plaintiff, and throwing him from the cribbing, on which he was working a jackscrew, on to the ground below, and injuring him. Plaintiff knew the kind of material the loops were made of, and that they might break if too much strain was put upon them, and saw two of them break before the one by which he was injured, but the latter was defective, and this was not known to plaintiff. *Held*, that since in continuing to work after two of the loops broke, and when the third loop was strained, and he feared that would also break, plaintiff did not assume the risk incident to the use of the defective loop, the court properly refused to direct a verdict for defendant.

3. SAME—PROXIMATE CAUSE—ACT OF FELLOW SERVANT—INSTRUCTIONS TO JURY.

The evidence tended to show that when the loop in question broke the timber that struck plaintiff was pushed against him by the foreman in an attempt to save himself. *Held* that, the breaking of the loop being the proximate cause of the injury to plaintiff, the court properly refused to instruct the jury that, if they believed that the timber would have fallen without injury to plaintiff if it had not been pushed by the foreman, then the injury to plaintiff was caused by the act of a fellow servant, for which he could not recover of the employer.

4. SAME—INSTRUCTIONS TO JURY.

An instruction that unless plaintiff received his injuries from the natural and probable result of raising the end of the bridge, and by the means employed in raising same, he could not recover, was properly refused, since it eliminated the issue as to whether the appliances furnished by the employer were suitable, proper, and reasonably safe, and was calculated to mislead the jury.

5. SAME.

One of the issues in the case being whether the loop furnished by defendant was suitable and reasonably safe, the court properly refused to instruct the jury that plaintiff could not recover if he knew, or by the exercise of ordinary care might have known, that the work undertaken was dangerous.

In Error to the Circuit Court of the United States for the Western District of Texas.

This is an action brought to recover damages for personal injuries claimed to have been received by plaintiff below while he, as an employé of the railway company, with others, was engaged in raising the fallen end of a bridge. At the time of the accident one of the railway company's bridges was in course of repair. It seems that a flood had undermined an abutment on the bank of a stream, so that the abutment toppled out into the water, letting fall one end of one of the bridge spans. To return the span to its former position was the work in hand at the time Murray fell and was hurt. In order to elevate the span, a platform or cribwork was laid beneath the fallen end, the span was then slowly raised by means of large jackscrews

placed upon the platform, and the platform or "cribbing" itself was carried up with the span, as the work of elevating the same progressed. Murray fell, or, rather, was knocked, from the platform when the work had proceeded until the platform was about eight feet high. It being impracticable, in the opinion of those in charge of the work, to place the jackscrews immediately beneath the fallen end of the span, loops, made from track steel, were hung around or under each foot or corner of the fallen end of the span. Through the two loops pine timbers were passed until the loops were about the middle of the timbers. Then under each of the four ends of the timbers was set a jackscrew, screwed down as low as possible. As the jackscrews, thus standing upon the cribbing and beneath the timbers, were screwed up or extended by means of iron levers worked by gangs of four men to each screw, the bridge was raised. Like a weight or bucket is borne suspended from the middle of a pole, the end of the bridge span, suspended from the middle of the timbers by means of steel loops, was slowly raised to its former position by aid of the jackscrews. The cause of the accident was the breaking of one of the steel loops, generally called a "stirrup." Murray, who was working with one of the gangs on a lever at the time the loop broke, thought that either Foreman Robinson pushed the pine timber upon him, or that it naturally fell against him, when the loop broke and released it, and that he was thereby knocked from the platform. Defendant's witnesses claimed that Murray was straining at the lever at the time the loop broke, and that he therefore lost his balance and fell, as soon as the weight was taken off the jackscrew by the breaking of the loop. Whichever theory is correct, however, is unimportant; for it is certain that the breaking of the loop was the efficient cause of the accident. The bridge did not fall when the loop broke, as precautions had been taken to render this impossible, and nothing else happened that might not have been anticipated by one of ordinary intelligence.

The main issue in the case was, conceding the negligence of the railway company in furnishing a defective loop, did the plaintiff assume the risk of injuries from that source, and was the plaintiff guilty of such contributory negligence as would prevent a recovery? This was one of the defenses pleaded by defendant in its answer.

The plaintiff, Murray, testified: That he was engaged in raising one of defendant's iron bridges at the time he was hurt. That one of the abutments had been undermined by water. That said abutment fell halfway down, so as to leave it slanting at an angle of 45 deg., and the north span dropped down said inclining abutment so that the end of said span came 8 or 9 feet below the level of the track. That by means of a steel rail bent or made into loops, and placed one loop over each corner of the fallen end of said bridge, he and his co-laborers were attempting to elevate said bridge to its original position. That through each loop was slipped a pine beam 8 or 12 feet in length, and 12x12 inches thick. That said loops rested on the middle of said beams, and that under and near each end of said beams large jackscrews were placed. "I was helping to turn one of the jackscrews, and thereby assisting in raising the end of the bridge. As we would turn the jackscrews, the bridge would come slowly up. I helped put some of the stirrups on the foot of the bridge myself. I think there was about three broke. When one would break, they would go and get another, and put it on, and go ahead. I saw what kind of materials the stirrups (loops) were made of when they brought them there. I remember distinctly of two of these same kind of irons breaking before the one broke that injured me. I had been working there, and I had seen two or three of these stirrups broken before. I knew that they had been broken. I knew that they would break if too much weight were put upon them, and at the time I was turning the ratchet, or turning the jack,—that was just before the one broke that injured me,—I found it turning very hard, and I apprehended that the stirrup might break. I knew if it came much heavier it would be liable to break. I and Larry Fisher called Mr. Robinson's attention to it; said it was getting hard to pull and hard to turn. We both spoke about its getting very heavy to raise. We went ahead, and it was only a few turns—I don't remember just how long, but a very little while—until it broke. When the iron stirrup

broke, that took all the weight off the jackscrews, except the weight of the iron and the beam. When I fell I did not have hold of this lever at all. I was trying to keep the timber off of me,—this beam. When I fell it came against me. I put both hands against the timbers, and tried to shove it off of me, and it shoved me right off down below. It was supposed that Mr. Robinson was pushing against the opposite side of the timber to keep it off of himself. I heard him say so. When the iron broke, the end of the timber where the jack was working sprung up, and the timber was misplaced, and that end where we were working shoved me off of the platform, down about eight feet, down in the bed of the creek.” “As to my familiarity with the work, as far as I went I knew how we had done the work. I saw them put this beam through the stirrup. I noticed when the weight of the bridge was on the beam it would spring about one-half of an inch down. I knew it would come back to its natural shape when the weight was suddenly removed. I knew it would spring up straight again. It (the beam) could have fell, or it could have been taken off easily. It could have been shaken off, and it could have been pushed off, by any one standing by, for there was nothing holding it. There was nothing holding it. No; it was just lying on top there. There was a block on top of the jack about four inches square that went against the beam,—an iron block. It was working on top of the jack, and was not fastened to the beam that it went under. There was generally a block put in between the beam and the iron block. I don't know about that for sure, but think there was. The blocks were different thicknesses, according to the height of the beam when we put the jackscrew in. It was sometimes thicker than at others. I think the height of the jack would be about four feet when fully extended. The base of the jack, I suppose, was about fourteen inches in diameter. The jack was not screwed down to the platform. It was always loose; just setting. The timber was sprung a little when the weight came on it. That is, when it was leaving the corner of the bridge. You could see it would spring down about one-half of an inch or five-eighths of an inch, and, of course, when it broke it seemed that it was the springing of the timber that upset the jacks. It could easily upset them. I could not say about what position it (the timber) came down, any more than that it upset the jack, and shoved me off. I saw all these things before I was hurt. If there was nothing to prevent, the beam would naturally tip over my way; if there was more of the beam over my side of the batter post than there was on the opposite side. After it passed the center, naturally the heavy part would tip down. As a carpenter, I knew more or less what this beam would weigh. I knew that if I fell off I might be hurt. To take the situation as it looked, the jack might fall off, and hurt anybody below it when it fell.” “When the first shoe broke there were many employes working around there. None of them quit work on account of the breaking. I had no experience to tell me how much a railroad iron would lift. I never made a study of that thing, and never knew anything about it. I was under the immediate orders of Mr. Robinson. He was my foreman. When Mr. Robinson examined this, and told me that it was all right, I put reliance on what he said, and went on turning the jack.”

Larry Fisher, among other things, testified that he examined the iron that broke which injured Murray immediately after the accident, and found a flaw in it which had been eaten away by the rust to the extent of three-eighths or one-half an inch on three sides, and that just before the accident occurred the jack at which they were working commenced to work hard, and that he was suspicious of something being wrong, and that he turned to the bridge foreman, Mr. Robinson, and told him that there was something wrong, and that the jack was working hard. Mr. Robinson examined it, and said, “No, there is nothing wrong; just keep right ahead;” and in less than three minutes from that time the stirrup broke, and the timber that was overhead struck Murray on the head, and caused him to fall into the river, and the jackscrew fell right across him. “I saw him fall, and he was badly hurt. The reason that we did not tell Mr. Robinson that we would not turn the jackscrew any more was because you are supposed to obey your foreman down there in that country when they give you orders.” “I went ahead when told by Mr. Robinson, naturally supposing a man following the line of busi-

ness he would not give instructions to the men working under him where he thought their lives would be in danger, and that he must understand his business. The iron that we were using to lift the bridge with was secondhand railroad iron. I noticed on the ball of the rail that it had been worn like as if it had been run over with car wheels. The flange had been worn out, and it was reported there that it had been picked up on the line. The flaw could have been detected before the break. The stirrup could have been hung up and tested with a hammer, and the ring would have told any mechanic or anybody familiar with iron whether it was a sound piece of steel or not. By the tone, it would have revealed the presence of the flaw. I would say that at least one-third of the iron had been affected by the rust. It had eaten in about three-eighths or one-half of an inch on three of the sides. The flaw was running in from the outer edge towards the center. The flaw ran right in from the opposite side of the ball from the flat of the rail. By hanging up this stirrup, and tapping it with a hammer, you can tell whether or not there is a flaw in it. This is a well-known test. The stirrup that I examined and found the flaw in is the one that injured the plaintiff."

G. J. Hartman, witness for the defendant, among other things testified that he was division superintendent on the division on which Murray was working, and was near the place of the accident when he was injured. "There was no danger whatever about the bridge falling, because we made all precautions for that. There was no danger about the bridge falling if any lifting apparatus should break, because we made all provisions for safety, and should the iron break there would ordinarily be no consequence attached to it. It would not make any material difference except to retard the progress of the work. There was no more danger to the men than there is in raising any kind of a heavy load. When a man is engaged in lifting heavy loads, there is always more or less danger. There was no more to indicate that Murray was in any special danger than any other man working there. There was nothing particularly to indicate that the angle iron would break. These irons may have been made of secondhand steel. I applied no test to them whatever. There was no test applied, to my knowledge. I did not know at that time what amount of weight this character of appliance was capable of sustaining. I sent no one to ascertain that fact by any means. The only way I could know what the thing would lift would be to put it to the actual test,—to the actual strain. I did not know when the first and second broke that the third was not capable of sustaining the end of the bridge. When we put the irons to the actual test, I knew, of my own knowledge, that three of them broke, and I think the third one that broke is the one that hurt Murray. I do not believe that I did inspect the hanger before it was put on to see if there was any defect in it."

A bill of exceptions, reciting all the evidence offered on the trial, shows the following proceedings:

"First. Under said proof defendant requested the court to charge the jury to find a verdict for defendant. The court refused to give said charge, as shown by statement subscribed to said bill of exception by the court, to wit: 'I have doubt as to whether this charge should be given, and, in view of such doubt, I decline to give it, and submit the case to the jury on the general charge of the court. [Signed] T. S. Maxey, Judge.' To the action of the court in refusing to give said charge defendant then and there excepted.

"Second. Under said proof defendant requested the court to charge the jury as follows: 'You are charged that if the danger to be expected from raising the end of said bridge in the manner and by the means employed was as open to the observation of plaintiff, Murray, as it was to the defendant or its servants in charge of said work, then plaintiff cannot recover, because in such case plaintiff, Murray, assumed the risk of such danger,'—which charge was by the court refused, and to the action of the court in refusing the same defendant then and there, in open court, excepted.

"Third. Under said proof defendant requested the court to charge the jury as follows: 'You are charged that if, in raising the end of the bridge in the manner and by the instrumentalities employed by plaintiff and his co-employees, there was no danger that could have been known by either plaintiff,

Murray, or the defendant or its servants in charge of the work of raising the end of said bridge, by the exercise of ordinary care, then plaintiff cannot recover in this case,'—which charge was by the court refused, and to the action of the court in refusing the same defendant then and there, in open court, excepted.

"Fourth. Under said proof defendant requested the court to charge the jury as follows: 'You are charged that if the danger that caused plaintiff's injury was as open and obvious to plaintiff as it was to defendant or its servants in charge of said work of raising the ends of said bridge, or if said danger was as well known to said plaintiff as it was to said defendant or its employes in charge of said work, then plaintiff cannot recover in this case,'—which charge was by the court refused, and to the action of the court in refusing the same defendant then and there, in open court, excepted.

"Fifth. Under said proof defendant requested the court to charge the jury as follows: 'You are charged that if you believe that when the iron stirrup broke, and the beam under which the jackscrew was placed, that plaintiff was engaged in turning, fell, that the same would have fallen without any injury to plaintiff if the same had not been pushed towards plaintiff by ——— Robinson, a co-laborer, and that the pushing of said beam towards said plaintiff by said Robinson knocked him off of the platform and caused the injury to said plaintiff, then he cannot recover in this case, for said injuries to plaintiff would be caused by the act of a fellow servant, for which defendant is not liable in damages,'—which charge was by the court refused, and to the action of the court in refusing the same defendant then and there, in open court, excepted.

"Sixth. 'You are charged that it is only an injury that could be foreseen and reasonably anticipated as the natural and probable result of an act of negligence that can be recovered for. Therefore, if you believe from the evidence that the manner in which plaintiff received his injuries was not the natural and probable result of the raising the end of said bridge in the manner and by the means employed in raising the same, and that it could not have been foreseen and reasonably anticipated, that plaintiff in performing the work he was engaged in, in the manner in which he was performing the same, would have been injured in the way he was injured, then you will find for defendant,'—which charge was by the court refused, and to the action of the court in refusing the same defendant then and there, in open court, excepted.

"Seventh. 'You are charged that if it should appear that plaintiff knew that in performing the duty of raising the end of said bridge in the manner that he and his co-employes undertook to do so, or by the exercise of ordinary care might have known, that it was dangerous, and he (plaintiff) still continued performing said work, then, in that case, plaintiff cannot recover in this case. If there was danger to plaintiff in performing said work, and the danger was known to him or open to his observation, then it was his duty to refuse to perform the work, and thereby avoid the danger; and if he voluntarily continued to perform the work with the knowledge of the danger, or with the danger open and obvious to him, he cannot recover, for in continuing to perform the work under such circumstances he would assume the risk of such known or open and obvious danger,'—which charge was by the court refused, and to the action of the court in refusing the same defendant then and there, in open court, excepted."

Another bill of exceptions is as follows:

"Be it remembered that upon a trial of the above styled and numbered cause in said court, on the 5th day of October, A. D. 1899, came the plaintiff, and moved the court to strike out from the defendant's answer its exceptions and pleas to the jurisdiction of the court, because the same were not well taken, and were wholly untrue, and that same should not be considered by the court, and in support thereof plaintiff introduced defendant's original answer filed in this cause on the 4th day of October, 1898, and which is as follows:

"Now comes the defendant in the above styled and numbered cause by its attorneys, and, excepting to plaintiff's original petition, says that the mat-

ter and things set forth and alleged therein are not sufficient in law to warrant a recovery thereupon, and of this the defendant prays the judgment of the court.

Falvey & Davis, Attys. for Deft.

"And for further answer herein, defendant, by its attorneys, comes and says that it denies all and singular the allegations in plaintiff's original petition contained, and of this it puts itself upon the country.

"Falvey & Davis, Attys. for Defendant."

—Which motion was then and there by the court duly sustained, and the court struck out all the exceptions and pleas of defendant to the jurisdiction of the court as in its answer set out.

"Defendant's exceptions and pleas to the jurisdiction of the court being as follows:

"That, excepting to plaintiff's original petition, defendant says that the matters and things set forth and alleged therein are not sufficient in law to show that the court has jurisdiction to grant the relief sought; wherefore the defendant prays the judgment of the court.

"Falvey & Davis, Attorneys for Defendant.

"And, for further special plea to the jurisdiction of said court, defendant, by its attorneys, comes and says that the laws of the republic of Mexico, as pleaded by plaintiff, are so vague and uncertain and dissimilar to the laws of this country that this court should not entertain jurisdiction herein and attempt to enforce said laws; that said laws have been passed upon by a decision of the supreme court of the state of Texas, to wit, in the case of the Mexican National Railway Company v. James C. Jackson, it being therein held that the courts of this state would not sit to adjudicate controversies like the one at bar, under the laws of said republic of Mexico, on account of their dissimilarity to our laws; and that the policy of this state, and the courts of this country, would be not to interfere with the traffic of railroads, having their lines in Mexico, by adjudicating causes arising in Mexico.

"(2) That said petition shows that the injury sustained by plaintiff occurred in the republic of Mexico, and any right of action he may have would be controlled by the laws of said republic, and it appears that said defendant has ever since said injury maintained its line of railroad in said republic, and continued to possess its property in said republic, and there is no reason shown in said petition why plaintiff did not sue for damages for said injuries in said republic, where the injury occurred, instead of bringing his suit in this court.

"(3) That it appears from the laws of Mexico, as set out in plaintiff's petition, that if plaintiff has any cause of action it would be controlled by the laws of the republic of Mexico; that according to said laws, as set out in plaintiff's petition, that suit and adjudication of the rights of plaintiff, and the awarding of damages to the plaintiff for the injuries sustained, would not be a final determination of the rights between the parties, but that plaintiff, according to said law, would have the right to bring suits from time to time to recover in said suits. If said injury is continuing or permanent; that said law is contrary to public policy, and this court has no jurisdiction to enforce the same.

"(4) That, according to article 313 of the Laws of said republic, the judge who takes cognizance of suits based upon civil responsibility shall endeavor to effect a compromise, so that the amount and terms of payment be fixed by agreement between the parties; that, according to said law, no right of action would accrue to the plaintiff after the judge who took cognizance of the case shall endeavor that the amount and terms of payment be fixed by agreement of the parties; that said law is contrary to public policy, and this court has no jurisdiction to enforce the same.

"(5) That, according to the laws of said republic as set out in said petition, said plaintiff would have no right in a civil suit to recover damages for his said injuries, unless he shows that the acts of defendant which caused the injury constituted a crime under said laws of Mexico; that the recovery in such civil suit is penal in its nature; that this court cannot enforce the penal laws of the republic of Mexico; that said laws so pleaded do not so sufficiently define what acts are made penal under said laws as to enable this court to judge whether or not said acts by which such injury was caused

are penal, within the meaning of said law, to entitle plaintiff to any recovery in a civil action therefor.

"(6) That, according to article 323 of the Laws of said republic of Mexico, a recovery may be had, not only for the damages sustained by the injury complained of, but the judge trying the case may award, as extraordinary indemnity, any sum that he may determine, considering the social position, etc., of the party injured; that said law is against natural justice and the policy of our law, in discriminating in favor of or against a litigant according to his social position, and this court has no jurisdiction to enforce the same.

"(7) The laws of the republic of Mexico, by which plaintiff's cause of action will have to be tried, are so vague and indefinite that this court cannot properly and intelligently determine and administer the same; wherefore defendant prays judgment whether or not this court will take further cognizance hereof.

Falvey & Davis, Attorneys for Defendant.

"Defendant, further pleading to the jurisdiction of the court, comes and says that plaintiff ought not to recover herein, because it says that the contract of service entered into by plaintiff and defendant herein was entered into in the republic of Mexico; that plaintiff's services thereunder were to be performed in said republic, where his wages and hire were to be paid; that plaintiff's cause of action, if any he has, arose entirely within said republic of Mexico, where defendant now and always has had and operated its railroad and business, and where all its cars and property are kept; it being at the time when plaintiff claims he was injured, and at all times since said date, subject to the jurisdiction of the courts of said republic of Mexico, under the laws of which it is entitled to have this cause adjudicated,—all of which defendant is ready to verify, and wherefore it prays the judgment of the court.

Falvey & Davis, Attorneys for Defendant.

"And, for further plea to the jurisdiction of the court in this behalf, defendant comes and says that actions and suits in said republic of Mexico are not regulated and governed by common law, but that all rights, remedies, and actions are entirely provided for and governed by the code and statutory laws of said republic, which materially alter and change the common-law rule; that, under the codes and statutes of said republic, plaintiff would not be entitled to recover for injuries sustained by him, as claimed in his petition, unless such act of defendant causing said injury is shown by plaintiff to be a crime under the penal code of the republic of Mexico; that no civil action would accrue to plaintiff in said republic for such an act of defendant as is set out in plaintiff's petition, unless such act was made penal by the laws of said republic; wherefore this court ought not to take cognizance of this suit, or attempt to enforce the penal laws of a foreign country, and wherefore the defendant prays that the court proceed no further herein, and that this case be dismissed.

Falvey & Davis, Attorneys for Defendant.

"To the judgment and action of the court in granting plaintiff's motion, and in striking out said pleas and exceptions to the jurisdiction, defendant then and there, in open court, excepted, and now hereby tenders this bill of exceptions number 8, asking that same be by the court duly allowed, signed, sealed, filed, and enrolled and made a part of the record herein, which is accordingly done this 4th day of November, A. D. 1899.

"T. S. Maxey, Judge."

The trial resulted in a verdict and judgment for the plaintiff, and the railway company sued out this writ of error, assigning as errors the several adverse rulings of the trial court as set forth in the bills of exception.

T. A. Falvey and Waters Davis, for plaintiff in error.

Millard Patterson and C. N. Buckler, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

In refusing the general charge in favor of the defendant, the trial judge expressed his doubt as to whether the charge should be given,

but resolved that doubt in favor of the submission of the case to the jury. This was proper, and any doubts we have on the subject are resolved on the same side. It is clear that, as to the manner and method of the work in hand at the time Murray was injured, the danger and risk were as well known to him as to any other servant of the company there employed, either as superintendent, foreman, or ordinary laborer, and we are of opinion that, as to the apparent risks and dangers in carrying on the work, Murray assumed them with his employment. But the case shown requires us to go further. While Murray assumed the risks attending upon the operation, and knew there was danger, the question is presented whether, in assuming the known and apparent risks, he also assumed the risk resulting from unknown defects in the tools and appliances furnished by the railway company. The loop that broke—the breaking of which was the proximate cause of Murray's injury—was defective, and the negligence of the company in furnishing it is conceded. The defect, while it was more or less apparent, and was discoverable upon slight inspection, was not known to Murray, nor probably to any other employé of the railway company, at the time. There had been no inspection of the same. No effort had been made on the part of the railway company to ascertain whether the stirrup was or was not defective. Under the rules which govern in regard to appliances furnished by employers to employés, it must be held that in regard to this defective loop the railway company knew, or ought to have known, that it was defective.

This makes a case where, in regard to the risks and dangers attending upon the work, the employer knew more than the employés, and he did not communicate his information. Conceding that Murray assumed the known risks and dangers attending upon his work, did he also assume the additional risks and dangers resulting from defects in appliances which were unknown to him, but were known, or ought to have been known, to the railway company? If he did not assume these unknown risks, the general charge was properly refused. If it was a matter for determination from the evidence, and the evidence on the point was conflicting and uncertain, then there was no error in refusing the general charge. "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213." *Railroad Co. v. Powers*, 149 U. S. 43, 45, 13 Sup. Ct. 748, 37 L. Ed. 642. "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employé has a right to rely upon this duty being performed, and that, while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employé with respect to appliances furnished. An excep-

tion to this general rule is well established which holds that where an employé receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. But no reason can be found for and no authority exists supporting the contention that an employé, either from his knowledge of the employer's methods of business, or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employé assumes the risks usually incident to the employment. The employé, on the other, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employé is not compelled to pass judgment on the employer's methods of business, or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which, where an appliance is furnished an employé in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the particular service in which he engages, the employé may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and while this does not justify an employé in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances." *Railroad Co. v. Archibald*, 170 U. S. 665, 671-673, 18 Sup. Ct. 777, 42 L. Ed. 1188.

Now, Murray testified:

"I helped put some of the stirrups on the foot of the bridge myself. I think there was about three broke. When one would break, they would go and get another, and put it on, and go ahead. I saw what kind of materials the stirrups (loops) were made of when they brought them there. I remember distinctly of two of these same kind of irons breaking before the one broke that injured me. I had been working there, and I had seen two or three of these stirrups broken before. I knew that they had been broken. I knew that they would break if too much weight were put upon them, and at the time I was turning the ratchet, or turning the jack,—that was just before the one broke that injured me,—I found it turning very hard, and I apprehended that the stirrup might break."

Taking this in connection with the fact that the loop which broke and caused Murray's injuries was defective,—a fact which Murray

did not know,—it cannot be held, as a matter of law arising on undisputed evidence, that Murray, in continuing to work after two of the loops broke, assumed all the risk attendant upon the work because he continued to work when the third loop was strained, and he feared that also would break if the strain should be continued. The distinction is very narrow, but it clearly exists.

The second, third, and fourth charges requested were properly refused for the reasons just given in regard to the action of the court in refusing the general charge, and need no further notice.

The fifth charge requested, as follows:

“You are charged that if you believe that when the iron stirrup broke, and the beam under which the jackscrew was placed, that plaintiff was engaged in turning, fell, that the same would have fallen without any injury to plaintiff, if the same had not been pushed towards plaintiff by ——— Robinson, a co-laborer, and that the pushing of said beam towards said plaintiff by said Robinson knocked him off of the platform, and caused the injury to said plaintiff, then he cannot recover in this case; for said injuries to plaintiff would be caused by the act of a fellow-servant, for which defendant is not liable in damages,”

—Was properly refused, because the proximate cause of the injury was the breaking of the stirrup, and any negligent action of a fellow servant taken at the time, particularly for the purpose of protecting himself, did not relieve the railway company from the responsibility of its own negligence.

The sixth charge was properly refused, because it is to the effect that, unless the plaintiff received his injuries from the natural and probable result of raising the end of the bridge, and by the means employed in raising the same, he cannot recover; and this eliminates entirely the issue as to whether the appliances furnished to raise the end of the bridge were suitable, proper, and reasonably safe, and, if otherwise correct in law, it would have tended to mislead the jury.

The seventh charge requested, that:

“If it should appear that plaintiff knew that in performing the duty of raising the end of said bridge in the manner that he and his co-employees undertook to do so, or by the exercise of ordinary care might have known that it was dangerous, and he (plaintiff) still continued performing said work, then, in that case, plaintiff cannot recover in this case. If there was danger to plaintiff in performing said work, and the danger was known to him or open to his observation, then it was his duty to refuse to perform the work, and thereby avoid the danger; and if he voluntarily continued to perform the work with the knowledge of the danger, or with the danger open and obvious to him, he cannot recover, for in continuing to perform the work under such circumstances he would assume the risk of such known or open and obvious danger,”

—Was correctly refused, for the reason just given as to the sixth requested charge.

All the questions raised as to the laws of Mexico and their applicability in this action have been heretofore determined adversely to the plaintiff in error, and need no further consideration. *Evey v. Railway Co.*, 26 C. C. A. 407, 81 Fed. 295; *Railway Co. v. Marshall*, 34 C. C. A. 133, 91 Fed. 933.

The judgment of the circuit court is affirmed.

MEXICAN CENT. RY. CO., Limited, v. ECKMAN.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1900.)

No. 893.

1. RAILROADS — NEGLIGENCE — DEFECTIVE TUNNEL — PERSONAL INJURY — EVIDENCE.

Plaintiff, who was conductor of a freight train on defendant's road, was injured by reason of his head striking against a rock in the roof of a tunnel, while riding on his train, seated on the top of the side of the cupola of the caboose. The evidence showed that the tunnel, at the point where plaintiff entered, was 18 feet from the top of the rail to the arch of the road, and that at 53 feet from the entrance it measured but 15 feet 10½ inches; that the standard clearance for tunnels is 20 feet, which is 19 feet and 7 or 8 inches above the top of the rail; and that it is customary to construct them so they will have a uniform section throughout, and not leave projections which will encroach upon the uniform section. It was also shown that some railroads use tell-tales or ropes hanging down near the approach to tunnels to warn men on top of a train, but that no warning was given at the entrance of defendant's tunnel. *Held*, that a request to instruct the jury for defendant, on the ground that the evidence failed to show that defendant was negligent in the construction of the tunnel, was properly refused.

2. SAME—CONTRIBUTORY NEGLIGENCE.

At the time of his injury, plaintiff was seated on the top of the side of the cupola of the caboose; having stationed himself there in order that he might see ahead, and that the engineer might see him. His train had already passed through two or three tunnels, and the one in which he was injured was of sufficient height at the entrance to clear him, but after proceeding therein about 50 feet his head struck against a rock in the roof of the tunnel, and he was knocked off, and run over by the train. Plaintiff had received no notice that the height of the tunnel was not uniform, and he had no knowledge that such was not the case. The evidence showed that plaintiff's position on the train was not improper, but that the custom is for men riding on top of a train to lie down when passing through a tunnel, and that it is the duty of a man in charge of a train to understand the condition of the road over which he runs. *Held*, that the question whether plaintiff was guilty of negligence contributing to his injury was properly submitted to the jury.

In Error to the Circuit Court of the United States for the Western District of Texas.

T. A. Falvey and Waters Davis, for plaintiff in error.

Millard Patterson and C. N. Buckler, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. J. W. Eckman, the defendant in error, brought his action against the Mexican Central Railway Company, Limited, the plaintiff in error, to recover damages on account of injuries received by him while operating a work train in a tunnel on the railway company's road in the republic of Mexico. He was working on the San Luis Potosi Branch of the company's road, on a division in the Rascon Mountains between Cardenas and Tampico. He had commenced work as conductor of a work train on the 5th of August, and he received his injury on the 23d of August, 1898. On the day he was injured he had a train made up of two box cars, two flat cars, a caboose, and the engine. The cars were being pushed

ahead of the engine, the engine facing in the direction that the train was moving, so that the engineer had the same in his eye. The injury occurred between 5 and 5:15 o'clock p. m. The sun had not gone down. The train was being pushed up the mountain side. The car furthest from the engine was a box car; next it was the caboose; next the caboose another box car, with the two flat cars between this last box car and the engine. The conductor was sitting on top of the side of the cupola of the caboose. There were about 200 Mexicans working on the track on this section of the road, and the conductor of this work train had orders to "get these men in" by 6 o'clock. There was a train due to leave Las Canoas, which it was necessary for the conductor of this work train to hold by flagging. The most reliable flagman he had had been sent forward on a passing train to Las Canoas to hold all trains until the work train got in. He had a man standing on the front end of the box car in front of the train, and stationed himself where he could see ahead, and where the engineer could see him. He also had two men standing between himself and the engineer. With his train, his men, and himself in the position just described he had, after sending forward his flagman, passed through two or three tunnels before entering this fourth tunnel, in which he received his injury. This fourth tunnel, in which the injury was received, is 225 feet in length. It has a sharp curve in it. He entered it from the east, and, after having proceeded about 50 feet, his head struck against a rock in the roof of the tunnel. He was knocked off thereby, and run over by a part of the train and by the engine, and badly hurt. The trial resulted in a verdict and judgment in his favor, to review which judgment this writ of error is brought.

Two errors are assigned, as follows:

"First. The court erred in refusing to give defendant's first special charge, where defendant asks the court to charge the jury to return a verdict for defendant (1) for the reason that the evidence introduced upon the trial of said cause failed to show that defendant was guilty of any negligence in and about the construction and maintenance of said tunnel, or the operation of its trains, or otherwise, which resulted in plaintiff's injury; (2) for the reason that the evidence showed that plaintiff himself, in riding on top of the cupola of his caboose, in the manner and under the circumstances in which he was riding at the time of his injuries, as shown by the evidence, was guilty of contributory negligence, which contributory negligence was the approximate cause of his injuries.

"Second. The court erred in sustaining plaintiff's motion, and striking out the pleas and exceptions of defendant to the jurisdiction of the court, (1) for the reason that said exceptions and pleas presented questions as to the jurisdiction of the court over the subject-matter in controversy in said cause, which questions of jurisdiction defendant would not and could not waive by pleading generally to the merits of said cause theretofore in its original petition; (2) for the reason that the right or liability of a corporation to sue or be sued in this state depends upon the sanction of the laws thereof, and that it is the policy of our state, as announced in the decision of *Railway Co. v. Jackson* (Tex. Sup.) 33 S. W. 857, to exclude from our courts controversies arising or accruing in the republic of Mexico under the laws of said republic, where no reasons are given for the institution of suits in our courts, and so that the traffic of railroads having their lines in Mexico may not be interfered with by the adjudication of causes of action arising in Mexico; (3) for the reason that the laws of the republic of Mexico which are applicable to plaintiff's suit, and which regulate the rights and remedies of

the parties, are so dissimilar to our laws that it is against the policy of this state and the courts of this country to attempt the enforcement thereof; (4) for the reason that the injuries sustained by plaintiff occurred in the republic of Mexico, and that any right of action he may have would be controlled by the laws of said republic, and it was charged that defendant ever since plaintiff's injuries maintained its line of railroad in said republic, and continued to possess its property therein; (5) for the reason that according to the laws of said republic the suit, and adjudication of the rights of plaintiff, and the awarding of damages to the plaintiff for the injuries sustained, would not be a final determination of the rights between the parties, but that plaintiff, according to said law, would have the right to bring suit from time to time, and recover thereon, where said injury is continued or permanent, as claimed in this case, which law is contrary to public policy, and should not be enforced by the courts of this state; (6) that according to said law the judge who takes cognizance of suits based upon civil responsibility is required to attempt to effect a compromise between the parties, which attempt must precede the bringing of a suit, plaintiff's right of action not accruing until after such judge should attempt to compromise such cases, which law is contrary to the policy of this state, and should not be enforced by our courts; (7) for the reason that plaintiff, under said laws, could not recover of defendant without showing that the acts resulting in his injury constituted a crime under the laws of Mexico, and that the recovery in a civil suit is penal in its nature, and that said laws pleaded by plaintiff do not sufficiently define the acts that are made penal so as to enable the court and jury to determine the rights and liabilities of the parties therefrom, wherefore our courts should not attempt to enforce the same; (8) for the reason that said laws give damages commensurate with the social position of the party injured, and therein are contrary to natural justice and the policy of our state, which laws this court has no jurisdiction to enforce; (9) for the reason that the contract of service entered into between plaintiff and defendant was made in the republic of Mexico, and that plaintiff's services therein were to be performed in said republic, where his wages and hire were to be paid, and plaintiff's cause of action arose entirely within said republic, where defendant now and always has had and operated its railroad and business, and where its cars and property are kept,—defendant being at the time when plaintiff claims he was injured, and at all times since said date, subject to the jurisdiction of the courts of said republic of Mexico, under the laws of which defendant is entitled to have its cause adjudicated; (10) for the reason that actions and suits in the republic of Mexico are not regulated and governed by the common law, but that all rights, remedies, and actions are entirely provided for and governed by the codes and statutory laws of said republic, which codes and laws materially alter and change the common-law rule."

All the questions raised by the second assignment of error were presented in substantially the same manner on the trial in the circuit court, and on a writ of error before this court, in the case of *Mexican Cent. Ry. Co. v. Murray* (recently decided) 102 Fed. 264, and in which case, in reference to these questions, we said: "All the questions raised as to the laws in Mexico and their applicability in this action have been heretofore determined adversely to the plaintiff in error, and need no further consideration,"—citing *Evey v. Railway Co.*, 26 C. C. A. 407, 81 Fed. 295; *Railway Co. v. Marshall*, 34 C. C. A. 133, 91 Fed. 933. This second assignment of error will therefore receive no further consideration.

The first assignment of error presents the issue as to whether there was any evidence tending to show negligence upon the part of the plaintiff in error in the construction and maintenance of the tunnel in which the defendant in error received his injury; and, further, whether the evidence showed that the defendant in error by his neg-

ligence so contributed to the injury as to forbid the submission of this issue to the jury. The plaintiff's own testimony tended to show that tunnel No. 4 at the entrance where the defendant in error entered was 18 feet from the top of the rail to the arch of the road, and amply sufficient to clear him in the position he occupied on the caboose; that a little further in it was 16 feet 10 inches, still a little further in 17 feet 1 inch, and at another place 17 feet 8 inches, and then 16 feet 3 inches; that this last-mentioned one was 30 feet inside of the tunnel from the east entrance; that at 53 feet from that entrance it measured 15 feet 10½ inches from the rail next the mountain side to the roof of the tunnel, and 16 feet 1 inch from the rail on the other side; that this ledge extended across the track from one side of the tunnel to the other, and was the lowest point found by the witnesses who measured the tunnel and testified on the trial. The witness Wellington, who assisted in the measurement of the tunnel, said that he commenced his measurement at the end the plaintiff (below) went into:

"We measured close to the end, or at the entrance. We started at the east end. The first measurement was 19 feet 6 inches. The next was 18 feet 7 inches. This was taken about 3 or 4 feet along the rail, from the rail to the roof of the tunnel. I took the lowest places I could see to measure from. The next one was 17 feet 10 inches; the next was 17 feet 6 inches; the next 17 feet 4 inches; the next 18 feet 4 inches; the next 17 feet 1 inch; the next 18 feet 3 inches; the next 16 feet 6 inches; the next 16 feet 1 inch; the next 16 feet 5 inches; the next 19 feet 1 inch; 20 feet 4 inches; 17 feet 1 inch; 19 feet 1 inch; 17 feet 10 inches; 18 feet 7 inches. When I got to 19 feet, I concluded I had measured far enough. I knew from what he said that we were further in than where he was knocked off. I went to the end of the tunnel towards San Luis Potosi, and I commenced measuring there. The first place we went was 17 feet 10 inches; then 18 feet 6 inches; then 18 feet 7 inches; then 18 feet 6 inches; 18 feet 8 inches; 18 feet 9 inches. Then I concluded to go to the east end of the tunnel, and measure on the other side of the track, on the outside of the curve, towards the mountain. The other measurements were on the inside. The first measurement on the outside of the curve was 17 feet 11½ inches. That is at the entrance of the outside rail. The next was 16 feet 10 inches; then 17 feet 1 inch; then 17 feet 8 inches; then 16 feet 7 inches; then 16 feet 6 inches; then 17 feet 4 inches; then 15 feet 10½ inches. From the entrance of the tunnel where plaintiff went in to this last measurement was about 53 feet. This was the lowest point where the tunnel roof came down to 15 feet 10½ inches from the rail. The roof was very rough. I measured every 3 or 4 feet. It is all solid rock. Some of the rocks came closer down to the rail than others. I measured from the top of the rail. When I came to this rock, 15 feet 10½ inches, that was not anything more than a rock simply projecting down towards the railroad track."

The witness Hartman, the superintendent on the Chihuahua Division of the company's road, testified for the company in part as follows:

"The rules of railroad companies require the trainmen to be on top of the train approaching stations and passing stations, and at no other time. If an engine was backing some cars up a mountain, it would be the conductor's duty to be on the first car; that is, the one furthest from the engine, on top of the car. If the engine was pushing the train, it would be the first car in front. It would be his duty in pushing these cars to be where he could see the track and signal the engineer. If the track was so curved that from the front end he could not see the engineer, it would be proper for him to be nearer the engine, where he could see and give his sig-

nals, provided he had a man on the front end. If the conductor should deem it necessary for him to be near the middle of the train to keep a better lookout, and he had a man on the front end of the train, it would not be improper for the conductor to be there, but there is no rule compelling him to be at such place. There is no rule of the company on it. If in his judgment it is proper for him to be there, and he thought it necessary, in the discharge of his duty as conductor, to take that position, towards the middle of the train, he would not be out of his place. He did not violate any rule of the company. I never knew of a man riding on a train going through a tunnel either standing or sitting up. They lie down; lie down flat. That is what it is proper for them to do. They do it on all roads that I ever knew anything about. They could see nothing going through a tunnel, no matter what position they occupy. I know of no rule that says anything about a man being on top of a train going through a tunnel, either lying down or otherwise. I have filled the positions of track laborer, freight rustler, telegraph operator, cashier, ticket clerk, roadmaster, trainmaster, brakeman, conductor, and superintendent. I have never done any braking where there were tunnels, but have where there were low bridges. If the bridge was not high enough to clear me, I should lie down. The man in charge of a train is supposed to understand the condition of the road over which he runs; otherwise he is not fit to take charge of the train. I do not say that a man passing through a tunnel a few times on a moving train can look up and tell the distance from the railroad track to the roof of the tunnel. If I was a conductor or brakeman on the train, I would know where the tunnel was. It is not the custom of railroad employes to stop the trains and measure these tunnels and bridges. It is not their business or duty to do it. A man on a train passing through a tunnel could not estimate the height of a tunnel. He could only guess at it."

The witness Kruttschnitt testified for the defendant, among other things:

"I have stated that the present standard clearance is 20 feet above the tie, which would be 19 feet 7 or 8 inches above the top of the rail. As the highest box cars hauled are 13 feet 10 inches in height from the top of the rail to running board, there would be headroom in these tunnels for a man standing erect on the running board 5 feet 9 inches or 10 inches, and correspondingly less in tunnels with 16 or 18 feet clearance. * * * In tunnels driven through solid rock formation, which requires no lining, it is customary to prescribe a minimum height and width inside, which allows no projection. This minimum height and width depends upon the established practice of the road, and in blasting some part of the tunnel might very well be a foot or more higher than others."

The witness Mudge, who testified by deposition for the railway company, concludes his testimony thus:

"It is the practice to maintain the same height throughout tunnels which are entirely in rock sections. But this is not uniform, as sometimes the falling of stones makes it necessary to make them larger than the standard dimensions of the tunnel."

The witness Dickenson, who testified by deposition for the company, says, among other things:

"Tunnels are usually and customarily so constructed as to have uniform section throughout. It is not customary to leave projections which would encroach upon the uniform section."

The witness Bryan, testifying for the defendant, said:

"It is not the practice to smooth the roof and sides of tunnels in the United States so that no stone may project from its roof or side, but it is the practice not to have stones project at the sides and roof inside the specified dimensions of the tunnel. In other words, if a tunnel is constructed of a certain width and height, the roof to conform to an arch turned to a certain radius

located a certain distance above the grade of the tunnel, it is the practice to remove any fragments of rock that project inside the section of the tunnel; but it is impossible to prevent the rock from breaking outside the section of the tunnel, thereby making the tunnel in places of considerably larger size than the prescribed dimensions. Under these conditions, it is impossible to prevent tunnels being higher or wider at certain points than at certain other points in their extent."

The witness Hartman, before referred to, testified that:

"Telltals are not used at bridges and tunnels on all well-regulated railroads. They frequently use them, but it is not usually done. * * * I have none of the train sheets of the Mexican Central showing the prescribed dimensions of their tunnels. There are blue prints showing the dimensions of the tunnels. I could not procure one before the trial is over. I could procure one from the chief engineer of the road, who has them at the City of Mexico. I could not get one short of the City of Mexico. I would not have time to get it here for the trial. I do not know anything about this tunnel in question. I have been through it twice, but never measured it. I think the measurements of the railway company are here. They had this tunnel measured. I think the attorneys for the defendant have the measurements. However, I am not certain. I do not know the number of the caboose on which Mr. Eckman was riding when he was injured. The standard height of a caboose on the Mexican Central is about 11 feet 4 to 6 inches from the top of the rail to the top of the cupola, and the cupola is 2 feet 6 inches from the top of the roof to the top of the cupola in the center; not quite so high on the edge of the cupola as it is round. The measurements will vary according to whether a car is loaded or not. The cupola of the car right would be about 14 feet, 1, 2, 3, 4, or 5 inches from the top of the rail to the top of the cupola. If the springs of the car are weak, and there is a load in the car, it will not be quite so high."

At another place he says:

"Sometimes they have telltales or ropes hanging down near the bridges, and those sort of things, at a tunnel, and sometimes they do not have them. The object of having telltales is to warn a man on top of a train that he is approaching a bridge or tunnel that will not clear him. A telltale is where two poles are put up, one on each side of the railroad track, similar to a telegraph pole, and they are planted to run up to a certain height, and then there is a rope tied across, with smaller ropes hanging perpendicularly about 6 or 8 inches below, and they will come down so that, if a man is standing on top of a car, he will strike these telltales or ropes, and warn him he is approaching a tunnel or low bridge."

No such warning was given at the entrance or near the entrance of the tunnel in which the defendant in error received his injury. He had received no notice from any one that the tunnel did not carry a height throughout its length uniform with the height at its entrance, and he had no knowledge himself that such was not the case.

In the case of *Hunter v. Railroad Co.* (N. Y. App.) 23 N. E. 9, 6 L. R. A. 246, it is said in the opening of the opinion:

"Assuming that the plaintiff was struck upon the head by the brick arch within the tunnel, and that he was, as a result of that blow, thrown from the cars and injured, I think there was ample evidence for the jury to determine that the defendant was guilty of neglect producing the accident, and that the plaintiff was free from carelessness contributing to it. The jury were warranted in finding that the only notice that the plaintiff had of the existence of the arch was that received from the telltale. This was located about 200 feet west of the west entrance of the tunnel. It served as a warning of the approach to the tunnel, but it gave no notice of the obstruction within the tunnel. A person receiving its warning, and noticing the height of the tunnel, might naturally suppose that the height at the entrance would

be maintained throughout its length, and, if the height was at any time reduced, that notice of that fact would be given. Relying, therefore, upon what would be apparent to his observation, he was exposed to a danger of which he had no notice or information."

There is much other testimony bearing on the issues presented by the first assignment of error, but we believe that the evidence we have recited is ample to show that the trial judge did not err in refusing to give the requested special charge referred to in this assignment. The issues were submitted to the jury under proper and sound instructions, to which the plaintiff in error did not and could not take any exception. The judgment of the circuit court is affirmed.

In re HATCH.

(District Court, S. D. Iowa, E. D. June 19, 1900.)

BANKRUPTCY—EXEMPT PROPERTY—RIGHTS OF MORTGAGE CREDITOR.

Where property claimed by a bankrupt as exempt has been set apart and delivered to him by the trustee, it passes out of the possession and control of the court of bankruptcy, and the trustee has no right or title thereto, nor the general creditors any interest or equity in such property; and therefore the court of bankruptcy will not, on the petition of a creditor claiming a lien on such property by virtue of a chattel mortgage, order the bankrupt to restore the property to the trustee, in order that it may be sold by the latter for the benefit of the mortgagee.

In Bankruptcy. On review of decision of referee in bankruptcy with reference to claim of E. D. Mahon, a creditor.

Work & Work, for bankrupt.

Walter W. Rankin, for creditor.

SHIRAS, District Judge. From the facts certified by the referee in this case, it appears that on the 1st day of March, 1899, the bankrupt, James H. Hatch, executed and delivered to E. D. Mahon a chattel mortgage upon certain personal property, including one bay mare and a lumber wagon, to secure the payment of a debt of \$125; that this mortgage was not filed for record or recorded as required by the provisions of the Code of Iowa; that on the 30th day of March, 1900, James H. Hatch was duly adjudged a bankrupt upon his own petition, and a trustee of his estate was appointed and qualified; that upon the application of the bankrupt the property exempt to him was set apart, there being included therein the bay mare and lumber wagon covered by the mortgage to E. D. Mahon; that the said E. D. Mahon filed her claim, based upon the note held by her and the chattel mortgage, and asked that the same be allowed as a preferred claim against the property included in the mortgage; that upon a hearing had before the referee it was ordered "that said claim be denied as a secured or preferred claim, but the same shall stand as a common claim, and be, and the same is, allowed as such for \$72.75,"—the referee holding that the failure to record the mortgage rendered it invalid, under section 67a of the bankrupt act. It further appears that on the 26th day of May, 1900, E. D. Mahon filed a petition before the referee, asking that an or-

der be made requiring the bankrupt to turn over and deliver to the trustee the bay mare and wagon set apart as exempt property, in order that the trustee might sell the same, and apply the proceeds to the payment of the claim due the petitioner. Upon the hearing on this petition the referee entered an order to the effect "that on demand the bankrupt, James H. Hatch, shall surrender and deliver to Edgar Daggett, trustee herein, the said mare, Nell, and the said lumber wagon; the said trustee to sell the same at public auction, first posting ten days' notice of the time and place of said sale, or at private sale, for not less than seventy-five per cent. of the appraisal; the proceeds, less expense of taking, keeping, and selling, or so much thereof as may be necessary, to be paid to the said E. D. Mahon." To this order the bankrupt excepted, and now presents the question of the validity of the order to this court for determination.

By the provisions of section 70 of the bankrupt act it is declared that there shall be vested in the trustee the title of the bankrupt, as it existed at the date of the adjudication, to the various kinds of property enumerated in the section, "except in so far as it is to property which is exempt." As the bay mare and the lumber wagon in controversy were set apart to the bankrupt as property exempt under the provisions of the Code of Iowa, it follows that the trustee is not vested with the title to this property, nor has he any equity therein as the representative of the general creditors. The trustee cannot assert any right to the property, nor show any ground for asking an order for a sale thereof. The actual possession of the property is held by the bankrupt, and since the same was segregated from the estate, and assigned to the bankrupt as exempt, it has ceased to be within either the actual or constructive possession of the court of bankruptcy. The situation is not one, therefore, which enables the creditor to invoke the jurisdiction of the court on the ground that, as the property is in the possession of the court, it can take jurisdiction over claims sought to be enforced against the property. The order excepted to requires the bankrupt, on demand, to deliver up the possession of the property to the trustee, and then directs the trustee to make sale thereof for the benefit of the mortgagee. The jurisdiction cannot, therefore, be sustained on the theory that the court has possession of the property; and I fail to see upon what ground the court in bankruptcy can undertake to direct the sale of property not in its possession, to which the trustee has no title, and in which the creditors have no interest or equity. The question whether the mortgagee can enforce the mortgage against the horse and wagon is one in which the other creditors and the trustee have no interest, but is simply a question to be decided between the mortgagor and mortgagee; and as the property in dispute does not form any part of the bankrupt's estate, and is not in the possession or under the control of the court, the referee should have refused to entertain the petition of the mortgagee, for want of jurisdiction. The order excepted to is therefore reversed, and the referee is directed to enter an order dismissing the petition, for the reason stated.

In re QUACKENBUSH.

(District Court, N. D. New York. June 13, 1900.)

No. 101.

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF ASSETS.

Where a debtor makes a voluntary transfer of his property, without consideration, to his wife, for the purpose of defrauding his creditors and placing the property beyond their reach, but continues always in the full use and enjoyment of the property, and the receipt of its rents and profits, and does not disclose the true facts regarding such property in his schedule in bankruptcy, or surrender it to his trustee, he is guilty of having "concealed, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy," within the meaning of Bankr. Act 1898, § 29b, so as to forfeit his right to a discharge, although the fraudulent transfer was made long before the passage of the bankruptcy act; for the concealment is continuous, and extends beyond the date of the adjudication in bankruptcy.

2. SAME.

The bankrupt is none the less guilty of "concealing" such property because the facts and circumstances relating to the fraudulent transfer were, upon the bankrupt's examination, made known to the trustee or the creditors, the essence of the offense being the placing of the property in such a situation that the trustee cannot reach it, with the intent, on the part of the bankrupt, not only to keep it from the creditors, but to enjoy it himself; nor is it material that the concealment proves unsuccessful, or that the trustee may recover the property for the benefit of the estate.

In Bankruptcy. On exceptions and on motion to confirm the report of the referee recommending that a discharge be denied the bankrupt because of his having concealed from the trustee his interest in certain real and personal property.

The referee recommended the denial of a discharge on the ground that the eleventh specification was well pleaded and its averments sustained by the proof. As originally filed specifications numbered 7 and 9 were defective. These defects have now been cured by amendment. In legal effect the report of the referee sustains also these specifications as amended. The questions debated, therefore, arise upon specifications numbered 7, 9, and 11. Specification 7, as amended, alleges, in substance, that the bankrupt knowingly and fraudulently concealed and still conceals from his trustee property known as the "Opera-House Property," situated in Pittsfield, Mass. It alleges that this fraud and concealment was consummated in the following manner: In the summer of 1881 the bankrupt, being largely indebted, for the purpose of defrauding his creditors, caused certain fraudulent and fictitious actions to be brought in which he permitted judgments to be taken by default and the said opera-house property to be sold to his brother-in-law for the nominal sum of \$500, which sum was advanced by the bankrupt. That after the sale the bankrupt continued to deal with said property as his own and received the rents thereof until the year 1895, when, at the request of the bankrupt, the property was, without consideration, conveyed to his second wife, he continuing as before to treat the property as his own, receiving the rents and profits thereof and concealing the same from his trustee. That the bankrupt knowingly and fraudulently omitted this property from his schedules pretending to receive the rents and profits as agent of his wife. That the property is worth the sum of \$100,000 over and above all liens and incumbrances. Specification 9, as amended, alleges, in substance, that the bankrupt knowingly, fraudulently and continuously concealed from his trustee and now conceals his estate and interest in the American House property, at Pittsfield, Mass. That this property was transferred to the bankrupt's first wife by the foreclosure of a fictitious mortgage in April, 1891, which foreclosure was deceitfully and collusively accomplished to enable the bankrupt to cheat his creditors. That

thereafter, by a series of fraudulent devices, the property was conveyed to the bankrupt's second wife in March, 1895; that after this conveyance the bankrupt continued to exercise acts of ownership over said property and to collect the rents and appropriate the same to his own use. That said property is worth to exceed \$100,000 and that the bankrupt concealed and continues to conceal the same from his trustee. Specification 11 alleges that the bankrupt has concealed his interest amounting to over \$5,000, in his deceased wife's personal estate, to one-third of which he became entitled upon her death, intestate, in September, 1891. That he conveyed the same in October, 1891, without consideration, to one Waterman, and by falsely and fraudulently claiming ever since that such transfer was a bona fide and honest transaction he has concealed his ownership in said fund, which belongs to his estate, from his trustee in bankruptcy.

The referee has presented a carefully prepared and voluminous report in which the salient features of the evidence are considered and, substantially, all of the authorities bearing on the questions involved are cited. The referee concludes his report as follows: "After most careful consideration, and most reluctantly, I am satisfied beyond doubt that the bankrupt has been guilty, in law as well as in fact, of such a concealment of property as is condemned by section 29, Bankr. Act. It is objected and urged that the cases cited by the counsel for the creditors deal with secret trusts, while none is here established. Whether there be a secret trust or merely a colorable transfer the result seems to me to be the same. The bankrupt has in fact a valuable interest in the undistributed personalty of his deceased wife which, had he been so disposed, he could have turned over or disclosed to his trustee, and which he has knowingly and fraudulently concealed, while a bankrupt, from his trustee. I cannot believe the bankruptcy act was ever intended to free from his debts any man whose affairs and surroundings are such as appear in this case. I may be wrong, but my convictions are clear. In my judgment a discharge should be refused."

Charles E. Patterson, for bankrupt.

John L. Cadwalader, John Lindley, David Levy, and George Cog-
gill, for opposing creditors.

COXE, District Judge (after stating the facts as above). The careful examination bestowed upon this case by the referee, evidenced by an elaborate and painstaking report upon all the issues of law and fact, renders it unnecessary at this time to do more than indicate the conclusion of the court upon the fundamental question of law involved. Broadly stated the referee has found that the proceedings by which, years prior to the present law, the bankrupt's property, real and personal, was transferred to his confidential adviser and to his wife, were instituted for the purpose of defrauding his creditors and putting his property beyond their reach. The referee finds that the transfers, though cunningly and ingeniously devised, were in fact without consideration and were null and void as to creditors. He finds further that though the legal title is in the wife the property is actually owned and controlled by the bankrupt himself, he having exercised the same dominion over it since the transfers as before. The conclusion follows that, upon his qualification, the property vested in the trustee by virtue of section 70, par. a, subd. 4, of the act, or that it belonged to the bankrupt under a secret trust for his benefit. The principal facts found by the referee are unquestioned and it is enough to say that his findings are supported by the evidence. There is no reason why they should not be accepted by the court.

The pivotal question of law arising upon these facts may be stated

briefly and broadly as follows: Can a discharge be refused upon the ground that the bankrupt has concealed his property from his trustee where he transferred it in fraud of creditors years prior to the act, but in such circumstances that he continues to control it and enjoy the benefits of it himself? The law, so far as applicable to this condition, provides that the judge, after duly investigating the merits, shall discharge the bankrupt unless he has committed an offense punishable by imprisonment as provided in section 29b of the act, namely,—knowingly and fraudulently concealed, while a bankrupt, from his trustee property belonging to his estate in bankruptcy. In order to warrant the refusal of a discharge under this section it is necessary that the creditors shall establish the following propositions beyond a reasonable doubt: First. That the bankrupt has concealed property from his trustee in bankruptcy. Second. That the property so concealed belongs to the bankrupt's estate. Third. That the concealment occurred while he was a bankrupt or after his discharge. Fourth. That the concealment was made knowingly and fraudulently. In other words, it is necessary to show that Quackenbush since he has been adjudicated a bankrupt has knowingly and fraudulently concealed from his trustee property which belongs to his estate and should be divided by the trustee among his creditors. If the fraudulent transfers complained of, occurring as they did long prior to the act of 1898, had culminated at the time they were made so that the bankrupt's interest in the property passed forever beyond his control and became vested legally and beneficially in the transferees, there can be no doubt that he would be entitled to his discharge no matter how preferential and fraudulent the transfers may have been as to creditors at the time. A fraud committed prior to the law making it a crime cannot bar a discharge. In *re Webb* (D. C.) 98 Fed. 404. In 1891 the bankrupt could have transferred his entire property to a single creditor to the exclusion of all the rest and the transaction, had it ended there, would not have affected his right to a discharge in the remotest degree. If, however, the creditor holds the property in trust for the bankrupt a very different proposition is presented. The difficulty with the bankrupt's contention is that the transaction did not end in 1891. By virtue of transfers made prior to July 1, 1898, the bankrupt is still enjoying property which equitably belongs to his creditors. The referee, after seeing and hearing the witnesses, has found that the transfer of the personal estate, which vested absolutely in the bankrupt upon the death of his first wife, was merely a juggle by which the legal title was temporarily vested in another to prevent the property from being reached by creditors. In short, this property was the property of the bankrupt. It is used and enjoyed by him as fully as if the legal title were in his name. The referee is of the opinion that the bankrupt acquired over it absolute ownership and control, that his attempts to hide it have proved abortive and that at any moment he can transfer it to the trustee if he desires so to do.

It is argued that there is no concealment because the facts regarding transfers to Waterman and to the bankrupt's present wife were made known to the creditors. It is thought that this is too technical

a view to take of the statute. Although the present act is more liberal than former acts in permitting discharges it cannot be doubted that the purpose of the lawmakers was to grant this privilege only to the honest bankrupt who surrenders all that he possesses to his creditors and not to one who by a process of legal necromancy is living in luxury upon an estate which equitably belongs to them. It would be an exceedingly narrow construction to hold that the bankrupt avoids the charge of concealment because he informs the trustee of the plan adopted to effectuate the fraud. This information in no way aids the trustee so long as the property is beyond his reach. Should a party in contemplation of bankruptcy convert his assets into gold and place it in the hands of a trusted agent who immediately embarks for some Patagonian port, it is thought that the bankrupt could hardly escape the charge of fraudulent concealment by giving a detailed account of the steps taken to get the property beyond the jurisdiction of the court. He might recite in his schedules the amount and value of the property abstracted and the name of the ship, of the agent and of the destined port; but all this would not condone an act which every honest man must regard with abhorrence. Again, a bankrupt conveys all his property to his wife for his own benefit and without consideration and the next day files his petition and schedules in which the deed of transfer is fully described. Can it be maintained that the accusation of concealment is met by such a disclosure? In each instance the property is gone, the creditors have lost it, the trustee cannot reach it, the bankrupt alone can call it back. The character of the fraud is not altered because it is admitted by the perpetrators. Disclosure of the fraud is not inconsistent with concealment of the property. The essence of the offense is the concealment of the property with intent to keep it from the creditors; the time when the scheme was concocted, which makes the concealment possible, is not material. Neither does it avail the bankrupt that the concealment has proved unavailing; the trustee may recover the entire amount and still the discharge must be withheld. The offense is consummated if the bankrupt with fraudulent intent conceals for a single day his property from the trustee. The law does not say that the fraud must be successful. One who attempts such dishonesty is deemed unworthy of a discharge and he is none the less unworthy because the attempt is or may be frustrated.

Leaving the real estate out of consideration, if the referee's facts and conclusions be correct, the bankrupt to-day has in his possession and under his control at least \$5,000 which belongs to the trustee. This property was transferred to the bankrupt's confidential friend by a mere legal shuffle for the purpose of keeping it from his creditors. The transferee parted with no consideration and understood the transaction as undertaken for the benefit of the bankrupt and to baffle his creditors. The court inclines to the opinion that the referee's findings of fact and conclusions of law are correct. It is this feature of continuous concealment, extending beyond the date of bankruptcy, which distinguishes this case from most of the cases cited under the present act. The question is a novel one, so far as the law of 1898 is concerned, and the argument has been presented with great learning and ability on both sides. The decisions arising under the

act of 1867 deal with language so nearly similar that they are entitled to great weight as interpreting the present law. Every important proposition now discussed is carefully considered in the *Husman Case*, 2 N. B. R. 437, Fed. Cas. No. 6,951. This case cannot be successfully distinguished, on principle, and the reasoning of the able opinion of the district judge fully sustains the determination reached in the case at bar.

The court cannot resist the conclusion that some part, at least, of the property in question belongs equitably to the trustee. The bankrupt, if not the actual owner, is the beneficial owner thereof and by reaffirming the fraudulent transfers, though made prior to the act, as a cloak to hide and cloud the title, is guilty of the concealment contemplated by the law. It is true that he has admitted some facts, but he has neither restored the property nor confessed the fraud. The result is that he is to-day enjoying property which should be divided among his creditors. It cannot be that congress intended to sanction and reward such conduct. It is not the intention of the law to release a dishonest debtor. Unless a bankrupt deals fairly with his creditors he cannot expect the court to give him a receipt in full of their debts. Discharge refused.

On Petition for Rehearing.

(July 10, 1900.)

The court has examined with care the arguments advanced in the petition and is clearly of the opinion that a case for a rehearing has not been made out. No new fact is presented, no new proposition of law is argued. Indeed, it is hardly possible to assume, in view of the elaborate oral argument, the exhaustive briefs and the unquestioned ability of counsel, that anything was omitted which could strengthen the bankrupt's position. The court did not discuss every proposition argued, but it considered them all. It was thought unnecessary, after reaching the general conclusion that concealment was shown, to enter into an analysis of all the subsidiary questions debated in the briefs. To have done so would have extended the opinion beyond reasonable length and was particularly unnecessary in this case because of full report of the referee. The court intended to make clear the central proposition that the record disclosed a case of concealment which compelled a refusal of the discharge.

It was shown that the bankrupt is enjoying property which equitably belongs to his creditors and would to-day be in the hands of his trustee if he performed his obvious duty regarding it. It can hardly be imagined that the nominal title in his wife would offer any obstacle if the bankrupt honestly desired that the property should be divided among his creditors, but even should she prove recalcitrant a disclosure of the whole truth by the bankrupt would compel a recovery by the trustee. In short, to state the case bluntly, the bankrupt's property is now in his possession or under his control. This property belongs to his creditors and would be in the hands of his trustee but for his fraud which fraud is persisted in and used as a cloak to cover the property and keep it in his possession. This conduct upon his part amounts to concealment and prevents a discharge.

The motion for rehearing is denied.

In re THOMPSON.

(District Court, N. D. Iowa. C. D. June 18, 1900.)

BANKRUPTCY—WHO SUBJECT TO ADJUDICATION—STOCK FARMER.

In Bankr. Act 1898, § 4b, exempting from liability to adjudication in involuntary bankruptcy "persons engaged chiefly in farming or the tillage of the soil," the latter phrase does not limit the former; and hence a person whose principal occupation is raising cattle and hogs for the market, his farm being devoted chiefly to use as pasture land, and for raising grass, hay, and corn wherewith to feed and fatten the stock, is not subject to be adjudged bankrupt on the petition of his creditors, being a farmer, though not a tiller of the soil.

In Bankruptcy. On petition for adjudication in involuntary bankruptcy.

From the evidence submitted in this case the court finds the facts to be as follows:

(1) That for more than six months next preceding March 2, 1900, the date of the filing of the petition by creditors in this case, the defendant, William J. Thompson, resided in Emmet county, Iowa.

(2) That on the 14th day of December, 1899, the defendant, Thompson, executed a chattel mortgage upon his personal property to the First National Bank of Estherville, Iowa, to secure the sum of \$1,500 due the bank, and on the 25th of January, 1900, he executed a second chattel mortgage on his personal property to Joseph Hardie for the sum of \$3,000; that when these mortgages were thus executed and delivered the defendant, Thompson, was "insolvent" within the meaning of that term as used and defined in the bankrupt act, and these mortgages were executed and delivered by the defendant, Thompson, with the intent thereby to give a preference to the mortgagees over his other creditors, he being indebted at the time the mortgages were given and at the time the petition in bankruptcy was filed in an amount exceeding \$5,000, the number of his creditors being less than 12.

(3) That the petitioning creditors, Joseph J. Steil and the firm of Mugan & Steil, are now, and were when the petition in bankruptcy was filed, creditors of said defendant, Thompson, holding provable claims against him in amounts exceeding \$500, which are unsecured.

(4) That with respect to the business and occupation of the defendant, Thompson, the parties have stipulated the facts to be as follows, and the court finds the facts to be: That in 1897 said William James Thompson was farming a half section of land in Emmet county, Iowa; that at that time he had horses and farming machinery for carrying on the farming business on said section; that he was not a cattle raiser; that he had cows sufficient to furnish milk for the uses of the farm; that in 1898 he farmed the half section and about 30 acres of a neighbor's land, and had in addition a quarter section of hay land; that in the fall of 1897 he purchased some cattle,—a small number, about 16 or 17; that in the spring and fall of 1898 he purchased a considerable number of cattle for feeding purposes; that in 1899 he purchased cattle so that he had about 250 head; about 100 of these he fed for beef cattle in the fall of 1899; that he leased an additional quarter section of land for hay land, and a half section for pasture land, for the cattle in the summer of 1899; that out of the land farmed by him there was about 330 acres of the land under plow, 80 acres in corn, the balance in wheat and small grain; that the corn raised on said land was about 80 acres, of which there was fed in fodder about 27 acres, and about 1,350 bushels fed otherwise; that to fatten the first 100 cattle that were being fattened it would take about 8,000 bushels in addition to that which he raised; that of the amount of land farmed by him three quarter sections was in a body, and a quarter section of hay land separate and apart from that, and a half section of grassy land separate and apart from that; the amount of grain raised on said place could not have exceeded about \$3,000; the cattle were worth about \$8,000 or \$10,000; in making the

above estimate as to the value of the cattle, it is not intended that he, the said William James Thompson, was worth \$10,000 over and above his debts. It is further agreed that the said Thompson had at various times purchased cattle to be fed and fattened upon the lands rented by him in Emmet county, and in payment for said cattle executed a chattel mortgage to the vendors for the full purchase price thereof; that the cattle purchased by him were young cattle, or were what is known as "stockers,"—that is, cattle which were to be fed and fattened for sale upon the markets; that all of said cattle were kept upon the lands rented by Thompson; that the corn raised by Thompson was fed to the said cattle as well as other corn, a considerable portion of which he purchased from the proceeds of small grain sold from said farm land; that all of the hay and grass grown upon said rented lands were fed to said cattle in order to feed them for the markets. It is further agreed that the said Thompson during the times hereinbefore mentioned kept and fed hogs upon the lands rented by him, and sold them in the usual manner upon the markets in Emmet county; that while said hogs were being fattened they were kept upon the lands rented by Thompson, and moved in the spring of 1900 upon the farm of Joe Hardle. It is further agreed that prior to the filing of the petition herein said W. J. Thompson had contracted and sold all of the stock owned by him; that delivery of the same was to be made, one part at a time, prior to the filing of the petition herein, and the balance during the month of May, 1900.

(5) That during the years 1897, 1898, and 1899 the greater part of the manual labor needed in the cultivation of the land occupied by defendant, and in feeding and taking care of the cattle and hogs owned by defendant, was done by hired help, under the control and direction of the defendant, although when necessary the defendant in person aided in doing the plowing and other work on the premises.

(6) That about the 1st of March, 1900, the defendant gave up the possession of the premises described in paragraph 4 of these findings, and removed his belongings, including the cattle and hogs he then had, to premises owned by Joseph Hardle.

D. B. Roberts and Yeoman & O'Connor, for petitioning creditors.
Wright & Nugent and Crim & Penn, for defendant.

SHIRAS, District Judge. The question of law presented by the facts of this case is whether the occupation of the defendant was such as to bring him within the classes of persons who cannot be adjudged to be bankrupts upon the petition of creditors, under the provisions of section 4 of the bankrupt act, which enacts that any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, may be adjudged to be an involuntary bankrupt. Upon behalf of the creditors it is contended that the excepted classes are but two in number, to wit, wage-earners and persons engaged in farming by tillage of the soil; or, in other words, that the phrase, "the tillage of the soil," is intended to limit the meaning which would otherwise be given to the description of "a person engaged chiefly in farming." If this had been the intent of congress, the more natural mode of expression would have been to enact that "any natural person, except a wage-earner or a person engaged chiefly in the tillage of the soil," should be excepted from the operation of the act; or if it was desired to use the word "farming," and yet to limit its meaning to mere tillers of the soil, the section would have declared that "any natural person, except a wage-earner or a person engaged chiefly in farming by tilling the soil," might be adjudged a bankrupt. Neither of these forms of expression is used, the declaration being that "any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil," may be declared to be bankrupt.

The section provides, therefore, for three classes of persons who are excepted out from the operation of the act, to wit, wage-earners, persons engaged chiefly in farming, and persons engaged chiefly in the tillage of the soil. It may be objected to this construction of the act that one who is engaged chiefly in farming will be engaged in the tillage of the soil, and therefore both descriptions are applicable to only one class of persons; but this is not true in all cases, and while it is true that both descriptions will, in the majority of instances, be applicable to those engaged in farming, yet this is not universally true, and the two descriptions are not strictly synonymous. Thus market gardeners, nurserymen, and the like are engaged in tilling the soil, but they are not engaged in the business of "farming" as that term is now used, and hence the need for including in the act words descriptive of a class who are engaged in tilling the soil, but who are not "farmers" as that word is now used and understood by the community at large.

It is, however, further contended on behalf of the creditors that, whatever may be the proper construction of the act in this particular, the defendant was not engaged chiefly in farming, because he was in fact a dealer in cattle, buying and selling upon the market. The facts show that in 1897 the defendant was farming a half section of land in Emmet county, having the necessary horses and machinery for that purpose; that in the fall of that year he bought some 16 or 17 head of cattle; that in 1898 he farmed the half section, with 30 acres leased of a neighbor, having in addition a quarter section of hay land, and during that year he added to his cattle by purchases from others; that in 1899, in addition to the land farmed in the preceding years, he leased an additional quarter section for hay land, and a half section for pasture land; that he had this year under plow 330 acres, 80 of which was in corn, and the remainder in wheat and small grain, and he had increased his cattle to 250 head, buying what are known as "stockers," and fattening them for the market by feeding to them the grass, hay, and corn produced on the farm, and buying from others the corn needed over and above that produced by defendant. In other words, the facts show that in 1899, and up to the spring of 1900, the defendant was engaged in farming 830 acres of land, of which 330 were under plow, and devoted to the production of corn, wheat, and other small grains, and the remainder was used for hay and pasture lands, and upon this farm the defendant had 250 head of cattle, which he was fattening for sale upon the market. The defendant claims that these facts show that he was engaged chiefly in the business of farming, and the creditors assert that his chief business was that of dealing in cattle. The business of farming includes the fattening of cattle and hogs for the market from the products of the farm, and but one conclusion can be drawn from the facts of this case, and that is that during the years 1897, 1898, and 1899 the defendant was engaged chiefly in the business of farming, and therefore he belongs to a class of persons who are excepted out from the provisions of the bankrupt act, and it must therefore be held, as a conclusion of law, that the defendant cannot be adjudged a bankrupt, and the petition filed against him must be dismissed, the defendant to recover judgment for costs.

In re WETMORE.

(District Court, E. D. Pennsylvania. June 11, 1900.)

No. 27.

BANKRUPTCY—PROPERTY VESTING IN TRUSTEE—CONTINGENT INTEREST IN ESTATE IN REMAINDER—WILLS—CONSTRUCTION.

Under a devise to the use of one for life, with power of disposition by will, and, in case of a failure to exercise the power, the property to go to the surviving next of kin of the testator, one who is next of kin does not take such an interest in the estate in remainder as will pass to the trustee under an assignment in bankruptcy.

For former opinion, see 99 Fed. 703.

Charles E. Morgan, Jr., for trustee.

Hatch & Wickes, for bankrupt.

McPHERSON, District Judge. This petition is presented by the trustee in bankruptcy, and asks the court to make an order directing the bankrupt to pay \$55,000 in cash, or to deliver certain securities now in his possession. The securities are held by the bankrupt under a claim of title arising upon these facts: In 1886 his father's will was admitted to probate, the fourth paragraph being as follows:

"Fourth. I give and bequeath to my executors hereinafter named, other than my wife, the sum of one hundred thousand dollars (in cash, or in securities or stock valued by my executors at that sum), upon trust to keep the same invested, and to receive the income thereof, and, after deducting reasonable charges for the management of the said trust, to apply the net amount of such income, from time to time as it shall accrue, to the use of my wife, Sarah Taylor Wetmore, so long as she shall live; and I empower my said wife to dispose of the principal sum so held in trust, and any accumulations thereof, by last will and testament duly executed by her, and in such manner as she shall think proper; and, in default of such disposition by will, I give the said trust fund, upon her decease, to my own then surviving next of kin, in like manner and shares as if the same were to be then distributed as my own proper estate, dying at time intestate."

Under this paragraph, \$100,000 in securities came into the hands of the executors named by the will. In January, 1899, the bankrupt filed a voluntary petition, upon which an adjudication was duly entered. In March of the same year, his mother died, leaving a will by which she exercised in favor of the bankrupt the power of appointment given to her by the foregoing paragraph; and he now holds, apparently in his own right, securities amounting to about \$55,000,—the remainder of the fund having been expended during his mother's lifetime. The petition now under consideration asks the court to order these securities to be delivered to the trustee; the theory of the petition being that the bankrupt's interest in the fund was, at the time of the adjudication, such an interest as he could have transferred at law, and was therefore property that passed to the trustee. A demurrer has been filed to the petition, and the question for decision is whether the bankrupt took a property interest, transferable at law, under the fourth paragraph of his father's will, or, stated in other words, whether such interest as he may now possess was acquired after the date of the adjudication.

I do not think any valuable purpose would be served by an elaborate discussion of the question, or by a detailed examination of the numerous, and not always harmonious, authorities cited by counsel. It seems clear to my mind that the bankrupt had no interest assignable at law in the trust fund created by the foregoing paragraph of his father's will, and therefore that no such interest passed to the trustee in bankruptcy. My reasons for this conclusion may be stated in a few words. The paragraph in question neither named the bankrupt, nor described him. No doubt, at the date of the testator's death he was then his father's next of kin, but the paragraph gave nothing to the next of kin ascertainable at that date. The bequest was to the next of kin ascertainable at a future date; and whether the paragraph would then describe the bankrupt depended upon his continuing to live until that time should arrive. Moreover, even if he outlived his mother, and might then be found to be the next of kin, it did not follow that the paragraph would give him an interest in the fund. There was another contingency between him and the acquiring of such an interest, namely, that his mother might exercise her absolute right of appointment in favor of some other person. These two contingencies, in my opinion, prevented him from taking an interest, assignable at law, in the fund created by the paragraph in controversy. His position is not to be distinguished from the position of an heir apparent, who will succeed to an estate if he outlive the owner, and if the owner do not make a will in favor of some other person. This, however, is a mere hope of succeeding to the estate, and has never been supposed to be such an interest as is capable of being transferred at law. In equity, an assignment by such an heir might be enforced as an agreement to convey, but only if a valid consideration had passed between the parties.

The demurrer is sustained, and the petition is dismissed.

In re EMSLIE et al.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 152.

1. MECHANICS' LIENS—SUFFICIENCY OF NOTICE.

Where the mechanic's lien law of the state (Laws N. Y. 1897, c. 418, § 9) provides that a notice of such lien, to bind the property, shall state, among other things, the agreed price or value of the labor performed or materials furnished, and the time when the first and last items of work were performed or materials furnished, a notice which wholly omits to specify these particulars is insufficient, although the statute also provides that a "substantial compliance" with its provisions shall be sufficient for the validity of the lien.

2. BANKRUPTCY—DISSOLUTION OF LIENS—MECHANICS' LIENS.

Where the mechanic's lien law of the state gives a lien for labor or materials from the time of the filing of a notice claiming such lien, authorizes such notice to be filed at any time during the progress of the work or within 90 days thereafter, and provides that if an action shall not be brought to enforce the lien within a specified time the lien shall be discharged, a lien acquired by the filing of such a notice within four months prior to the filing of a petition in bankruptcy against the insol-

vent debtor will not be dissolved by his adjudication as a bankrupt, under the provisions of Bankr. Act 1898, § 67f, not being a "lien obtained through legal proceedings," within the meaning of that section.

8. SAME.

Nor is such a lien dissolved by section 67e, which provides that an adjudication of bankruptcy shall annul all incumbrances of his property made or given by the bankrupt within four months prior to the filing of the petition, and intended to hinder, delay, or defraud his creditors, or which are void by the laws of the state in which the property is situated; for a mechanic's lien is not created by the debtor, but by the statute, or by the act of the lienor in filing the statutory notice.

4. SAME—STAY OF ACTION IN STATE COURT.

Where a creditor claiming a mechanic's lien on property of a person who has been adjudged bankrupt, over which the court of bankruptcy has acquired jurisdiction, brings an action in a state court for the foreclosure of such lien without leave of the bankruptcy court, it is an unwarrantable interference with assets of the bankrupt in the custody of the latter court, and the further prosecution of such action will be stayed.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Southern District of New York.

In Bankruptcy. See 97 Fed. 929; 98 Fed. 716.

C. H. Young, for appellant.

T. V. W. Anthony, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from an order, granted upon the application of a trustee in bankruptcy, staying an action brought in a state court by a subcontractor to foreclose a lien, claimed under the New York mechanic's lien law, for the labor and materials furnished in building a house. The notice of lien was filed by the subcontractor April 28, 1899. August 15, 1899, upon a petition in involuntary bankruptcy filed by creditors, the contractors who erected the house for the owner of the real estate were adjudicated bankrupts. The action to foreclose the lien was commenced August 16, 1899.

We agree with the court below that a valid lien was not acquired by the subcontractor, owing to the omission to comply with the terms of the statute, which required the notice of lien to specify "the agreed price or value of the labor performed or to be performed and materials furnished or to be furnished," and "the time when the first and last items of work are performed and materials are furnished." Laws N. Y. 1897, c. 418, § 9. The notice of lien does not attempt to comply with either of these requirements, but states merely that "there remains due and unpaid (under contracts with Holland Emslie & Son) the sum of \$1,700." Not only is there no statement of the contract price, or the value of the work and materials, or of the time when the first and last items were furnished, but there are no statements which by any possible implication can supply any information about these facts. The statute is to be liberally construed in aid of every beneficial purpose which was contemplated in its enactment, and a substantial compliance with its provisions is sufficient to uphold the lien. But a construction which would uphold a notice like

the present would nullify its provisions, which are intended for the benefit of every claimant as well as for the owner of the property. *Foster v. Schneider* (Sup.) 2 N. Y. Supp. 875; *Brandt v. Verdon* (Com. Pl.) 18 N. Y. Supp. 119. As was said in the former of these decisions:

"To entitle a claimant to its benefits, the directions of the statute must be substantially observed. If they are not, the lien cannot be secured, and the court has no power or authority to sustain the proceeding; for a substantial compliance with the requirements of the statute is necessary to confer jurisdiction."

We are constrained to differ from the opinion of the court below that the lien was void, as against the trustee in bankruptcy, irrespective of the insufficiency of the notice. The statute gives a lien for the value or the agreed price of the labor and materials from the time of the filing of the notice, authorizes the notice to be filed at any time during the progress of the work or within 90 days thereafter, provides that if an action shall not be brought to enforce the lien within a specified time the lien shall be discharged, and prescribes the procedure in an action to enforce the lien. When the notice is filed, provided the filing is within the period prescribed, the lien binds the property to priority of payment in favor of the lienor for any indebtedness for improving the property due from the owner, as against subsequently acquired rights and titles. It will be observed that, although the lien is not created until the filing of the notice, this is an act optional with the mechanic or material man, and, if he chooses, he can perfect a lien day by day concurrently with the progress of the work.

A trustee in bankruptcy cannot acquire a better title than the bankrupts had, except as to property which has been transferred contrary to the provisions of the bankrupt act, and takes the estate subject to all liens and incumbrances other than those enumerated in section 67. That section denies the privileges of a lien to claims which, for want of record or for other reasons, would not have been valid as against creditors if there had been no bankruptcy, and enumerates the liens and incumbrances which are dissolved by the adjudication of bankruptcy, or can be kept on foot and enforced by the trustee for the benefit of the estate. The latter consists of two classes,—liens obtained through legal proceedings against an insolvent debtor within four months prior to the filing of a petition in bankruptcy against him, and incumbrances created by the act of the bankrupt within four months prior to the filing of the petition, which are intended to defraud creditors or are void by the laws of the state in which the property is situated. The section preserves all liens given or accepted for a present consideration. In our opinion, liens like the present do not fall within either of the two classes. They are not within the first class, because they are not created or obtained through legal proceedings, either in strict definition or in the ordinary meaning of the term. A legal proceeding is any proceeding in a court of justice by which a party pursues a remedy which the law affords him. The term embraces any of the formal steps or measures employed in the prosecution or defense of a suit.

In the section it obviously refers to the use of judicial process, the phraseology being "levies, judgments, attachments, or other liens obtained through legal proceedings." The filing of notice of a mechanic's lien has no necessary relation to the initiation or the prosecution of a suit. The filing is essential in order to maintain the action to foreclose the lien, because otherwise the lien does not attach; but it is no more a preliminary step in the suit than is the protesting of a note in a suit against the indorser. It is a proceeding of the same kind as filing a chattel mortgage or recording a deed.

Such liens are not within the second class, because they are not an incumbrance created by the debtor. They are created by the statute, or by the act of the lienor in filing the statutory notice. The incumbrances which are invalidated by the section are those which are "made or given" by the person adjudged a bankrupt. They include, not only those specifically mentioned, "conveyances, transfers, and assignments," but all incumbrances, of whatever form, derived from his contractual act. Unless it can be said that the lien emanates in or is created by the contract authorizing the labor and materials to be furnished, it arises without his act. If it is a creature of the contract, rather than of the statute, it is supported by the same consideration, and, being given for a "present consideration," is preserved by the section.

There are no equitable considerations in favor of the general creditors of a debtor which should defeat a mechanic's lien. Every creditor dealing with the debtor does so with the knowledge that those who are furnishing labor and materials for the building can, if they choose, acquire a priority of payment over other creditors. Statutes giving such liens are designed to enable mechanics and material men to rely upon the security of the building itself, without looking to the responsibility of the owner. The justice and expediency of giving such claims priority over the debts of general creditors is manifested in the legislation of the several states. We cannot believe that it was the intention of congress to put them upon the footing of the liens particularly mentioned in section 67. The question of the validity of such liens was considered by the circuit court of appeals for the Seventh circuit. In *re Kerby-Dennis Co.*, 36 C. C. A. 677, 95 Fed. 116. In considering the provisions of section 67 the court used this language:

"We cannot indulge the presumption that congress intended to avoid a lien secured by the act of labor, and preserved and continued in force only when legal proceedings are instituted within a specified time. Such a construction would avoid all mechanic's liens, and all the liens of laborers, which the laws of various states have for years sought to protect and to prefer."

We agree with the opinion of that court that the terms of section 67 do not invalidate such a lien. The learned judge in the court below thought the lien given by the New York statute was to be distinguished from the lien given by the statute of Michigan, which was under consideration in that case, by the circumstance that the lien under the New York statute originates in the filing of the notice of lien, while in the Michigan statute it originates by the act of furnishing the labor or materials, and is thus a strictly con-

temporaneous lien. We do not discover any substantial distinction between the two statutes. In one the lien is not given unless the notice is filed; in the other, although it arises when the labor or materials are furnished, it is lost unless a notice is filed within a specified time. The object of both statutes is the same, and both accomplish practically the same result. In one the filing of the notice is necessary to perfect the lien, and in the other it is necessary to preserve it. In both it is wholly optional with the lienor whether he will avail himself, or not, of his right of priority.

We have thought it necessary to discuss the questions which have been considered in regard to the efficacy of the lien, because, in making the order, the court below passed upon these questions apparently with the view of determining the rights of the parties to the fund in controversy. The order staying the action in the state court was a proper exercise of power, and should not be disturbed. That action was an interference with assets of the bankrupts in the custody of the bankruptcy court over which that court had previously acquired jurisdiction; and, as it was brought without the leave of the court, the order staying its prosecution was properly granted, within the principle of the decision of this court in the recent case of *In re Russell* (C. C. A.) 101 Fed. 248.

The order is affirmed, without costs.

In re FIXEN et al.

FORGY v. FIELD et al.

(Circuit Court of Appeals, Ninth Circuit. May 21, 1900.)

No. 582.

1. BANKRUPTCY—PREFERENCES—PAYMENT OF MONEY.

A payment of money on account in the ordinary course of business is a transfer of property, and, if made while the debtor is insolvent, and within four months before he becomes bankrupt, constitutes a preference, within the meaning of Bankr. Act 1898, § 60.

2. SAME—PROOF AND ALLOWANCE OF CLAIMS—PREFERRED CREDITORS.

Under section 57g, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," a creditor who has received a partial payment of his debt while the debtor was insolvent, and within four months before the latter became bankrupt, cannot prove the balance of his debt as a claim against the estate of the bankrupt without surrendering the preference so received, notwithstanding the fact that the payment was made in the ordinary course of business, and that the creditor had no knowledge or reasonable cause to believe that the debtor was insolvent, or that a preference was intended.

Appeal from the District Court of the United States for the Southern District of California.

This cause comes before this court upon the alleged error of the district court for the Southern district of California, sitting as a court of bankruptcy, in allowing the claim of Marshall Field & Co. against the estate of Fixen & Co., bankrupts. It appears that on May 29, 1899, Fixen & Co. were indebted to Marshall Field & Co., appellees herein, in the sum of \$745.61 for merchandise

sold and delivered to said Fixen & Co. by the appellees, and that on that day the appellees received from Fixen & Co., in the ordinary course of business, the sum of \$428.45 on account of said indebtedness, leaving a balance of \$317.16 still due the appellees. Shortly thereafter the appellees again sold merchandise to the said Fixen & Co. to the amount of \$232.50, making a total indebtedness of \$549.66. It has been shown that Fixen & Co. were insolvent on May 29, 1899, when they made the payment on account to the appellees, and that said payment was made within four months of the filing of the petition in bankruptcy. The court below allowed the claim of appellees, as creditors of the bankrupts, for \$549.66. The trustee of the bankrupt estate, appellant herein, objected to this allowance upon the ground that the bankrupts had, while insolvent, given a preference to the claimants, Marshall Field & Co., by said payment on account; that said claimants had not surrendered any portion of said payment to the bankrupt estate or to the trustee thereof, and the enforcement of said transfer and payment would give to said claimants a greater percentage of their debt than to other creditors of the same class. Upon this contention the trustee brings the matter to this court, and asks for a reversal of the judgment of the court below.

E. T. Dunning and I. H. Johnston, for appellant.

Charles Udell, L. L. Shelton, and H. G. W. Dinkelspiel, for appellees.

Henry Ach, *amicus curiæ*.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The question to be determined in this case is whether a payment made on account by an insolvent debtor, in the ordinary course of business, within four months prior to his adjudication in bankruptcy, where it does not appear that the creditor receiving the payment had reasonable cause to believe that it was intended as a preference, constitutes a preference, under the bankruptcy act, that will prevent the allowance of the creditor's claims for the balance of the account. Section 60 of that act provides (30 Stat. 562):

"(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

It has been questioned whether a payment of money in the ordinary course of business can be considered a transfer of property. In section 1 of the same act, however, the word "transfer" is defined as including "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." As the word "property" is legally understood to include every class of acquisitions which a man can own or have an interest in, it must certainly cover money; and the payment of money, therefore, by an insolvent to an unsecured creditor within the statutory period must be considered a transfer of his property, constituting a preference, under section 60a of the act of bankruptcy, the enforcement of which transfer would allow one creditor to obtain a greater percentage of his debt than any other creditors of the same class. How is such preference to be dealt with? Subdivision "b" of section 60 of the same act provides:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

It is not contended that the appellees herein believed or had any knowledge that the payment from the bankrupt was intended to give to them a preference, or that it would, in effect, be a preferential transfer. The trustee could not, therefore, recover upon the ground stated in subdivision "b." But the bankruptcy act provides, in section 57g, that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." The appellees have not surrendered their preference, yet seek to have their claim allowed for the balance due them from the bankrupt, upon the contention that they received the payment from the bankrupt in good faith, without knowledge of its insolvency, continued to sell goods to the bankrupt firm in the usual course of business, and that the acceptance of said payment on account should not be held as a preference which would prevent the allowance of their claim. In the former bankruptcy act, of 1867, the belief of the creditor as to the intention of the debtor in giving a preference was considered, when the surrender of such preference was required. In section 23 it was provided:

"Any person who * * * shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim * * * until he shall have first surrendered to the assignee all property, money, benefit, or advantage received by him under such preference."

But in the act of 1898 congress omitted from section 57g any reference to cause for belief on the part of the creditor, and stated in concise and unmistakable terms that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." It is evident that the purpose or intent of the parties in giving or receiving a preference was not intended to be considered in this section, but the effect of the preference in the benefit or advantage which it would give to one creditor over another. No penalty is imposed on the creditor by the section, but merely an option on the part of a creditor who has received a preference to keep what he has received, and take no dividends from the bankrupt's estate, or to surrender his preference and share equally with the other creditors in the distribution of the estate. The fundamental principle of the act is a real and effectual equality in the distribution of the bankrupt estate. *Lowell, Bankr.* p. 43. In the disposition of property among creditors, equality is equity. *Bank v. Sherman*, 101 U. S. 403, 406, 25 L. Ed. 866. To accomplish the purpose of the statute, the court exercises its equitable jurisdiction in dealing with preferences. The right to prefer creditors is an infirmity still remaining in the body of the common law. It is contrary to the letter and spirit of the maxim that equality is equity. *Paper Co. v. Robbins*, 151 Ill. 632, 38 N. E. 153; 11 Am. & Eng. Enc. Law (2d Ed.) 186. In this view of the scope and purpose of the act, it certainly cannot be considered inequitable to require one who has received an undue portion of the estate,

no matter if innocently, to surrender that advantage before participating in further distributions of the estate with those who have not received such preference. Coll. Bankr. p. 286.

It is urged very earnestly on behalf of the appellees, and by counsel who have appeared as *amici curiæ*, that this interpretation of the act will be disastrous to credit; that it will unsettle business, and render mercantile transactions so uncertain and insecure that the country at large will suffer by it. It is further contended that congress did not intend by this act to interfere with or disturb the ordinary course of business of the country; and, in support of a construction of the statute that will avoid such supposed consequences, numerous authorities are cited, which may be summed up in the rule that "statutes will be construed in the most beneficial way which their language will permit, to prevent absurdity, hardship, or injustice." Suth. St. Const. § 324. The first observation pertinent to the consideration of this rule is that the province of construction lies wholly within the domain of ambiguity. *Hamilton v. Rathbone*, 175 U. S. 414, 421, 20 Sup. Ct. 155, Adv. S. U. S. 155, 44 L. Ed. —. It must therefore appear that the statute is ambiguous, and thus open to construction. "The considerations of evil and hardship may properly exert an influence in giving a construction to a statute when its language is ambiguous or uncertain and doubtful, but not when it is plain and explicit. The same may be said of the consideration of convenience, and, in fact, of any consequences. If the intention is expressed so plainly as to exclude all controversy, and is one not controlled or affected by any provision of the constitution, it is the law, and courts have no concern with the effects and consequences. Their simple duty is to execute it." Suth. St. Const. § 324. That the bankrupt act is ambiguous and uncertain in many of its provisions cannot be denied. But we are of the opinion that the particular provisions under consideration are reasonably clear and certain. Section 57g provides that the claims of creditors who have received "preferences" shall not be allowed unless such creditors shall surrender their "preferences." There is no ambiguity in this provision, and no uncertainty as to its purpose. When a creditor presents a bona fide claim against the bankrupt estate, the question to be determined is, has the creditor received a "preference" in his dealings with the bankrupt? If he has, the claim cannot be allowed. If he has not, it must be allowed. Then the question arises, what is the meaning of the word "preference"? If we turn to section 60a, we find the word "preference" defined, and it is there declared to mean "a transfer" by the bankrupt "of any of his property," where the effect of the enforcement of such a "transfer" will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. This definition fits very closely into section 57g, and points out still more distinctly the preferred claims that are disallowed. But, to understand accurately the character of the transaction that will amount to a preference, we must look for the meaning of the words "transfer of property." This meaning is found in paragraph 25 of section 1 of the act, where a "payment" is explicitly made one of the methods of transferring property. With respect to the question under consideration,

the statute itself has furnished us with this information: (1) That a payment of money is a transfer of property; (2) a transfer of property by an insolvent debtor, whereby his creditor obtains a greater percentage of his debt than any other creditor of his class, is a preference; (3) a claim of a creditor who has received a preference shall not be allowed, unless such creditor shall surrender his preference. The word "preference," as used in paragraph 2 of section 3a, and in section 60b, has no other meaning than that declared in section 60a. It is true that in those other sections a preference qualified by certain other conditions produces other consequences, but the consequences clearly follow from the other conditions, and not from any different meaning attached to the word "preference."

It is to be further observed that the construction which the appellees give to section 57g is the same as was given to section 23 of the act of March 2, 1867 (14 Stat. 517, 528). But in that section it was provided that the creditor should not prove his claim if he had accepted a preference, "having reasonable cause to believe that the same was made or given by the debtor" contrary to the provisions of that act, until he had surrendered the preference. This construction would require that the creditor's claim should be allowed under the present act, unless it should be established that the creditor had reasonable cause to believe that the preference was made or given by the debtor contrary to the provisions of the act. To give the act this construction, we must do that which congress has failed to do, namely, interpolate the qualifying provision of the former act. This we cannot do. As was said by the supreme court in *Bank v. Sherman*, supra:

"We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is our business to execute the law as we find it, and not to make or modify it."

But, assuming that this reference to different provisions of the present act, and the comparison made with the corresponding provisions of the former act to ascertain the meaning of the statute, demonstrate that it is open to construction, what follows? As we have read the act, is its meaning absurd? No such claim is made, and could not be sustained if urged. Does this meaning or interpretation of the act work hardship or injustice? It is claimed that it does, and that, by interfering with the ordinary transactions incident to trade upon credit, the administration of the law as thus interpreted will destroy the business of the country. This is by no means clear. The creditor is not compelled to surrender a payment made to him on account, in the ordinary course of business, unless he has reason to believe that his debtor is insolvent and that the payment is a preference. If the creditor is innocent in the transaction, he has his option to retain the payment and waive his claim to the balance of the account, or he may surrender the payment and present his claim for the whole account. He will do that which will be to his best interest, and his loss, in any event, will be one of degree. It is a well-known fact that the credit system of trade has its limitations and restrictions adjusted as far as possible to the contingencies of loss by insolvency, and that the possibility of insolvency and its attending losses is a continual factor in the ordinary

business of the country, which the bankrupt act is expected to adjust and equalize among all creditors by an equitable and just distribution and settlement of the insolvent estate. It would seem, therefore, that, instead of destroying business, the interpretation we give to the act will be to the advantage of legitimate credit, in placing all creditors as nearly as possible on an equal footing. This view of the statute has been taken in the following cases, in which the question now under consideration has been fully and ably considered: *In re Knost* (D. C.) 1 Nat. Bankr. N. 403; *In re Conhaim*, 2 Nat. Bankr. N. 148, 97 Fed. 923; *In re Wise* (D. C.) 2 Nat. Bankr. N. 151. In the case of *Electric Co. v. Worden*, 3 Am. Bankr. R. 634, 39 C. C. A. 582, 99 Fed. 400, the circuit court of appeals for the Seventh circuit reaches the same conclusion. The Ft. Wayne Electric Company, being indebted to the Columbus Electric Company, gave three notes covering the indebtedness, maturing upon various dates. After the maturity of the first note the creditor received from the debtor a partial payment thereon, in the regular course of business, and without reasonable cause to believe that the debtor was insolvent, and without an intent to obtain an unlawful preference. Shortly afterwards involuntary proceedings were instituted against the debtor by other creditors, and it was adjudged bankrupt. The Columbus Electric Company filed its claim for the balance due upon the notes. The district court ordered that, if the said creditor should surrender to the trustee the sum received from the debtor as a partial payment, then the full amount of its claim would be allowed as an unsecured claim, but, upon the refusal of the creditor to repay said amount, its claim should be disallowed and expunged from the list of claims upon the trustee. The case was appealed to the United States circuit court of appeals. In expressing the opinion of the court, after discussing the sections of the act herein construed, Judge Jenkins said:

"The bankrupt here intended to prefer the appellant, in the sense that, while insolvent, it sought to give an advantage over other creditors. It was received, to be sure, innocently, and without knowledge of that intent, but the payment none the less worked a preference. It gave to the appellant an undue advantage over other creditors, and, while the act will not permit a recovery by the trustee of the payment because it was received innocently, it none the less remains that the meaning of the act is that, if the appellant seek further payment out of the estate of the bankrupt, he shall share equally with other creditors with respect to his claim. That can only be accomplished by a surrender of the preference received as a condition of further payment out of the bankrupt estate. This construction, as we think, works out the highest equity between creditors. It may be difficult to reconcile the various phrases used in the act, but the construction which we place upon the section gives to the language therein employed its natural meaning."

This opinion expresses our views upon this subject. The judgment of the district court is reversed, and the cause remanded to said court, with directions to disallow the entire claim of Marshall Field & Co., and expunge it from the list of claims against the bankrupt estate.

HALL v. KINCELL et al.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 583.

BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEES.

Under the general grants of jurisdiction to the district courts of the United States, as courts of bankruptcy, in the bankruptcy act of 1898, such a court has jurisdiction of a bill in equity by a trustee in bankruptcy to set aside a conveyance of property previously made by the bankrupt, and alleged to have been fraudulent as to his creditors and preferential in character; and such jurisdiction is not taken away or limited by the provision of section 23b that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted."

Appeal from the District Court of the United States for the Southern District of California.

On April 15, 1899, F. J. Kincell, one of the appellees herein, was adjudged a bankrupt by the United States district court for the Southern district of California, under the provisions of the bankruptcy act of July 1, 1898. Thereafter, on May 9, 1899, F. G. Hall, appellant herein, was elected trustee of the estate of said bankrupt. About one month before his adjudication in bankruptcy, the said Kincell conveyed to his wife, Elizabeth Kincell, by deed, certain real property, of the value of about \$4,000, in payment of his promissory notes which she held in the sum of \$1,600. Within a few days after the receipt of this deed, to wit, March 17, 1899, the said Elizabeth Kincell mortgaged the said real property to the Riverside Savings Bank & Trust Company, appellee herein. On July 6, 1899, the appellant, as trustee of the said bankrupt estate, commenced an action in the United States district court for the Southern district of California against the appellees herein; alleging that the said deed from the bankrupt to his wife, and the mortgage by her to the bank and trust company, constituted an unlawful preference of a creditor of the said F. J. Kincell, and an unlawful conveyance of the said property of said bankrupt within four months of his adjudication in bankruptcy, and were in fraud of other creditors of the said bankrupt, and contrary to the provisions of the bankruptcy act. The prayer of the bill was "(1) that the conveyance aforesaid be adjudged fraudulent and void, and that the same be canceled and set aside, and the record of the same be canceled; and (2) that the premises be adjudged to be released from the lien and operation of the mortgage; or (3) that the defendants pay to plaintiff the value of the said premises, to wit, the sum of four thousand dollars, in gold coin of the United States; and (4) for costs of suit, and for such other and further relief as the court may deem meet and agreeable to equity." The appellees demurred to the bill upon several grounds,—among others, that the said district court had no jurisdiction of the persons or of the subject-matter of said action. Upon this ground alone the court sustained the demurrers, and dismissed the bill for want of jurisdiction. This decision is assigned as error by the appellant, and the case brought into this court for review.

John G. North and E. T. Dunning, for appellant.

E. B. Stanton and Wilfred M. Peck, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the court.

By the second section of the act of July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States" (30 Stat. 544, 545), the district courts of the United States are

made courts of bankruptcy, and invested, within their respective territorial limits, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms,—among other things, to—

"(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * * (15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." Pages 544, 546.

In addition to the jurisdiction here created in the bankruptcy courts, and the powers granted to such courts in the paragraphs of the section quoted, it is further provided:

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 44 provides for the appointment of trustees for bankrupt estates. These trustees are by sections 1, 33, and 50b of the act made officers of the court; and in section 47 it is made the duty of such trustees, among other things, to—

"(2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest." Page 557.

Section 67e provides:

"That all conveyances, transfers, assignments, or encumbrances of his property * * * made or given by a person adjudged a bankrupt * * * with the intent and purpose on his part to hinder, delay, or defraud his creditors * * * shall be null and void as against the creditors of such debtor * * * and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid, shall, if he be adjudged a bankrupt, * * * be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." Page 564.

Section 70 provides, with respect to the property of the bankrupt, that:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors." Page 565.

It appears from these provisions that the powers granted in this statute to the district courts of the United States within their respective territorial limits are the general and specific powers peculiar to a court of bankruptcy having such jurisdiction at law and in equity as will enable it to cause the estates of bankrupts to be collected, determine controversies with respect thereto, and distribute the proceeds of the estate among the creditors of the bankrupt. The jurisdiction covers the entire subject of bankruptcy proceedings, unless it is somewhere limited or qualified by the statute itself. That an express limitation

or qualification conferring exclusive jurisdiction elsewhere cannot be found in clear and unambiguous language must be conceded, but it is claimed that it is supplied by interpretation; that the concluding words of clause 7, § 2, "except as herein otherwise provided," point to section 23, where the general power granted to bankruptcy courts to determine controversies that may arise in relation to estates of bankrupts is limited by the qualified concurrent jurisdiction of the United States circuit courts. It is claimed that it is further qualified by an exclusive jurisdiction of the state courts over such cases as the bankrupt might have brought or prosecuted in such courts if bankruptcy proceedings had not been instituted. Section 23 is divided into three paragraphs, and is as follows:

"Jurisdiction of the United States and State Courts. (a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. (b) Suits by the trustees shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. (c) The United States circuit court shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act." 30 Stat. 544, 552.

The question whether paragraph "b" of this section is a limitation upon the general grant of jurisdiction contained in the second section of the act has been considered in a number of cases arising in various districts, and very different conclusions have been reached as to the proper interpretation of this paragraph.

The first case in which a court interpreted this statute as limiting the jurisdiction of the bankruptcy court is that of *Burnett v. Mercantile Co.*, 91 Fed. 365, in the United States district court for the district of Oregon. The proceeding was by a trustee in bankruptcy to set aside certain conveyances made by the bankrupt in fraud of his creditors. The defendant demurred to the complaint upon the ground that the district court was without jurisdiction, the controversy being one between citizens of the same state. The court held that under section 23 of the bankruptcy act a court of bankruptcy has no jurisdiction of an action by such trustee to set aside a fraudulent conveyance made by the bankrupt to a defendant who is a citizen of the same state with the bankrupt and the trustee. It was argued in that case that, because the bankrupt could not maintain a suit to set aside a conveyance as fraudulent made by himself, therefore the provision quoted did not apply. The court answered this argument by saying that the question before the court was one of jurisdiction, involving the right to determine the controversy, and not a question of the principles that would obtain in reaching such a determination. It was explained by the court that, if the bankrupt himself had brought the suit in the state court, he could not have been turned out of that court on the ground of a lack of jurisdiction. He might have failed to maintain his right of action by reason of his own act, but this defect in his cause of action would not deprive the court of jurisdiction over the case. The court

therefore concluded that section 23b of the bankruptcy act required that suits relating to the validity of conveyances made by the bankrupt prior to bankruptcy proceedings must be brought in the court of the state which would have had jurisdiction of the case had bankruptcy proceedings not been instituted. The only exception to this exclusive jurisdiction of the state court over such cases would be suits between citizens of different states, involving the amount necessary to give the United States circuit court jurisdiction, and suits wherein the proposed defendant consented to being sued in a United States court.

In the case of *Mitchell v. McClure*, 91 Fed. 621, in the Western district of Pennsylvania, the court took the same view of this statute as in the case just cited, and held that the district court had no jurisdiction of an action of replevin brought by a receiver or trustee in bankruptcy to recover possession of personal property alleged to belong to the bankrupt, but held adversely by the defendant under a claim of title.

In the case of *Heath v. Shaffer*, 93 Fed. 647, in the Northern district of Iowa, the trustee of a bankrupt brought suit in the district court, as a court of bankruptcy, asking for an injunction to restrain the defendants from further prosecuting in a state court a suit brought by them for the foreclosure of a chattel mortgage executed by the bankrupt. The holder of the chattel mortgage had taken possession of the mortgaged property before the institution of proceedings in bankruptcy against the mortgagor. The court held, under the authority of *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403, construing the bankrupt act of 1867, that the court of bankruptcy would not enjoin the further prosecution of such a suit, but the trustee must appear and assert his right and title in the state court. The question of jurisdiction of the bankruptcy court over the bill brought to test the validity of the mortgage sought to be foreclosed in the state court was referred to by the court, but not determined, although jurisdiction was doubted, for the reason stated in *Burnett v. Mercantile Co.* and *Mitchell v. McClure*, *supra*.

The case of *In re Abraham*, 35 C. C. A. 592, 93 Fed. 768, in the circuit court of appeals for the Fifth circuit, is cited as an authority in line with these two cases, supporting the proposition that the United States district court, as a court in bankruptcy, has no jurisdiction of a suit by a trustee to set aside a transfer of property made by the bankrupt in violation of the provisions of the bankruptcy act. But the opinion of the court does not go that far. The appeal in the case was treated as a petition for the revision in matter of law of the proceedings of the district court taken upon summary process to try the title to property in the possession of a purchaser from the bankrupt's voluntary assignee, and claimed by the creditors as belonging to the bankrupt estate. The opinion contains a very able and interesting discussion of the law relating to the scope of summary proceedings in the bankruptcy court under the act of 1867, and its limitation under the act of July 1, 1898. All that the court decided was that under the present act the trustee in bankruptcy could not recover from the assignee the property assigned, or its proceeds, on summary petition in the court of bankruptcy, but must proceed by plenary action

at law or in equity, in the proper state court or United States circuit court.

In the case of *Hicks v. Knost*, 94 Fed. 625, in the Southern district of Ohio, and in the case of *Perkins v. McCauley*, 98 Fed. 287, in the Southern district of California, the interpretation of section 23 of the bankruptcy act announced in *Burnett v. Mercantile Co.* and in *Mitchell v. McClure*, *supra*, is followed. The objection to the interpretation of the statute adopted in these two cases is that it deprives the district court of a large part of its jurisdiction clearly and distinctly given in the general grant, to exercise original jurisdiction at law and in equity in bankruptcy proceedings in determining controversies in relation to the estates of bankrupts, and to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the act. The constitutional authority of congress is to establish throughout the United States uniform laws on the subject of bankruptcy, and the title of the present act indicates that it was the intention of congress to make the act as full and complete as the legislative authority upon the subject. The title is, "to establish a uniform system of bankruptcy throughout the United States,"—not an outline, embracing merely the initiative and final proceedings, but a system, operating effectively and uniformly throughout the United States. The courts of the United States have been described as possessing limited jurisdiction, but the limitation is only with respect to the character of the parties and the nature of the subject-matter involved in the suit. When a person has a right to go into a United States court, or the subject is one which can be brought into such a court under the constitution and laws of the United States, the court has the entire power, as a court of equity or as a court of law, to do complete and entire justice between the parties. *Curt. Jur. U. S. Cts.* p. 129. And this is the power and authority conferred in general and specific terms by this act upon the courts of bankruptcy with respect to the subject of bankruptcy. But it is contended that, after having created this jurisdiction, congress determined, under the guise of a direction to the trustee of the bankrupt estate, to transfer to the state courts nearly the entire jurisdiction relating to the collection of bankrupt estates. This is certainly a remarkable statute, if that is its meaning and purpose. But the weight of opinion is clearly opposed to this view. In the case of *In re Gutwillig* (D. C.) 90 Fed. 475, an insolvent debtor made a general assignment under the laws of the state of New York, which assignment recited the insolvency of the assignor, and the transfer of all his property and effects to an assignee for the benefit of creditors, upon the trust to convert the same into money, and, after paying the expenses of executing the trust, to pay all creditors of the assignor ratably and in proportion to their several demands. Thereafter certain creditors of the insolvent debtor presented a petition to the district court of the United States for the proper district, praying that the insolvent debtor might be adjudged a bankrupt. The creditors also applied to the court for an injunction restraining the assignee under the insolvent assignment from dealing with the property of the bankrupt further than might be necessary to preserve the

same. In support of the validity of the assignment as against the trustee in bankruptcy, it was urged that the trustee could take no property save that which the statute gave him; that the bankruptcy act contains no provision making such assignments voidable, unless they have been made with intent to defraud creditors, and that under section 70 of the bankrupt act the trustee takes the estate of the bankrupt as of the date he was adjudged a bankrupt; and that his title could not reach back so as to cover property previously assigned by the bankrupt. These objections the court deemed insufficient, and granted the motion for a restraining order. The case again came before the court upon a motion to dissolve the restraining order in *Re Gutwillig* (D. C.) 90 Fed. 481. The motion was made upon the ground that the sheriff of the county where the property of the bankrupt was located had, prior to the bankruptcy proceedings, by virtue of a writ of replevin issued out of the state supreme court in an action brought by a vendor against the bankrupt and his assignee, taken from the possession of the assignee certain goods, which the sheriff continued to hold. The purpose of the motion was to relieve the sheriff from the restraining order, so that he might deliver to the vendor the property replevied, in accordance with the terms of the writ. It was charged, however, in opposition to the motion, that the sheriff, in executing the writ of replevin, had taken property not described in the writ, appropriating other material and labor, to the prejudice of other creditors of the bankrupt. The reply to this charge was that under section 23b of the bankruptcy act the controversy between the trustee and sheriff concerning the property in the hands of the sheriff could only be determined in the state court. The opinion of the court upon the question as thus presented gives the reasons for upholding the jurisdiction of the bankruptcy court as follows:

"Section 23b is expressly limited to suits which the bankrupt himself 'might have brought if proceedings in bankruptcy had not been instituted.' The bankrupt, in consequence of his voluntary assignment, could not have brought any suit against the sheriff for this trespass; nor could he bring any suit to declare the assignment void as to creditors, or as respects the bankrupt law; nor any suit to prevent the appropriation of the value of the other materials and labor, admixed possibly with the vendor's flannel, from being appropriated for Codey's benefit to the prejudice of other creditors, such as might be maintained in a court of bankruptcy, as in a court of equity. It is in that court, under section 2, that such controversies should be determined, where the severe rule of law as regards title by accretion or admixture, which is enforced justly, it may be, against the wrongdoer (*Silbury v. McCoon*, 3 N. Y. 379; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Cavin v. Gleason*, 105 N. Y. 261, 11 N. E. 504; *Joslin v. Cowee*, 60 Barb. 48; *Hyde v. Cookson*, 21 Barb. 92), is not applicable as against creditors or other vendors having equal or superior rights (*Bank v. Goddard*, 131 N. Y. 502, 30 N. E. 566; *Bank v. Dunn*, 97 N. Y. 149, 159)."

After this decision in the district court, the assignee petitioned the circuit court of appeals in the Second circuit to vacate the restraining order granted by the district court, on the ground that the district court had no power to make the same, that it interfered with the due performance of his duties as general assignee for the benefit of creditors of the insolvent assignee, and that the general assignment was not voidable by a trustee in bankruptcy. The cir-

cuit court of appeals affirmed the order of the district court, in an opinion which discusses the effect of the bankruptcy act upon voluntary assignments under the state law, but in the opinion of the court no reference is made to the provisions of section 23 of the act. In *re Gutwillig*, 34 C. C. A. 377, 92 Fed. 337, 63 U. S. App. 191. The judgment of the court, however, necessarily involves a determination that this section does not deprive the court of bankruptcy of jurisdiction of a suit by a trustee to set aside a transfer of property made by a bankrupt, and alleged to be in violation of the act. In the case of *In re Brooks*, 91 Fed. 508, in the district court of Vermont, the same interpretation was given to this statute as in the last case; and in the case of *Carter v. Hobbs*, 92 Fed. 594, the district court of Indiana, and in the case of *Murray v. Beal*, 97 Fed. 567, the district court of Utah, reached the same conclusion. In *Robinson v. White*, Id. 33, the district court of Indiana adhered to its decision in *Carter v. Hobbs*, and in the case of *Lehman v. Crosby*, 99 Fed. 543, the district court of the Southern district of New York adhered to its decision in the case of *In re Gutwillig*. The doctrine of these cases is that section 23b is to be strictly construed as being a limitation upon the general grant of jurisdiction to the courts of bankruptcy in other parts of the act; that this provision does not apply to a suit by the trustee to set aside an alleged fraudulent conveyance of property to the bankrupt, which is one the bankrupt could not have maintained; that in such a case the court of bankruptcy has jurisdiction of the suit. This interpretation of subdivision "b" necessarily involves the contrary proposition that, where the suit is one which the bankrupt himself might have prosecuted if proceedings in bankruptcy had not been instituted, the trustee can only maintain his action in the state court. In other words, the state court has exclusive jurisdiction of all cases brought by the trustee against parties claiming property adversely to the bankrupt estate, except where the action is one the bankrupt could not have maintained prior to bankruptcy proceedings, and except, also, where the proposed defendant consents to being sued elsewhere. To this interpretation there are many serious objections, in the lack of harmony it produces in the various provisions of the act, but the exception which permits the proposed defendant to be sued in the bankruptcy court upon his consent appears to be conclusive. No consent or agreement between parties can confer jurisdiction upon a court of the United States to hear and determine a controversy unless the court has jurisdiction of the subject-matter. This rule has been so often stated that no authorities need be cited in its support. Jurisdiction over the person of the defendant in a United States court may be obtained by his consent, although he is sued in a district of which he is not an inhabitant, but this is not sufficient unless the court has also jurisdiction over the subject-matter in controversy. If, then, the defendant may by his consent be sued in the bankruptcy court by the trustee in bankruptcy, it is because the court has jurisdiction over the subject-matter involved in the suit, and only requires jurisdiction over the person of the defendant to proceed with the action to final judgment. In this view of the

law, section 23b cannot be interpreted as a limitation upon the general grant of jurisdiction to the courts of bankruptcy in other parts of the act.

We come now to the consideration of those cases which have given a still different interpretation to this statute, and where all its provisions appear to be harmonized in a uniform system of bankruptcy administered by the bankruptcy court. In the case of *In re Sievers* (D. C.) 91 Fed. 366, the insolvent debtor, Charles F. Sievers, made a general assignment for the benefit of his creditors under the laws of the state of Missouri. Thereupon certain creditors of Sievers filed their petition in the proper United States district court to have him adjudicated a bankrupt; and a few days thereafter they filed a second petition for the appointment of a receiver to take charge of the assets of the bankrupt, and to enjoin his assignee from proceeding with the administration of the estate. An order to the assignee to show cause was issued upon the last petition, to which the assignee made return, admitting the assignment, and alleging that he had qualified as assignee as required by the laws of the state of Missouri, and was proceeding to administer the trust imposed upon him by the deed; claiming a right to do so notwithstanding the proceedings in bankruptcy. It was contended, as one of the grounds in support of this return, that any action challenging the respondent's right to hold the assigned property must be brought in the courts of the state, which it was urged had exclusive jurisdiction of such controversies. The court, in its opinion, discusses the question very elaborately, and considers very carefully the general scope and purpose of the bankruptcy act, the jurisdiction of the bankruptcy court as therein provided, the character of actions a trustee may be required to prosecute or defend in administering the estate of the bankrupt, and the general jurisdiction of the United States circuit courts, at the time the bankrupt act was passed, over cases arising under the constitution and laws of the United States, and in cases where the plaintiff holds an office created by an act of congress. From the considerations arising from a comparison of these statutes of jurisdiction, the court reaches the conclusion that subdivision "a" of section 23 is in the nature of a prohibition directed against the exercise of jurisdiction by the United States circuit courts in any case between the trustee and an adverse claimant, unless the bankrupt himself could have resorted to the circuit court for the assertion of such claim against the adverse claimant, and that subdivision "b" reinforces the prohibition of subdivision "a," but in this instance the prohibition is addressed to the trustee, instead of the circuit court, as found in the latter subdivision; that both subdivisions of section 23, when read together, relate to the same subject-matter, and that is to the jurisdiction of the United States circuit court, and to that alone, and is in no way applicable to the jurisdiction of the district courts as courts of bankruptcy. The question at issue in this case was taken, upon a petition for review, to the circuit court of appeals for the Eighth circuit, under the title of *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325, where the jurisdiction and the order of the district court enjoining the assignee

under the state laws from further proceeding with the administration of the estate of the bankrupt were sustained and approved; but in the opinion of the court no reference is made to section 23, although the question of jurisdiction which it presented must necessarily have been determined against the claim that it limits the jurisdiction of the bankruptcy court. The opinion in this case has been followed in the cases of *In re Newberry* (D. C.) 97 Fed. 24; *Norcross v. Nathan* (D. C.) 99 Fed. 414; and in *Cox v. Wall*, Id. 546. In the case of *In re Hammond*, 98 Fed. 845, in the district of Massachusetts, the court had before it the question of jurisdiction of a proceeding by a trustee in bankruptcy for the recovery of the property of the bankrupt, held by an attaching creditor, whose attachment was obtained in a suit begun against the bankrupt within four months prior to the filing of the petition in bankruptcy. The court in its opinion reviews the history of the act of July 1, 1898, and discusses its various provisions in the light of previous legislation upon the subject. It also considers the jurisdiction and power of courts of bankruptcy under these previous acts as established by adjudicated cases, and arrives at the conclusion that the present act gives the court jurisdiction of the proceedings against the attaching creditor; holding that his possession of the property was not in opposition to the right of the bankrupt, nor in antagonism to its title, but entirely upon the assumption that the title was in the bankrupt. The decision is based upon the doctrine declared in this court in the case of *In re Francis-Valentine Co.*, 36 C. C. A. 499, 94 Fed. 793. In following that case the district court in Massachusetts did not find it necessary to determine the question of jurisdiction under section 23b, in a suit brought by the trustee against a defendant holding adversely to the bankrupt estate, but excellent reasons are given for the jurisdiction of the bankrupt court as maintained in the last cited cases. In the case of *In re Woodbury*, 98 Fed. 833, in the Northern district of Dakota, the court had before it the precise question involved in the present case, and the opinion of the court as to the scope and purpose of section 23b is perhaps the most satisfactory explanation yet made of that provision of the statute. In brief, the court is of the opinion that subdivision "b" of section 23 relates only to the venue of actions brought or prosecuted by trustees of bankrupt estates, and requires that such suits shall be brought in the district and division in which they would have been brought if bankruptcy proceedings had not been instituted; thereby providing against the jurisdiction which the trustee might invoke by reason of his residence in a district or division of a district other than that of the bankrupt, as permitted in section 45 of the act. It may be said, further, in support of this interpretation, that the title of section 23 is "Jurisdiction of United States and State Courts." The cases holding that this section refers only to the United States circuit courts must reject this title, or at least that part referring to state courts, as superfluous. But, if we hold that subdivision "b" of the section refers to the venue of suits brought by the trustee, then the title of the section is correct as it stands, since subdivision "b" determines, not only the district and division of the United States cir-

cuit and district courts where the trustee may bring suits, but also the court of the state, when he enters that jurisdiction. In this view of the provision, it is in the nature of a personal privilege, and may be waived by the defendant, as provided in the section. Loveland, Bankr. p. 71. It must be admitted, however, that no interpretation of section 23 has yet been proposed that is entirely free from criticism; and while the learned opinion of the court in the case of *In re Woodbury*, supra, fails to remove all doubts as to the meaning of the section, it leaves less doubt than the other interpretations, and, with the light we now have, we cannot suggest a more satisfactory explanation of the purpose and effect of the subdivision of the section under consideration.

In the present case the only question is as to the jurisdiction of the district court, as a court of bankruptcy, over a bill brought by the trustee to set aside a conveyance alleged to be an unlawful preference under the bankruptcy act, and given for the purpose of defrauding the creditors of the bankrupt. It is, therefore, not necessary to determine which of the latter interpretations of the section is correct. If we conclude that the first is erroneous, and adopt either of the others, the court had jurisdiction of the bill of complaint; and upon that question we have no doubt. The subject-matter of the controversy arises out of the bankruptcy proceedings, and is necessarily involved in the settlement and administration of the bankrupt estate. This is of itself a ground of jurisdiction. *Ex parte Christy*, 3 How. 308, 313, 11 L. Ed. 603; *Mitchell v. Manufacturing Co.*, 17 Fed. Cas. 496; *Burr v. Hopkins*, 4 Fed. Cas. 814. It follows that the district court had jurisdiction of the bill of complaint in this case, and the demurrer on that ground should have been overruled. The judgment of the court below is therefore reversed, and the cause remanded for further proceedings not inconsistent with these views.

In re SAN GABRIEL SANATORIUM CO.

PERKINS v. MARKHAM et al.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 573.

1. BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEES.

A court of bankruptcy has jurisdiction of an action by a trustee in bankruptcy against a receiver appointed in pending proceedings in a state court for the foreclosure of a mortgage, and sued by leave of that court, to recover the property affected, on the ground that the property was fraudulently conveyed by the bankrupt to the present holder, and that the lien of the mortgage is invalid in whole or in part.

2. SAME—RESTRAINING MORTGAGE FORECLOSURE.

After the institution of proceedings in bankruptcy, a mortgage creditor of the bankrupt brought suit in a state court to foreclose his mortgage, and procured the appointment of a receiver therein. The trustee in bankruptcy, challenging the validity of the mortgage lien, in part, obtained leave from the state court to sue its receiver for the recovery of the property, and began an action against him in the court of bankruptcy. The mortgagee moved the latter court to permit him to make the trustee a

party to his foreclosure suit, and the trustee applied for an injunction to restrain the further prosecution of the foreclosure proceedings. *Held*, that the court of bankruptcy should retain its jurisdiction over the controversy until the claims of the parties were fully determined, and that, pending such adjudication, the application of the mortgagee should be denied, and that of the trustee granted.

On Petition for Review of Certain Orders of the District Court of the United States for the Southern District of California, in Bankruptcy.

This matter has been brought into this court upon the petition of the trustee in bankruptcy to review two orders of the court below,—one granting leave to make the trustee in bankruptcy a party defendant to foreclosure proceedings in the state court, and the other denying the petition of the trustee for an injunction to restrain said foreclosure proceedings. It appears that the property involved in the foreclosure proceedings, known as the "San Gabriel Sanatorium," and situated in the county of Los Angeles, state of California, was prior to December 14, 1897, owned by the respondent H. H. Markham; that on that date he sold said property to the International Pulmonary Company, a corporation, taking a note in part payment thereof, and a mortgage securing the same, covering all of said property; that thereafter said mortgagor conveyed said property to the San Gabriel Sanatorium Company, a corporation, and said last-named corporation thereafter, to wit, on March 20, 1899, executed a deed of said property to one J. W. McCauley, who entered into possession thereof. Within four months after the execution of the deed to McCauley, to wit, on March 21, 1899, a petition in involuntary insolvency was filed by certain creditors of the San Gabriel Sanatorium Company; and on June 26, 1899, said company was adjudicated a bankrupt, on the grounds that a fraudulent preference was made on February 13, 1899, to the First National Bank of Pasadena, and that on March 20, 1899, it transferred its property to J. W. McCauley, without consideration, to hinder, delay, and defraud its creditors. On August 14, 1899, the respondent H. H. Markham commenced an action in the state court to foreclose the aforesaid mortgage upon the real and personal property of the bankrupt, and for the appointment of a receiver. A receiver was appointed the following day, August 15th, and qualified as such. This action was against the International Pulmonary Company (mortgagor), the First National Bank of Pasadena, and J. W. McCauley. The meeting of creditors of the said bankrupt to elect a trustee was begun on July 22, 1899, and continued until August 28, 1899, when the petitioner, Gregory Perkins, Jr., was appointed as trustee of the estate of the San Gabriel Sanatorium Company, bankrupt. It appears that this estate consisted solely of the property known as the "San Gabriel Sanatorium,"—a large institution for the cure of consumptives and other invalids, and for boarding and providing the inmates thereof with hotel accommodations. On August 29, 1899, the trustee filed a petition in the state court for leave to sue the said receiver for the recovery of all the property involved in said foreclosure action to the estate of said bankrupt. This petition was granted, and thereupon a suit was instituted in the United States district court against said H. H. Markham, the First National Bank of Pasadena, and J. W. McCauley. On September 8th following, the respondent Markham applied to the United States district court for permission to make said trustee a party to the foreclosure proceeding in the state court. The First National Bank of Pasadena filed a petition in the United States district court September 6, 1899, setting forth that on February 13, 1899, it took a note from the said bankrupt, secured by a chattel mortgage on personal property in said sanatorium, and that it desired to file a cross bill in said foreclosure suit brought by the respondent Markham in the state court, and also prayed leave to make the said trustee a party defendant therein. On October 10, 1899, the United States district court granted these applications. This action of the court is the first error assigned by the petitioner. On October 13, 1899, the trustee filed a further petition, setting forth, in addition to the above matters, that, if said mortgages of Markham and the bank are permitted to be foreclosed in the state court, a large amount of expense

will be incurred, and by reason of the embarrassments concerning the title to said property in consequence of the several transfers, mortgages, and conflicting claims, the interests of said bankrupt estate and of all parties interested will be better subserved, guarded, and protected by a sale of the property free and clear of all liens thereon, due provision being made for the rights of Markham, the bank, McCauley, and others, by transferring the same to the proceeds derived from said sale; that, under the law and course of procedure in the state of California, it is impossible for the trustee to litigate and have adjudicated in said foreclosure proceeding the conflicting interests between him and said McCauley regarding the illegal transfer under which said McCauley claims all of the equity of redemption in the property aforesaid. And the petitioner prays that Markham and the First National Bank of Pasadena be restrained from further prosecuting said foreclosure proceedings, and for an order directing and authorizing the sale of the said property free and clear of all liens and incumbrances and conflicting claims of title by the trustee, the bank, McCauley, Markham, and the receiver. On October 21, 1899, the judge of the court below entered an order refusing to grant the foregoing petition. This action of the court is also assigned as error by the petitioner.

E. T. Dunning, for petitioner.

Anderson & Anderson, for respondent H. H. Markham.

A. R. Metcalfe, for respondent First National Bank of Pasadena.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the court.

After Markham had commenced his action in the state court, on August 14, 1899, to foreclose his mortgage upon the real and personal property of the bankrupt, and for the appointment of a receiver to take charge of the same, and before he had applied to the United States district court, on September 8, 1899, for leave to make the bankrupt and the trustee of the bankrupt estate parties defendant to the action in the state court, the trustee in bankruptcy had, on August 29, 1899, applied to the state court having jurisdiction of the foreclosure proceedings, and had obtained the permission of that court to bring suit in the United States district court against the receiver appointed by the state court, for the recovery of all the property described in the complaint in the foreclosure proceeding; and the trustee had, on August 29, 1899, brought that suit in the United States district court, and process had been duly issued in the action and served upon all the parties. This action was therefore pending in the district court at the time the court made the orders which are now the subject of review, and was within the jurisdiction of that court. See opinion in the case of *Hall v. Kincell* (rendered at the present term of this court) 102 Fed. 301. It appears from the record that the trustee in bankruptcy in this action challenges the validity of the Markham mortgage, to the extent of the personal property claimed by the mortgagee to be covered by it. He also denies the validity of the chattel mortgage given to the First National Bank of Pasadena to secure the payment of \$10,000, and alleges that the sale of the real and personal property to McCauley was illegal and void. It appears further that the district court, in determining the issues presented by the petition in bankruptcy, held that the latter sale was without consideration, and was fraudulent and void as against the creditors of the bankrupt. The court also held that the chattel mortgage was

illegal and void, as to \$8,000 thereof, for the reason that the mortgage was executed at a time when the bankrupt was insolvent, and that to the extent of \$8,000 it was given and received as a preference, contrary to the provisions of the bankrupt act. It remains for the district court, as a court of bankruptcy, to determine the validity of the chattel mortgage for the remaining \$2,000, and the validity of the Markham mortgage with respect to the personal property therein described.

In this aspect of the proceedings, we are of the opinion that the district court, having the general jurisdiction at law and in equity provided in the act of July 1, 1898 (30 Stat. 544), was authorized to determine these questions, not only upon the issues presented by the petition in bankruptcy, but also in dealing independently with the claims of the lienholders as against the property of the bankrupt estate. It is true, the state court has exclusive jurisdiction over proceedings to foreclose mortgages; but where, as in this case, the state jurisdiction has been invoked after bankruptcy proceedings have been commenced, and where the validity of a mortgage lien, or some part of it, is involved in the bankruptcy proceedings, we think the bankruptcy court should retain its jurisdiction until such claims are fully determined and adjudicated; and particularly should this be the action of the bankruptcy court when the state court, exercising the rule of comity which should always obtain between the state and federal courts, consents that its receiver may be made a party to the action in the federal court. It follows from these considerations that pending adjudication of these claims the district court should have denied the application to make the trustee in bankruptcy a party defendant to the foreclosure proceedings in the state court, and should have granted the petition of the trustee that the plaintiff in the foreclosure proceedings and the First National Bank be enjoined until the further order of the court from further prosecuting the foreclosure proceedings in the state court.

The disposition to be made of the property after an adjudication by the court of bankruptcy as to the validity of the mortgage lien may properly be left to be determined, in view of all the circumstances, when that stage of the proceedings has been reached. The court may direct the trustee to sell the property free from whatever mortgage lien may be found to exist upon it, or the court may direct that it may be sold subject to such lien, or the trustee may be directed to appear in the state court, and represent the interest of the bankrupt estate in foreclosure proceedings in that court. The district court will, of course, pursue that method of procedure which will best subserve the interests of the bankrupt estate, while at the same time preserving the valid rights of the mortgagees. The orders of the district court involved in this review are reversed, and the cause remanded for further proceedings in accordance with this opinion.

MACKEL v. ROCHESTER.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 566.

BANKRUPTCY—EXAMINATION OF BANKRUPT—PRIVILEGE AGAINST SELF-CRIMINATING TESTIMONY.

In an action in the district court by a trustee in bankruptcy against a third person to recover the value of property alleged to have been fraudulently transferred to him by the bankrupt, the latter, being under examination as a witness, cannot refuse to answer questions relating to the transaction in suit, on the ground that his answers would tend to criminate him, his constitutional privilege against self-criminating evidence being secured by Bankr. Act 1898, § 7, subd. 9, which provides that a bankrupt, "at such times as the court shall order," shall submit to an examination concerning "his dealings with creditors and other persons and all matters which may affect the administration and settlement of his estate," but that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."

In Error to the District Court of the United States for the District of Montana.

This cause is brought to this court upon the alleged error of the court below in refusing to require a witness to answer certain questions, and in directing a verdict for the defendant. It appears from the record that one Frederick A. Bartlett, residing at Butte, Mont., filed a petition in bankruptcy on February 8, 1899, and thereafter, in March, 1899, was duly adjudged a bankrupt. Alexander Mackel, the plaintiff in error, was elected trustee of the bankrupt's estate. On the 3d day of April, 1899, the trustee brought suit in the district court of the United States for the district of Montana, against the defendant in error, to recover the value of certain property alleged to have been sold by the bankrupt to the defendant in error within four months of the date of his petition to be adjudged a bankrupt, with the intent and purpose on the part of the said bankrupt to hinder, delay, and defraud his creditors. The property thus transferred consisted of a stock of merchandise alleged to have been of the value of over \$8,563, and constituted all of the property of the said bankrupt not exempt from execution. It is alleged that the defendant in error took into his possession all of the said stock of goods, and converted the same to his own use, without paying a fair compensation for it, and that at the time of the pretended conveyance he knew that it was made by the said Bartlett with fraudulent intent, and that he had reasonable cause to believe that said Bartlett was then insolvent. The defendant, in his answer, avers that he bought said stock of goods in good faith, paying therefor the sum of \$6,344.25, which amount was paid to said Bartlett on said 4th day of February, 1899, and constituted a fair consideration for said property, and denies any knowledge of Bartlett's insolvency or fraudulent intent in selling said property. At the close of the testimony for the plaintiff taken upon the trial of the cause, the defendant moved the court to instruct the jury to render a verdict for the defendant. This motion was based upon three grounds. The court sustained the motion upon the third ground,—that there was no evidence tending to show that the defendant, at the time of purchasing the said stock of goods, had reasonable cause to believe that the said Bartlett was insolvent, or contemplated going into bankruptcy, or had any intention to hinder, delay, or defraud his creditors, or any one. Judgment was accordingly entered for the defendant.

John A. Shelton, for plaintiff in error.

M. P. Gilchrist, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error are 15 in number, 12 of which comprise refusals of the court to require the witness Frederick A. Bartlett to answer certain questions, and 3 relate to the peremptory instruction to the jury to return a verdict for the defendant, and in ordering judgment accordingly. The witness Bartlett declined to answer the questions referred to, upon the ground that the answer would tend to incriminate him, and the court instructed the witness that he might so refuse to answer, and that the witness was to be the judge as to whether or not the answer would tend to incriminate him. The act of July 1, 1898 (30 Stat. 544), provides, in section 2, that the district courts of the United States are made courts of bankruptcy, and invested, within their respective territorial limits, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers, and during their respective terms. This jurisdiction is defined generally and specifically in the section in 20 different paragraphs. The duties of the bankrupt under the authority of the court so empowered are set out in section 7 as follows:

"The bankrupt shall * * * (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

This section thus provides for the production of the facts material and necessary to determine the issues in the settlement of the bankrupt's estate for the benefit of his creditors, by requiring the bankrupt to disclose all the evidence within his possession, and yet accords to him that immunity from penalty for compulsory incriminating disclosures which is guaranteed by the constitution and by section 860 of the Revised Statutes, namely:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

It is further provided, in section 21 of the bankrupt act, with regard to the evidence that may be elicited in bankruptcy proceedings:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the state in which the proceedings are pending, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

This section, together with section 7 above quoted, certainly provides for full and complete testimony by the bankrupt or any other person under examination by the court. This information is necessary for the speedy and equitable settlement of the estate. If the bankrupt is honest, his testimony cannot injure him. If dishonest, and his testi-

mony would tend to incriminate, the act provides immunity from criminal prosecution; and any personal odium that might be incurred from giving such testimony need not be considered. The law provides immunity from a legal penalty, not a moral penalty.

In the case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, the petitioner, Brown, had been subpoenaed as a witness before the grand jury to testify in relation to a charge then under investigation by that body against certain officers and agents of the Allegheny Valley Railway Company for an alleged violation of the interstate commerce act. After testifying that he was the auditor of the railway company during the years 1894 and 1895, he was asked the question: "Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company, during the months of July, August, and September, 1894, coal from any point on the Low Grade Division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?" He declined to answer, for the reason that his answer would tend to accuse and incriminate himself. He was also asked a question which involved the production of certain of his books of account, and declined to answer for the same reason. Various proceedings were had in the matter, and an appeal was finally taken by Brown to the supreme court of the United States. Mr. Justice Brown, in delivering the opinion of that court, said:

"This case involves an alleged incompatibility between that clause of the fifth amendment to the constitution which declares that no person 'shall be compelled in any criminal case to be a witness against himself,' and the act of congress of February 11, 1893, c. 83 (27 Stat. 443), which enacts that 'no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents before the interstate commerce commission, or in obedience to the subpoena of the commission, * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding.'"

After some discussion of the statute and citation of cases, he says (page 605, 161 U. S., page 650, 16 Sup. Ct., and page 824, 40 L. Ed.):

"It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but, as we have already observed, the authorities are numerous, and very nearly uniform, to the effect that, if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. * * * The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness

into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other. * * * If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the interstate commerce law or other analogous acts,—for instance, the bankruptcy act,—wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are therefore of opinion that the witness was compellable to answer." (Page 610, 161 U. S., page 652, 16 Sup. Ct., page 825, 40 L. Ed.)

In the present case many of the questions which the witness refused to answer were of the ordinary character. For example: "Prior to the time of your filing your petition in this court asking to be adjudged a bankrupt, what, if any, business had you been engaged in?" "I'll ask you if you kept a set of books prior to the time you filed your petition in bankruptcy?" The refusal of the bankrupt to answer such questions would indicate a determination not to answer any questions relating to his business affairs. He had asked to be adjudged a bankrupt, and thus subjected his business dealings for four months prior to his petition to the scrutiny of the court. His debts amounted to several thousand dollars, while his assets were practically nothing. The debts were contracted in the transactions of a mercantile business. He had closed that business by selling the stock of goods. In his sworn statement of debts and estate no account was given of the money received for said stock of goods. It is alleged that this transfer occurred within the four months preceding his petition in bankruptcy. If so, it was certainly a matter for the examination of the court of bankruptcy, and as full and complete testimony as possible with relation thereto should have been elicited. The bankruptcy act contemplates the equitable distribution of the estate of the bankrupt among his creditors, and that the bankrupt will honestly produce and transfer to the trustee all property belonging to him. The testimony which he may be compelled to give includes any matter within his knowledge which is relevant to the transaction under investigation and material to its determination. If, in giving such testimony, he exposes himself to prosecution and penalty, he is within the protection of the statute, and upon any such prosecution is authorized to plead as a bar thereof that under the compulsion of this section he gave the criminating testimony. Under such conditions it was error for the court to refuse to require the bankrupt to give further testimony.

The assigned error of the court below in directing a verdict for the defendant need not be considered at this time, in view of the foregoing conclusion. The instruction to the jury was given on the ground of the insufficiency of the evidence to connect the defendant with any fraud or collusion on the part of the bankrupt. It has been determined that the bankrupt should be compelled to give fuller and more complete testimony with relation to the sale of his stock of goods to the defendant. The effect of this testimony cannot now be determined;

and until such evidence has been given, and the court has acted upon it, no decision is required of this tribunal upon this instruction. The judgment of the court below is reversed, with directions to take further proceedings in accordance with this opinion.

In re GERDES.

(District Court, S. D. Ohio, W. D. January 13, 1900.)

No. 2,650.

1. **BANKRUPTCY—CONFLICTING JURISDICTION—STATE AND FEDERAL COURTS.**

Where an action for the foreclosure of a mortgage has been brought in a state court of competent jurisdiction, and that court has rendered a decree fixing the liability of the mortgagor and ordering a sale of the property affected, before the filing of the petition in bankruptcy, such court has control of the property for the purposes of sale, and has jurisdiction, exclusive of the court of bankruptcy, to determine and enforce the rights of the mortgagee in and against the property; and the court of bankruptcy will not, at the instance of the trustee in bankruptcy, enjoin or stay the further prosecution of the proceedings in the state court.

2. **SAME—INTERVENTION BY TRUSTEE.**

In such a case, the title to the property, subject to the decree and order of sale by the state court, vests in the trustee in bankruptcy, and he is a proper party to the suit in the state court; and if any balance remains, after discharging the liens out of the proceeds of the sale, the trustee should apply to the state court to be made a party, and ask to have such balance paid to him.

3. **SAME—PETITION FOR INJUNCTION—FILING.**

A trustee in bankruptcy presented to the referee in charge of the case a petition for an injunction staying proceedings in a state court on a decree for the foreclosure of a mortgage on property of the bankrupt, but such petition was not filed in the office of the clerk of the court of bankruptcy. *Held*, that it was not properly before the referee, and should be dismissed.

In Bankruptcy.

On the 29th day of March, 1899, J. K. Pruden brought suit in the court of common pleas of Shelby county, Ohio, against John H. Gerdes, the bankrupt, to foreclose a mortgage on real estate, given by Gerdes to Pruden on the 17th day of November, 1897. The Citizens' Bank of Sidney, Ohio, and the Shelby County Building & Loan Association, who had mortgages upon the same property, were also made defendants. The Citizens' Bank of Sidney made default, but the Shelby County Building & Loan Association filed an answer setting up its mortgage and the amount due thereon, and, without contesting the claim of the plaintiff, prayed that the amount due to it upon its mortgage might be paid out of the proceeds of the sale of the property. On the 15th day of May, 1899, a decree was rendered finding that there was due from Gerdes to Pruden on his mortgage the sum of \$900, with \$70.80 accrued interest, and ordering the sale of the real estate, and directing that the proceeds of the sale be brought into court for further order. An order of sale was issued and placed in the hands of the sheriff of Shelby county on the 25th day of May, 1899, who, on that day, caused the real estate to be appraised, as required by the laws of the state, and on the 26th day of May, 1899, caused notice to be published, as required by the laws of the state, that said real estate would be sold at public auction at the door of the court house, in said Shelby county, on the 26th day of June, 1899, at 1 o'clock p. m., in pursuance of the order of sale. On the 8th day of June, 1899, Gerdes filed, in this court, a petition to be adjudged a bankrupt, and on the next day filed a motion in the court of common pleas of Shelby county, in the suit in which the real estate was ordered to be sold, giving notice that he had filed a voluntary petition in bankruptcy, and asking a stay of the proceedings for the sale of the real estate.

On the 12th day of June, 1899, Gerdes was adjudged a bankrupt by this court. On the 21st day of June, 1899, the referee served notice upon the clerk of the court of common pleas of Shelby county that Gerdes had been adjudged a bankrupt, and that the case had been referred to him, and that all proceedings in the state court must be suspended until the further order of the bankrupt court. On the 26th day of June, 1899, the sheriff of Shelby county, Ohio, sold the real estate to Pruden for \$4,800, and the sale was confirmed by the court, and a deed ordered to be made to the purchaser. On the 3d day of July, 1899, W. H. Pemberton was elected by the creditors of Gerdes the trustee in bankruptcy. On the 13th of July Pemberton, as trustee, filed a motion in the suit in the Shelby common pleas, asking to be made a party, which was overruled, and leave to become a party was refused him. On the 11th day of November, 1899, Pemberton, the trustee, filed with the the referee a petition, entitled an "Amended Petition in Bankruptcy," setting up substantially the facts hereinbefore recited, and praying "that the said sheriff of Shelby county, Ohio, may be enjoined from executing a deed to the said purchaser at the said sale, and that the said clerk of the said court may be enjoined from distributing the proceeds of the said sale, and that all further proceedings in the said court of common pleas of Shelby county, Ohio, shall cease, and that an order shall be granted to this, your relator, to proceed and sell the said premises, and that he distribute the proceeds thereof according to law and the orders of this court, and for such further relief as he may be entitled to, either in law or in equity." To this petition Pruden filed an answer, and to the answer the trustee filed a reply. Thereupon the referee certified to this court, for its opinion and decision, the following question: "Has this court jurisdiction to sell the property of the bankrupt, and make distribution of the proceeds, or has the court of common pleas jurisdiction to close up the sale and distribution?"

J. A. Davy, for bankrupt.

THOMPSON, District Judge. Courts of bankruptcy have jurisdiction to sell all real and personal property belonging to the bankrupt's estate. Bankr. Act, § 70, pars. b, c; General Orders in Bankruptcy 13 (32 C. C. A. xvii., 89 Fed. vii.). If the real estate be incumbered by liens, the liens may be redeemed, or the property sold subject thereto. Forms in Bankruptcy, 43, 44 (32 C. C. A. lxxiii., lxxiv., 89 Fed. xlix., l.). But if the trustee desires to sell the real estate free of liens, without redemption, he must give the lienholders their day in court, because they are entitled to be heard before the property is discharged from their liens and their liens transferred to the fund arising from the sale thereof. The lienholders, unless they surrender their securities and prove their claims, are strangers to the bankruptcy proceedings, and are entitled to have their property rights adjudicated by the courts of the state in the county in which the real estate is situated. *Hicks v. Knost* (D. C.) 94 Fed. 625.

But in the case at bar the bankrupt court could not order the sale of the real estate in question, because it had already been sold, free of liens, by the state court, and it was no longer the property of the bankrupt or his trustee. Pruden's mortgage was made before the passage of the bankrupt act, and he had brought suit in the state court to foreclose it, and had obtained a decree of sale, and the appraisement had been made and the sale advertised, before the petition in bankruptcy was filed. The state court had jurisdiction of the subject-matter and of the parties, and the control of the property for the purposes of sale, and it is clear under the authorities that it had power to proceed with the sale and the distribution of the proceeds thereof, notwithstanding the commencement, pending the sale, of the proceedings in bankruptcy

against Gerdes. Its jurisdiction was not ousted by the commencement of the proceedings in bankruptcy, and it has exclusive jurisdiction to determine and enforce the rights of Pruden in the property or its proceeds. *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. Ed. 400; *Moran v. Sturges*, 154 U. S. 256-265, 14 Sup. Ct. 1019, 38 L. Ed. 981.

When the trustee was appointed, the title to this real estate, subject to the decree and order of sale of the court of common pleas of Shelby county, vested in him by operation of law, as of the date when Gerdes was adjudged a bankrupt, and the trustee, therefore, was a proper party to the suit in the court of common pleas of Shelby county, as the only one entitled to receive the bankrupt's share of the proceeds of the sale, and the action of that court in overruling his application to be made a party must have been inadvertent. If there be any balance remaining of the proceeds of the sale, after discharging the liens, the trustee should renew his application to be made a party, and ask to have such balance paid to him.

The petition for an injunction presented to the referee was never filed in the clerk's office of this court, and therefore was not properly before the referee, and for that reason, and for the further reason that the petition does not make a case entitling the trustee to the relief asked, it is hereby dismissed, and the costs will be paid out of the fund in the hands of the trustee.

BUCKALEW v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. June 8, 1900.)

No. 924.

INSURANCE POLICY—REVENUE STAMPS—PREMIUM INSTALLMENTS.

Where a life insurance policy for one year provided that the premium should be paid in four installments, and that the policy should embrace four separate insurance contracts, and should not remain in force after any one period unless installments for the succeeding period were paid, such policy should have been stamped as a contract of insurance for one year, and the placing of additional stamps on the policy as the installments were paid did not satisfy the law.

In Error to the Circuit Court of the United States for the Northern District of Texas.

From a conviction of Sam Buckalew for violation of the internal revenue law, defendant brings error. Affirmed.

Plaintiff in error was charged by indictment in the United States district court for the Northern district of Texas, at Ft. Worth, with a violation of the internal revenue act of 1898, in failing to properly stamp with adhesive stamps an accident policy of insurance issued by him as agent for the Travelers' Insurance Company to one Bill Smith; to which he pleaded not guilty, was tried upon an agreed statement of facts, and was found guilty, and sentenced to pay a fine of \$10. Motion for a new trial was made and overruled, writ of error applied for and obtained from this court, and the necessary bonds duly given, and the errors complained of are now presented to this court.

The case was tried on an agreed statement of facts, which is attached to the general bill of exceptions herein, which shows the facts to be as follows: "First. That the defendant, Sam Buckalew, is the duly authorized and

constituted agent of the Travelers' Insurance Company of Hartford, Conn., doing a life and accident business in the state of Texas. Second. That on the 17th day of September, 1899, the said defendant, Sam Buckalew, in the prosecution of his business as such agent, accepted from one Bill Smith an application for an accident policy in the sum of \$1,500, on which the total premium for one year from said date was the sum of \$18.75, which premium was to be paid in four separate payments, the first of which was to be \$4.70, payable November 17, 1899; \$4.70 on January 17, 1900; \$4.65 on March 17, 1900; and \$4.75 on May 17, 1900. That the said Bill Smith was an employé of the Texas & Pacific Railway. That, by arrangement between the said insurance company and said railway company, accident policies of this character were arranged to be written and paid for in installments, by orders given by the insured on the paymaster of said railway company. That a true copy of the application made by the said Bill Smith to the said Travelers' Insurance Company for said accident policy is hereto attached, marked 'Exhibit B,' and made a part thereof. That the said defendant, Buckalew, as the agent of the said Travelers' Insurance Company, executed and delivered to the said Bill Smith an accident policy in the sum of \$1,500, a true copy of which is hereto attached, marked 'Exhibit C,' and made a part hereof. Third. That on September 17, 1899, the said Buckalew placed and canceled internal revenue stamps on said application for said policy in the sum of 2½ cents, the amount required by law for the first premium. That no stamp whatever was placed upon or canceled on the policy. Fourth. That the defendant, Buckalew, in stamping the application of the said Bill Smith, instead of the policy, acted under instructions of the said Travelers' Insurance Company, directing him in detail how to stamp insurance contracts in such matters. Fifth. That at the time of the taking of said application and the execution of said policy the said Buckalew intended, at the payment of the first premium of \$4.70, to place additional stamps on said application in the same amount, and to cancel same to cover the second period of said contract, and that same was paid at the time specified in said contract, and additional stamps, amounting to 2½ cents, placed on said application, and canceled. And that he intended, at the payment of the second premium, to place a like amount of stamps thereon, and cancel same, covering the second period of insurance called for in said policy, and that said premium was paid, and that he did place on said application and cancel 2½ cents in internal revenue stamps. And that he intended, on the payment of the third premium, to likewise place additional stamps thereon, and that said premium was paid, and 2½ cents additional in revenue stamps were placed on said application, and canceled. And that he likewise intended, upon the payment of the said last premium, to place thereon the necessary additional internal revenue stamps, and cancel same, and that same were placed thereon, and duly canceled; and that such was his custom, and the custom of other agents, acting under instructions from said company in matters of like character. Sixth. That it is not the intention of the government to admit, by making this agreement, that the placing and cancellation of said internal revenue stamps upon said application is admissible in evidence, but that said facts are true, and that same shall be treated as true, upon the trial hereof, provided the court, over the objection of the government, should admit proofs of such facts, and either party may object to any fact thereon hereby for any legal reason."

The application for said insurance provides as follows, to wit:

"I agree that the policy shall embrace four separate insurance contracts, and shall remain in force after the first insurance period only as continued by payments of premium for the consecutive periods following, and that I will make no claim for injuries during any period for which its respective premium has not been actually paid."

"(Exhibit B.)

"Bill Smith. Assignment for \$18.75.

No. 1,041,863.

"(Sum of Premiums on Four Separate Insurance Contracts.)

"September, 1899.

"Paymaster of Texas and Pacific Railway: For value received I hereby assign to the Travelers' Insurance Company of Hartford, Conn., or its au-

thorized agent, four premiums, for separate insurance contracts, as follows: First premium, \$4.70 dollars, to be paid and deducted from my wages for the month of October, 1899; second premium, \$4.70 dollars, to be paid and deducted from my wages for the month of November, 1899; third premium, \$4.70 dollars, to be paid and deducted from my wages for the month of December, 1899; fourth premium, \$4.65 dollars, to be paid and deducted from my wages for the month of January, 1900.

"Express Agreement. The payments named in this assignment are premiums for separate and independent contracts for consecutive periods of two, two, three, and five months, and each shall apply only to its corresponding insurance period. All claims for injuries received during any period for which its respective premium shall not have been actually paid shall be forfeited to the company, except that, in case of a just claim before the first premium shall be due, if the sum due the insured be less than the sum of all the payments called for by this assignment, it shall be credited thereon; if greater, the assignment shall be receipted in full, and the balance paid to the insured.

"Occupation: Roundhouse man.

"Where employed: Fort Worth, Texas.

"Signature: Bill ^{his} x Smith.
mark.

"Witness: L. L. Bateman.

"(892 Ed. April, 1897; April 14, 1899.)"

Extracts from Exhibit C.

"(10) The payments directed in the order or assignment are premiums for separate and consecutive periods of two, two, three, and five months, and each is to apply only to its corresponding insurance period. All claims for injuries received during any period for which the respective premium shall not have been actually paid shall be forfeited to the company, except that in case of a just claim before the first premium is due, if the sum due the insured be less than the sum of all the payments called for by the order or assignment, the amount of the claim shall be credited thereon; if greater, the order or assignment shall be receipted in full, and the balance paid to the insured. In making settlement for any claim for injuries received during any insurance period for which the premium has been paid, the amount of the premium for later unpaid periods may be deducted from the amount found due. (11) In case the insured shall fail to leave in the hands of the paymaster any premium as it shall fall due, as directed in said order, this policy shall be void."

D. T. Bomar, for plaintiff in error.

J. W. Gurley, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On this writ the plaintiff in error presents two propositions, as follows:

"First. The application for an insurance policy is a part of the policy, and a revenue stamp placed on the application is a compliance with the revenue law. Second. The policy of insurance which was issued to Bill Smith was such that the insurance for each succeeding period did not take effect until the premium for the previous periods had been paid, and hence the stamp for each period need not be placed thereon until the premium for the previous period has been paid."

From the view that we take of the case, the first proposition is not material, because the plaintiff in error did not affix stamps sufficient to meet the requirements of the law on either application or policy at the time of the execution of the same.

On the second proposition, we notice that the policy of insurance issued to Bill Smith was a contract with said Bill Smith for ac-

cident insurance for a period of one year, upon which the amount of premium agreed was \$18.75. For the convenience of the said Bill Smith, the premium was stipulated to be paid in installments at deferred dates corresponding to the periods of two, two, three, and five months, and for the security of the insurance company Bill Smith agreed as follows: "I agree that the policy shall embrace four separate insurance contracts, and shall remain in force after the first insurance period only as continued by payments of premium for the consecutive periods following, and that I will make no claim for injuries during the period for which its respective premium has not been actually paid," and, further, it was stipulated that, in case of any accident to Bill Smith which entitled him to benefits, the same were to be first credited upon the installments unpaid, whether due or not. Notwithstanding these stipulations and reservations, we are of opinion that the policy was a policy issued for one year, upon which the premium agreed was \$18.75. There was no error in the refusal of either of the special charges requested, and we find no reversible error on the record. The judgment of the circuit court is affirmed.

In re MARSHALL.

(Circuit Court, N. D. California. May 16, 1900.)

No. 12,897.

1. CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—COUNTY ORDINANCE—GAME—HABEAS CORPUS.

A county ordinance making it a misdemeanor, and punishable by fine or imprisonment, for any person to use "any kind of a repeating shotgun, or any kind of a magazine gun, for the purpose of killing or destroying any kind of wild duck, geese, quail, partridge, doves, or any other birds," is in conflict with the fourteenth amendment to Const. U. S., providing that no state shall "deprive any person of life, liberty, or property without due process of law," in that it interferes with one's right of property in a repeating shotgun or magazine gun.

2. SAME—POLICE POWER OF STATES—GAME—PROHIBITING GUN OF CERTAIN MAKE.

Where the manifest purpose of a county ordinance is to prevent the taking or killing by one person of more than 25 quail, partridge, or grouse in any one day, it is not a reasonable exercise of the police power to prohibit the killing, within such limit, by the use of a repeating shotgun or magazine gun.

Bishop & Wheeler, for petitioner.

Hugh J. McIsaac and E. B. Martinelli, for respondent.

ROSS, Circuit Judge. The petitioner was convicted in the justice's court of Marin county, Cal., of a violation of the provisions of an ordinance enacted by the board of supervisors of that county declaring in its seventh section that "every person who, in the county of Marin, shall use any kind of a repeating shotgun, or any kind of a magazine shotgun, for the purpose of killing or destroying any kind of wild duck, geese, quail, partridge, doves, or any other birds, shall be guilty of a misdemeanor"; and by its eighth section, prescribing

that "any person violating any provision of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for not less than ten days or more than thirty days, or pay a fine of not less than twenty dollars or more than two hundred dollars, or by both such fine and imprisonment. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine." The complaint upon which the petitioner was prosecuted, and on which his conviction rests, charges, in substance, that on the 12th day of January, 1900, he did in the county of Marin, state of California, use a repeating shotgun for the purpose of killing quail and blue jays, and did on that day and in that county shoot and kill with a repeating shotgun one quail and one blue jay, contrary to the provisions of the seventh section of the ordinance mentioned. A judgment of imprisonment having followed the conviction, the petitioner seeks his discharge from custody under that judgment by means of a writ of habeas corpus, on the ground that the judgment and his imprisonment thereunder are in contravention of provisions of the constitution of the United States, and therefore void.

By the fourteenth amendment of that constitution, it is, among other things, declared that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The broad question in the case is whether all or either of these provisions have or has been violated by the judgment under which the petitioner is held in custody. "Life," said Mr. Justice Swayne in the Slaughter-House Cases, 16 Wall. 127, 21 L. Ed. 425, "is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property." This was said in a dissenting opinion, but it is none the less true. The evidence given on the hearing of the application of the petitioner shows that the repeating shotgun with which the petitioner killed the quail and blue jay he was convicted of killing was his own gun, manufactured by a concern whose annual output of such guns aggregates several million dollars in value; that the petitioner killed the quail and blue jay on his own land; and that the gun in question with which he did the killing was not only not more, but in fact less, destructive than the double-barreled automatic ejector shotgun, not prohibited by the Marin county ordinance. Guns are made, not for ornament, but to be used; and their chief, if not their only, value is in their use. "The constitutional guaranty," said the court of appeals of New York in *Re Jacobs*, 98 N. Y.

105, "that no person shall be deprived of property without due process of law, may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived, and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property." See, also, *Pumpelly v. Green Bay Co.*, 13 Wall. 177, 20 L. Ed. 557; *Wynehamer v. People*, 13 N. Y. 398; *People v. Otis*, 90 N. Y. 48. To deprive the petitioner of the use of the gun in question is therefore to deprive him of his property. Not only so, but, if Marin county may lawfully prohibit the use of such a gun, every other county within the state of California may, as a matter of course, do likewise, and so may every other state and territory within the United States; thus practically destroying the manufacture of this class of guns for the shooting of game within the United States. Of course, this right of property, as well as the higher right of liberty of action on the part of the owner,—the rights here involved of freely using one's own property,—is subject to the lawful exercise of the police power,—a power which, as said by the court in the *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. Ed. 394, "is, and must be from its very nature, incapable of any very exact definition or limitation." It is not denied on the part of the petitioner, and cannot be successfully denied, that private property and private rights must always yield where the public safety, public health, or public morals demand the sacrifice. Thus, if a great conflagration is spreading towards one's house, and the public exigency demands it, the individual's home may be torn down or blown up, if such drastic measure be necessary to stay the fire. So may gambling and dance houses and such devices and other things as have direct relation to public morals be absolutely inhibited and prohibited. On the same principle,—that of danger to the public,—it is held that the sale of intoxicating liquor by retail may be entirely prohibited, and the value of breweries destroyed, by the laws prohibiting the manufacture of malt liquors. *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Mugler v. Kansas*, 123 U. S. 669, 8 Sup. Ct. 273, 31 L. Ed. 205. But surely, in a case like the one at bar, where there is no question of the public safety, public health, or public morals, and where the prohibited act is in no respect *malum in se*, the absolute prohibition of the use of one's own property on his own land cannot be held to be a reasonable exercise of the police power, when regulation will plainly attain the end desired by the legislation in question. In the present instance, what was the end sought? Manifestly, only the prevention of the taking or killing by one person of more than 25 quail, partridge, or grouse in any one day; for section 3 of the ordinance provides:

"Every person who in the county of Marin shall take, kill or destroy more than twenty-five quail, partridge or grouse in one day, and every person who in the county of Marin shall have in his possession in any one day more than twenty-five quail, partridge, or grouse, shall be guilty of a misdemeanor."

That end is just as effectively accomplished without the obnoxious section as with it. It is wholly immaterial to that object whether the sportsman or hunter use a repeating or magazine gun, or a double or single barreled gun. When the limit is reached he has to stop shooting or incur the penalty prescribed. And the opportunity of detection is just as great in the one case as in the other. No valid reason is therefore perceived, and none has been suggested by counsel, why the owner of a repeating or magazine shotgun should be prohibited from using it, and the owner of the equally, if not more effective, double-barreled automatic ejector shotgun be free to use it, in killing the 25 quail, partridge, or grouse permitted to be killed by any person in one day. The equal protection of the laws, to which every person is, by the provision of the constitution of the United States above quoted, declared entitled, would indeed be a vain thing if such discriminatory legislation was sustained by the courts. If section 7 of the ordinance in question is valid, no reason is perceived why the process of elimination may not be extended by next prohibiting the use of the double-barreled automatic ejector shotgun, next all but muzzle-loading guns, and so on, until the popgun only is permitted to be used upon wild duck, geese, quail, partridge, grouse, doves, or other birds in Marin county. Laws enacted in the exercise of the police power, whether by a municipal corporation acting in pursuance of the laws of a state, or by a state itself, must be reasonable, and are always subject to the provisions of both the federal and state constitutions, and they are always subject to judicial scrutiny. *Yick Wo v. Hopkins*, 118 U. S. 372, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Forster v. Scott*, 136 N. Y. 577, 584, 32 N. E. 976, 18 L. R. A. 543; *Toledo, W. & W. R. Co. v. City of Jacksonville*, 67 Ill. 37; *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727. "Laws passed in the exercise of it [the police power]," said the court of appeals of New York in *Re Jacobs*, *supra*, "must tend towards the preservation of the lives, health, morals, or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend, in some plain and appreciable manner, towards the accomplishment of the objects for which the legislature may use this power." In a very recent case the supreme court of California held that "a county ordinance making it a misdemeanor for one to transport, or offer to transport, from the county, game lawfully taken therein, is an unreasonable interference with the right of private property, and therefore void." *Ex parte Knapp* (Cal.) 59 Pac. 315. Enough has been said, I think, to show that the section of the ordinance under which the petitioner was convicted and is imprisoned is unconstitutional and void. But the further the matter is looked into, the more indefensible does the judgment of conviction appear. As has been seen, the charge against the petitioner upon which he was convicted, and for which he was sentenced to imprisonment, was the killing of one quail and one blue jay. Now, neither by the ordinance of Marin county, nor by any statute of the state of California, are blue jays in any way protected, except by those provisions

of the ordinance in question which declare it a misdemeanor for any person to use a repeating or magazine shotgun "for the purpose of killing or destroying any kind of wild duck, geese, quail, partridge, grouse, doves, or any other birds." This ordinance does not assume to protect blue jays in any other way, and I think it would puzzle any one to give a sensible reason why it should; for they are well known pests, and are unfit for human food, and are therefore not within the purview of the police power in respect to game, the source of which, said the supreme court in *Geer v. Connecticut*, 161 U. S. 534, 16 Sup. Ct. 606, 40 L. Ed. 799, "flows from the duty of the state to preserve for its people a valuable food supply." Yet a blue jay was one of the two birds the petitioner was charged with, and convicted of, killing, and for which he is imprisoned. And that blue jay the ordinance in question permitted the petitioner, or any other person, to kill with a rock, rifle, cannon, double or single barreled shotgun, or with any other thing than a repeating or magazine shotgun. Such discriminatory legislation, without any basis of sound reason to rest upon, is, in my opinion, so plainly void as to require no further comment.

An order will be entered discharging the prisoner from custody.

N. K. FAIRBANK CO. v. LUCKEL, KING & CAKE SOAP CO.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 504.

1. TRADE-NAMES—INFRINGEMENT—INTENT.

It is not essential to the right of a complainant to an injunction against the infringement of a trade-name that absolute fraud or willful intent to infringe be shown, but it will be presumed that the defendant intended the natural consequences of its acts; and if it puts its goods on the market under a name so nearly like complainant's as to enable dealers to palm them off on customers as complainant's, and at a price which makes it an object to do so, it may be held responsible for the consequent injury to complainant's business.

2. SAME—USE OF DIFFERENT LABELS OR PACKAGES.

It is not a defense to a suit to enjoin infringement of a trade-name by the adoption of a name so similar as to deceive purchasers, who are acquainted with complainant's article only by name and through complainant's advertisements, that defendant uses distinctive labels or forms of package.

3. SAME.

A trade-name differs from a trade-mark in that it appeals to the ear more than to the eye, and hence the character of the label or package used by an imitator is of no great force in determining the question of infringement.

4. SAME—SIMILARITY OF NAMES—"GOLD DUST" AND "GOLD DROP."

The name "Gold Drop," used by defendant to designate a washing powder, is sufficiently similar in sound to the name "Gold Dust," previously adopted by complainant for a similar article, and by which name its product had been for several years extensively advertised, to deceive ordinary purchasers not familiar with the style of label or package used by complainant, and its use constitutes an infringement, although defendant uses a different style of label and package, especially where defendant sells its product, which retails at the same price, at a lower price

to dealers, and thus makes it an object for them to palm it off on purchasers asking for complainant's whenever possible, which it is shown they in fact have done.

Appeal from the Circuit Court of the United States for the District of Oregon.

Fenton, Bronaugh & Muir (Rowland Cox, of counsel), for appellant. Cake & Cake, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity. It was instituted to restrain the infringement of the trade-mark or trade-name "Gold Dust," used to designate a washing powder manufactured and sold on the market by appellant. The alleged infringement consists of the use of the name "Gold Drop" to designate a washing powder manufactured and sold by appellee. The circuit court held that appellant was not entitled to the relief prayed for, dismissed its bill, and rendered a decree in favor of respondent (88 Fed. 694), from which the present appeal is taken.

The bill, after alleging complainant's use, appropriation, and right to the trade-mark or trade-name of "Gold Dust" to identify its washing or soap powder since the year 1887, avers that respondent, since the 1st day of July, 1897, with full knowledge of complainant's rights in the premises, "wholly without your orator's consent, intending to injure and defraud your orator, and to divert to itself the business and profits connected with the sale of 'Gold Dust' washing powder which of right belong to your orator, has knowingly and fraudulently made use, in connection with the manufacture and sale of a washing or soap powder by said defendant manufactured, of the words or designation 'Gold Drop,' and has caused washing or soap powder by it, the said defendant, manufactured, to be offered and sold as 'Gold Dust' washing powder, and as and for the washing powder of your orator's manufacture, and continues so to do, notwithstanding your orator's protest in the premises, in violation of your orator's rights aforesaid, and contrary to equity, to your orator's great loss and injury actually sustained"; that the acts of the respondent are unlawful, and "tend to cause the washing or soap powder of the defendant, put up as aforesaid, to be mistaken for your orator's 'Gold Dust' washing powder, and to be substituted therefor by unscrupulous persons, and because, all and singular, they enable and promote an unfair competition, and a false and fraudulent sale of the defendant's washing powder, and as and for your orator's 'Gold Dust' washing powder, to your orator's great loss and injury," and "constitutes a fraudulent, inequitable, and unfair competition in business, and a trespass upon, and violation of, the good will of your orator's business, connected with the manufacture and sale of its 'Gold Dust' washing powder, against which your orator is equitably entitled to be protected, and which fraudulent, inequitable, and unfair competition and trespass upon your orator's good will it prays may be prevented and restrained according to the course of equity," etc. The answer denies having committed any

wrongful, illegal, or fraudulent acts, or any acts, in violation of complainant's rights in the premises, and for a separate answer alleges:

"That on or about July, 1894, defendant began to manufacture a certain washing compound or soap powder, and that on or about said time defendant offered said soap powder for sale in the market, and has continued so to do, without interruption, ever since; that defendant placed upon said package of washing compound aforesaid the name or designation 'Gold Drop,' and wrapped the said package in paper of an entirely different color and character from that of the plaintiff, the general effect of which said wrapper was such that the packages of plaintiff and defendant might easily be distinguished, and in truth the defendant avers that there are no common features whatever between the packages of plaintiff and defendant, but that said packages cannot be mistaken one for another; * * * that said soap powder, the package in which the same was sold, the wrapper thereon, designation 'Gold Drop,' figures, color, and general effect of said package was produced, and said powder sold with said wrapper as aforesaid, without any intention to enter into unfair competition with the plaintiff, or to violate any of the rights of the plaintiff whatever; and the defendant avers that the said name 'Gold Drop' on said package, the color, the lettering, and the general effect of said package, does not in any manner whatever violate any of the rights of the plaintiff, or infringe upon the word or name or designation 'Gold Dust,' nor the package in which said plaintiff puts up its said washing compound or soap powder under the name 'Gold Dust.'"

There is no substantial conflict in the evidence produced at the trial. The questions as to priority of use, and expenditure and popularization of the washing powder under the name of "Gold Dust," by appellant, are undisputed.

Jasper G. Gilkinson, the secretary of the N. K. Fairbank Company, testified that:

"Ever since the introduction of 'Gold Dust,' in the year 1887, the N. K. Fairbank Company has used every possible means to familiarize the public with the words 'Gold Dust,' and to increase its sale. They have advertised extensively in newspapers, have issued hangers, cut-outs, etc., and in every way they have endeavored to draw the attention of the public to the name of the goods. They have expended during the period after its first adoption, in 1887, more than a million of dollars in advertising, and hundreds of thousands of dollars for traveling salesmen."

The testimony shows that respondent at the time it commenced the manufacture of its washing powder "Gold Drop" was well aware of the existence of complainant's "Gold Dust," and that it had been extensively and expensively advertised in Oregon as well as in other states; that in 1897 respondent sent a letter to Rowland Cox, counsel for complainant, which reads as follows:

"Portland, Oregon, Sept. 23, 1897.

"Mr. Rowland Cox, New York, N. Y.—Dear Sir: Replying to your letter of the seventeenth inst., we inclose the face of our label, which we think is sufficient answer, being at once seen to be the most strikingly distinctive washing powder label in the market. We might add that the name commended itself to us from the fact that it is familiar to the people of this great prune-growing region as the name of a popular prune or plum known as the 'Gold Drop Prune,' as will be seen by referring to any Northwest nursery catalogue.

"Very truly yours,

Luckel, King & Cake Soap Co.,

"Chas. W. Cottel, Secretary."

Mr. Luckel, the president of the respondent, in reply to the question, "How did you come to choose the name 'Gold Drop'?" answered as follows:

"Our secretary, Mr. Cottel, had a whole lot of names; that is, we were going to get up a washing powder, and he wrote out from twenty-five to thirty, I should judge, on a small piece of paper,—different names,—and this was one of them; and he preferred a different name, and Mr. King and I thought that this would be the best, on account of it being short,—good for advertising, and easy to remember."

It also appears from the testimony that the packages of the respondent's "Gold Drop" were sold to retail dealers at a less price than the complainant's "Gold Dust," and that both were sold to purchasers at the same price; that at four different stores in Portland two witnesses at different times asked for "Gold Dust" and were given "Gold Drop" without any explanation; and that the bills were in three instances marked as "G. Dust." There was testimony on behalf of respondent to the effect that its "Gold Drop" was sold by it without any fraudulent or other intention to palm off or sell the same upon the reputation acquired for the soap under the name of "Gold Dust," and that respondent took especial pains to avoid any imitation of complainant's labels.

Upon these general facts, without entering into details, we pass to the legal questions involved herein. It is assigned as error that "the court erred in adjudging and decreeing that the name 'Gold Drop' used by the defendant does not infringe upon the trade-mark and trade-name 'Gold Dust' of this complainant, and does not deceive the trade and consumers to the detriment of complainant," and that the court erred in refusing to enter a decree in favor of complainant enjoining respondent from the commission of certain acts as prayed for in the bill of complaint. In many of the decided cases it has been held that the respondent ought not to be held liable for the imposition or fraud of the merchants or shopkeepers or their assistants in palming off upon the innocent public his goods as those of another. As an abstract proposition, this may be conceded to be correct; but it falls far short of being the only view of the case. The controlling question is whether or not the respondent has "knowingly put into the hands of the retail dealer the means of deceiving the ultimate purchasers." *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 23 C. C. A. 554, 77 Fed. 869, 878, and authorities there cited; *New England Awl & Needle Co. v. Marlboro Awl & Needle Co.* (Mass.) 46 N. E. 386; *Von Mumm v. Frash* (C. C.) 56 Fed. 830, 838. The fact that "Gold Drop" was sold to retail dealers for a less price furnished an incentive and inducement to retail dealers to dispose of "Gold Drop" instead of "Gold Dust," as they thereby gained a greater profit for themselves.

The law is well settled that in suits of this character the intention of the respondent in adopting the style of package, or choosing a name for a similar product, is to a certain extent immaterial. It is not essential to the right of complainant to an injunction to show absolute fraud or willful intent on the part of the respondent. Upon familiar principles, it will be presumed that the respondent contemplated the natural consequences of its own acts. If the acts of respondent in the adoption of the name of "Gold Drop" constituted an infringement of the trade-mark or trade-name of the complainant, and it was put on the market in such a manner as to interfere with the legal rights of complainant, to its loss and injury, it would be entitled

to an injunction, irrespective of the question of any testimony as to actual fraud or willful intent. The court must determine the intent from respondent's acts and the results produced thereby. *R. Heinisch & Sons v. Boker* (C. C.) 86 Fed. 766, 769.

It is claimed that the respondent's packages are to the eye unlike complainant's. Admit it. There are many cases where respondent's packages and labels are to the eye so distinctive and unlike the packages of complainant as not to deceive purchasers exercising ordinary care, who are accustomed to the size of the packages and the general characteristics of the labels. But how about the stranger who knows nothing about the packages or of the labels, but has read the advertisement, and remembers the name "Gold Dust"? Is it not fair to assume in a case like this that a decided majority of the purchasers would not ask for a specific size of a package with a certain designated label? Would they not call for the article by name? It must constantly be borne in mind that there are two kinds of trade-marks,—one of peculiar pictures, labels, or symbols; the other in the use of a name. The infringement charged herein is in the adoption by the respondent of both the trade-name and trade-mark. So far as the name "Gold Dust" is concerned, the dissimilarity of the labels, size of packages, and character of symbols can make no essential difference. As was said in *Hier v. Abrahams*, 82 N. Y. 519, 525:

"The trade-mark consisted in the word simply, and the plaintiffs might have printed it on any form of label they might fancy, without losing the protection of the law. The defendants had no right to adopt it by merely putting it on a label of different fashion from that which the plaintiffs had been in the habit of using."

See, also, *Battle v. Finlay* (C. C.) 45 Fed. 796; *N. K. Fairbank Co. v. Central Lard Co.* (C. C.) 64 Fed. 133, 136.

The trade-name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisements of the name were for the purpose of having the intended purchaser ask for "Gold Dust" without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would have no great force. The imitation of the name "Gold Dust," by which the soap or washing powder of complainant was known, would constitute an infringement, because purchasers would be liable to be misled who had no knowledge of the article except the advertised name as being the best soap or washing powder in the market. It is not unusual for a certain specific article advertised extensively, of reputed excellence, to become publicly known and called for by the name which is more readily retained in the memory. This is one of the reasons why respondent selected the name "Gold Drop,"—"on account of its being short; good for advertising, and easy to remember."

Many precautions were taken by respondent to avoid imitating complainant's label. Is it not peculiarly significant that no efforts whatever were made in this direction with reference to the selection of a name totally dissimilar from that of "Gold Dust"? Why was "Gold Drop" selected? There were plenty of other names that were short and easy to remember. Other manufacturers of washing soap had

found no difficulty in this regard; for instance: "Pearline"; "Babbit, 1776," etc. When these facts are considered, is it not reasonably clear that in selecting "Gold Drop," which conveys to the mind so close an imitation of "Gold Dust," there was some intention or design upon the part of respondent to impose "Gold Drop" upon the public as that of "Gold Dust," or, at least, to obtain some advantage or benefit from complainant's advertised trade-name "Gold Dust"? Was not this result accomplished whether so intended or not?

These general views bring us directly to what we conceive to be the controlling question in this case. In the light of the evidence, and of all the surrounding circumstances presented herein, are the names "Gold Dust" and "Gold Drop" so similar in sound as to deceive the unwary or mislead an unsuspecting customer to accept "Gold Drop" for "Gold Dust"? This is the test that has often been applied in cases of this character.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* (C. C.) 32 Fed. 94, 97, Mr. Justice Bradley said:

"Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law."

It may be said that if one stops to reflect upon the names "Gold Dust" and "Gold Drop," and listens to the sound, he will discover that the names are not entirely similar. A layman, as well as a lawyer or a judge, might so decide upon a careful inspection and reading of the names. But in determining that question we must put ourselves in the place of a purchaser of ordinary caution, who asks for a washing powder called "Gold Dust," and from his standpoint determine whether he would be liable to be misled or deceived by the name "Gold Drop." *Glen Cove Mfg. Co. v. Ludeling* (C. C.) 22 Fed. 823; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 23 C. C. A. 554, 77 Fed. 869; *Manufacturing Co. v. Simpson*, 54 Conn. 527, 545, 9 Atl. 395; *Colman v. Crump*, 70 N. Y. 573, 578.

The question whether complainant's trade-name of the words "Gold Dust" has been appropriated by respondent's use of the words "Gold Drop," separate and distinct from the use of symbols and devices adopted by complainant, may be said to be a close one. But, after a careful examination of the numerous authorities cited by the respective counsel upon this subject, we are of opinion that it must be answered in the affirmative. It is true that in many of the cases the alleged infringer dressed the words relied upon with such accessories that made it clear that the name used might be mistaken for the complainant's words, and the courts in such cases have usually placed their conclusions upon such grounds. The following cases shed some light upon the similarity of names that have been held to be infringements:

In *Glen Cove Mfg. Co. v. Ludeling* (C. C.) 22 Fed. 823, 825, the contesting parties were both engaged in the manufacture of corn flour for food. Complainant adopted and used the word "Maizena"; respondents, "Maizharina." The court held that the defendant's word

and picture, as applied by him to the packages of his corn flour, in connection with the similarity of his packages in form, size, color, printing, and other characteristics to the complainant's, were well calculated to lead purchasers to confuse the identity of the products of the respective parties. In the course of his opinion, Wallace, J., said:

"If the decision were to depend solely upon the question of a substantial similarity in the sonorous properties between the word used by complainant and that used by the defendant, decisions in analogous cases furnish sufficient authority for granting an injunction. Thus, the word 'Cocaine' has been held to be an infringement of a trade-mark in the word 'Cocaine' (Burnett v. Phalon, *42 N. Y. 594); 'Bovina,' of the word 'Boviline' (Lockwood v. Bostwick, 2 Daly, 521); the word 'Appolinis,' of the word 'Appolinaris' (Actien-Gesellschaft Appolinaris-Brunnen v. Somborn, 14 Blatchf. 380, Fed. Cas. No. 496); 'Hostetter,' of the word 'Hostetter' (Hostetter v. Vonwinkle, 1 Dill. 329, Fed. Cas. No. 6,714); 'Leopoldsalt,' of the word 'Leopoldshall' (Radde v. Norman, L. R. 14 Eq. 349). The rule is well settled that to enable the proprietor of a trade-mark to relief against an illegal appropriation it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; it is sufficient if there is such a degree of resemblance that ordinary purchasers, using ordinary caution, are likely to be deceived."

In *Estes v. Leslie* (C. C.) 29 Fed. 91, Shipman, J., said:

"The name 'Chatter-Book,' as printed upon the cover of the defendant's books, is, in my opinion, an imitation of the name 'Chatter-Box,' which by association, when used upon books of a juvenile character, points 'distinctively to the origin or ownership' of the books to which it is applied; and the use by the defendants of the name 'Chatter-Book' upon the books which are represented by the exhibits in the case, the same being books of a juvenile character, of the general appearance, style, and manner of cover of complainant's books, should be enjoined pendente lite."

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, supra, Mr. Justice Bradley said:

"The name 'Cellonite Manufacturing Company' is sufficiently similar to that of the 'Celluloid Manufacturing Company' to amount to an infringement of the complainant's trade-name. The distinguishing words in both names are rather unusual ones, but supposed to have the same sense. Their general similarity, added to the identity of the other parts of the names, makes a whole which is calculated to mislead."

In *N. K. Fairbank Co. v. Central Lard Co.* (C. C.) 64 Fed. 133, 135, it was held "that the word 'Cottoleo' is sufficiently similar to 'Cottolene' to infringe it."

The conclusions we have reached upon this point are not in opposition to the views expressed by the court in *Coats v. Thread Co.*, 149 U. S. 562, 565, 13 Sup. Ct. 966, 37 L. Ed. 847, *Sterling Remedy Co. v. Eureka Chemical & Mfg. Co.* (C. C.) 70 Fed. 704, affirmed upon appeal in 25 C. C. A. 314, 80 Fed. 105, and *Proctor & Gamble Co. v. Globe Refining Co.*, 34 C. C. A. 405, 92 Fed. 357, upon which respondent chiefly relies. These cases were decided on the dissimilarity of the labels used by the respective parties and other clearly-distinguishing features of the signs, symbols, and colors used thereon. The first case related to spool thread of "six cords." The court said:

"The controversy between the two parties * * * is reduced to the single question whether, comparing the two designs upon the main or upper end of the spool, there is such resemblance as to indicate an intent on the part of defendants to put off their thread upon the public as that of the plaintiffs', and thus to trade upon their reputation."

The second case related to certain medicinal tablets for the cure of the tobacco habit. The complainant used the trade mark "No-To-Bac" and the defendant "Baco-Curo." The court with reference to these names said it was not "seriously claimed that they are the same, or so similar that one could well be mistaken for the other." The third was a soap case. The complainant's trade-mark was impressed upon a wrapper or label used for covering cakes of washing soap known to the trade as "Everyday Soap"; on the wrapper or label of defendant's cakes the words were "Everybody's Soap." The case was disposed of by the distinguishing features of the respective labels. The court said: "The appellant relies not so much upon the infringement of its trade-mark as upon its complaint that the use by the defendant of its label is an unfair competition in trade." That case differs from the case in hand in this: that there the appeal was taken from an order denying a preliminary injunction, and the question to be determined was whether the court below had improvidently exercised its discretion, "and not whether, upon the final hearing, upon full view of all the facts in the case, this court would, upon the evidence before it, reach the same conclusion as that of the court below." Here we have the whole case before us for a decision upon its merits, and upon the whole case we are of opinion that the court erred in dismissing the bill and refusing to grant an injunction. The decree of the circuit court is reversed, and cause remanded, with directions to enter a decree in favor of appellant in accordance with the views expressed in this opinion.

CLINTON E. WORDEN & CO. v. CALIFORNIA FIG SYRUP CO.

(Circuit Court of Appeals, Ninth Circuit. May 21, 1900.)

No. 564.

1. TRADE-NAMES—RIGHT TO PROTECTION—USE FOR PURPOSE OF DECEPTION.

The name "Syrup of Figs," used upon a medicinal preparation to be taken in small doses, and when accompanied by descriptive matter printed upon the package plainly indicating that the medicinal properties claimed for the remedy are not derived from figs, but from "the laxative principles of plants known to act most beneficially," is not so calculated to mislead and deceive purchasers as to deprive the manufacturer of the right to protection in the exclusive use of such name as a fanciful designation of its product; it being shown that such product in fact contains so little fig juice as to have no appreciable effect, either medicinally or otherwise, and that no such preparation as "syrup of figs" is known to the drug trade.

2. APPEAL—REVIEW—NECESSITY OF ASSIGNMENT OF ERROR.

A ruling on a demurrer to a bill on the ground of multifariousness cannot be reviewed on appeal when no assignment of error is made thereon; the defect, if it exists, being one which may be waived.

3. SAME.

A provision of a decree in a suit for unfair competition requiring defendant to account for profits, although the bill contained no allegation that defendant had realized profits, is not so plainly erroneous as to require consideration by an appellate court, in the absence of an assignment of error thereon.

Ross, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of California.

The appeal in this case is from an interlocutory decree in a trade-mark case ordering an injunction, and accounting of profits. The bill alleges that in 1879 Richard E. Queen invented a medical remedy for constipation, consisting of a solution of plants known to be beneficial to the human system, and that said preparation became popular and found a ready sale; that the said Queen soon thereafter sold his invention to the complainant, the California Fig Syrup Company; the appellee herein; that this medical compound has always been marked and named "Syrup of Figs," and has been advertised under that name, and that the complainant and its predecessors in interest were the first to designate a laxative preparation by the name "Syrup of Figs," and the first to pack and dress or mark a liquid laxative preparation or medicine in an oblong, rectangular box, with a statement of its virtues printed thereon, and having on the front thereof a representation of a branch of a fig tree bearing fruit and leaves, surrounded by the words "Fig Syrup Company," or "California Fig Syrup Company," and below thereof the words "Syrup of Figs"; that the complainant has spent large sums of money in advertising said preparation under the name of "Syrup of Figs" or "Fig Syrup," and large quantities thereof have been sold, and that the business is one of great profit; that by virtue of the premises the complainant has acquired the exclusive right to the name "Syrup of Figs" or "Fig Syrup," as applied to a liquid laxative medical preparation. The bill proceeds to charge that the appellant, Clinton E. Worden & Co., a corporation, has manufactured a compound in imitation of the complainant's Syrup of Figs, and called it by the name "Syrup of Figs," and has put up the same in bottles and packages in imitation of the complainant's bottles and packages, and that the other defendants are druggists doing business in San Francisco, and are engaged in selling the medicine so put up by the appellant. The defendants demurred to the bill on the ground that it was multifarious, and for want of equity, for the reason that the words "Syrup of Figs" were necessarily either descriptive or deceptive, and in neither event could they form the subject-matter of a lawful trade-mark. The demurrer was overruled, and the defendants answered, admitting that the appellant had manufactured and the other defendants had sold a liquid laxative under the name of "Syrup of Figs"; but they denied that the complainant was entitled to relief in equity, for the reason that it had fraudulently represented the nature of its preparation, and they alleged that in fact said preparation never did contain any syrup of figs or any juice of figs, and that the name "Syrup of Figs" or "Fig Syrup" was designed and adopted with the intent to deceive the public and perpetrate a fraud upon it, by inducing it to believe that the preparation contained figs, and that by reason thereof it possessed laxative properties, and that the public has thereby been induced to believe said statements concerning the complainant's medicine, whereas in fact the said preparation consists of the well-known laxative, senna, combined with certain aromatic substances, added for the purpose of giving it a pleasant taste and counteracting the griping effect of senna. Elaborate proofs were taken upon the issues so raised, and upon the hearing the court found that the complainant was entitled to an injunction on the ground of unfair competition in trade, for the reason that, in the opinion of the court, the form and appearance of the defendant's bottles, labels, and packages so nearly resembled those of the complainant as to constitute unfair competition in trade; and in the decree the court enjoined the defendants from using or selling or offering for sale a liquid laxative medicine under the name of "Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation of the name "Syrup of Figs." 95 Fed. 132.

Purcell Rowe and John H. Miller, for appellant.
Warren Olney, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question presented in this case is whether the appellee has so fraudulently represented to the public the nature of the preparation which he has sold under the name of "Syrup of Figs" that a court of equity may not protect him in the use of that name. We are referred to two decisions of the circuit courts of appeals which it is said answer this question in the affirmative. *California Fig Syrup Co. v. Frederick Stearns & Co.*, 20 C. C. A. 22, 73 Fed. 812, 33 L. R. A. 56, and *Same v. Putnam*, 16 C. C. A. 376, 69 Fed. 740. It is said, moreover, that the decision of this court in the case of *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 4 C. C. A. 264, 54 Fed. 175, holding the appellee herein guiltless of any attempt to impose upon or defraud the public, was rendered upon a proposition that was not involved in the case, and that therefore the remarks of this court upon that subject are obiter, and are not authority upon the question which is now under consideration. The two decisions so cited from the circuit court of appeals for the First and the Sixth circuits were based upon facts which differ in material respects from the facts upon which the decree was rendered in the case at bar. In those cases it was shown that the appellee's fig syrup was offered to the public under the representation that it contained the laxative and nutritious juice of the figs of California, and the preparation was designated "The California Liquid Fruit Remedy," whereas in fact it was shown that there never had been in the preparation more than one-tenth of 1 per cent. of the juice of figs,—a quantity so small as to have no perceptible effect either medicinally or by way of flavor. The record in the present case shows that, after the decisions in those cases were rendered, the appellee made material alterations in the representations which were printed on the cartons or boxes inclosing its remedy, and in its new label eliminated the representations which had controlled decision in the cases referred to, and that in lieu thereof it set forth the following representations:

"This excellent remedy presents in the most acceptable form the medicinally laxative principles of plants known to act most beneficially, to cleanse the system effectually, to permanently overcome habitual constipation and the many ills dependent on it, etc. The juice of figs in the combination is to promote the pleasant taste."

It is by these representations so offered to the public that the rights of the appellee in the present case must be measured. It is urged that there still remains the false representation which is suggested by the name of the preparation which is thus offered for sale. It is said that the name "Syrup of Figs" is a false name; that it declares to the public that the preparation is composed of a liquid decoction of figs; that, therefore, it is calculated to deceive the public. It is argued that, if the name does in fact properly designate the preparation, it is not susceptible of appropriation as a trademark, and that, if it does not in fact properly designate the preparation, it is deceptive, and therefore not entitled to protection in a court of equity. The first horn of this dilemma so presented may be disregarded. The appellee's medicinal preparation is not a syrup of

figs. It is not made from figs, and the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect, either in promoting the pleasant taste or otherwise. It is shown, also, that there is known to the drug trade no such preparation as a syrup of figs, and that appellee's grantor was the first to use the name. We do not think the name "Syrup of Figs," as applied to the appellee's preparation, is in itself calculated to mislead or deceive the public to any material extent. Any one who knows enough to take medicine when he is ill must know that a liquid medicine to be taken in small doses as a laxative would be worthless for the purpose intended, if it consisted of nothing more than a syrup or decoction of figs. There is in the form in which the medicine is presented, the purpose for which it is used, and the size of the dose which is prescribed, sufficient to charge him with notice that the medicine contains something more than a preparation of figs. And if, indeed, he be so uninformed and ignorant that the name "Syrup of Figs" alone conveys to him the impression that the compound is made of figs, there may be found in the carton a distinct intimation to the contrary. It is there declared that the "remedy presents in the most acceptable form the medicinally laxative principles of plants known to act beneficially," and that the juice of the figs in the combination is only to promote the pleasant taste. As the name "Syrup of Figs" is so used by the complainant, it is a fanciful name only. The equities of the case are not affected either for or against the appellee by the use of the very small quantity of figs which enter into the preparation of its medicine. *Centaur Co. v. Robinson* (C. C.) 91 Fed. 889; *Von Mumm v. Frash* (C. C.) 56 Fed. 830; *Stone Co. v. Wallace* (C. C.) 52 Fed. 431; *Stuart v. F. G. Stewart Co.*, 33 C. C. A. 480, 91 Fed. 243; *Société Anonyme de la Distillerie de la Liqueur Benedictine de L'Abbaye de Fecamp v. West Distilling Co.* (C. C.) 43 Fed. 416.

It is contended that there was reversible error in the ruling of the court upon the question of the multifariousness of the bill. It is said that the bill was multifarious for the reason that it failed to charge that there was concert of action between the various defendants who sold the fig syrup which was manufactured by Clinton E. Worden & Co., and that in the absence of such an allegation the defendants could not be joined in a single suit. If the bill was indeed multifarious, it was a defect which could be waived by the defendants. We think they did so waive it by their failure to include in their assignments of error the ruling of the court upon that question. It is contended further that the portion of the decree which awards an accounting is erroneous, for the reason that, in a suit on a common-law trade-mark, the complainant is not entitled to recover the defendants' profits, but only his own damages, and for the further reason that in the present case the bill contains no allegation that the defendants realized any profits. The action of the court in so decreeing an accounting of the profits is not assigned as error, and we do not consider it such plain error as to require our consideration in the absence of such assignment. The appellant suggests that the court must have adopted that portion of the decree through inad-

vertence. If such is the case, and the decree is erroneous in that respect, we apprehend that no difficulty would be encountered in obtaining its correction upon application to the circuit court. The decree is affirmed.

ROSS, Circuit Judge, dissents.

ATLAS GLASS CO. v. SIMONDS MFG. CO. et al

(Circuit Court, W. D. Pennsylvania. February 19, 1900.)

1. PATENTS—INFRINGEMENT—GLASS-BOTTLE MOLDS.

The Windmill patent, No. 416,389, for a mold for glass bottles, etc., construed, and held infringed by machines known as the "Powers Machines," for mechanically pressing and blowing glass articles.

2. SAME—MACHINES FOR MOLDING AND BLOWING BOTTLES.

The Rylands patent, No. 416,376, for machinery for the manufacture of glass bottles, which consists of a rotary table to facilitate the use of molds of the Windmill type, held infringed by the Powers machine as to claim 11, and not infringed as to claim 1.

3. SAME—TERM—LIMITATION BY PRIOR FOREIGN PATENT.

To constitute a "foreign patent," within the meaning of Rev. St. § 4887, which, under such section, will limit the term of a subsequent American patent, it is not essential that the foreign grant shall be the equivalent of a patent granted by the United States, either as to the length of term or the breadth of the exclusive rights secured to the grantee, but it is sufficient if exclusive rights are granted for a definite term.

4. SAME.

Prior to the enactment of patent legislation in Denmark, in 1894, monopolies in inventions in that country were secured by royal letters patent, granted by grace of the king, through the ministry of the interior, on petition therefor; and such patents gave to the grantee a monopoly to "make and allow to make" the thing patented, for a stated term, on condition that he carried out his invention within a year and continued to employ it. Held, that such a grant was in present, and the condition a condition subsequent, and that it was a "foreign patent," within the meaning of Rev. St. § 4887, whose term limited that of a subsequent patent granted by the United States for the same invention.

In Equity. Suit for infringement of patents. On final hearing.

William L. Pierce, for complainant.

James Negley Cooke and James I. Kay, for defendants.

BUFFINGTON, District Judge. This bill was filed by the Atlas Glass Company, owner of the four patents hereinafter specified, against the Simonds Manufacturing Company, John J. Powers, et al., for alleged infringement thereof by the manufacture and sale of certain machines for mechanically pressing and blowing glass, known as the "Powers Machines." Pending the suit the two patents granted to Blue were withdrawn, and the charge of infringement limited to claims 3 to 7, inclusive, of patent No. 416,389, granted December 3, 1889, to James Richard Windmill, assignor to Dan Rylands, for a mold for glass bottles, etc., and claims 1 and 11 of patent No. 416,376, granted December 3, 1889, to Dan Rylands, for machinery for the manufacture of glass bottles. The defenses thereto are noninfringement, invalidity of the patents, and that by reason of the expiration

of two prior Danish patents both these patents had lapsed before the bringing of this suit. During the pendency of this bill the Swayzee Glass Company of Indiana, the S. M. Bassett Glass Company, and the Gilchrist Jar Company of New Jersey, desiring to purchase and remove certain machines from this district, were, on their several petitions, made defendants. In the case of U. S. Glass Co. v. Atlas Glass Co. (C. C.) 88 Fed. 493, this court had before it for consideration on the charge of infringement what is known as the "Atlas Glass Machine." The patents under which it was built were not involved in that issue, but the mechanical and novel features of the machine were fully considered and there discussed. From the opinion of the court, the relation of that machine to the prior art will be seen. In a general way, it may be said to be a co-operative device, in which Blue, the patentee, has, in addition to and in conjoint action with his own devices, embodied the molds of Windmill and the revolving table of Rylands. The result has been the production of a machine which was revolutionary in character in the art to which it belongs. It was the first means devised by which bulged glass articles were successfully pressed and blown mechanically. It produced a new article in commerce,—a machine-made, bulged-glass vessel. It largely increased the capacity of factories over the old hand and lung process. The Windmill patent is the foundation on which this advance is built. The device is fully set forth in the patent:

"The apparatus consists, essentially, of a sliding mold, in which the pressing of the glass article is effected, and a second or outer mold surrounding the sliding mold, in which second mold the pressed article is blown, and the required form given to it."

The sliding press mold is not hinged, but "consists of a cylinder having a capacity or mold of the required shape made in it; the said sliding mold working through an opening in the base plate of the apparatus." The blow mold is thus described:

"In the base of the apparatus the blowing mold is supported; the said mold being divided vertically into two halves, hinged together at the back; the said halves, when closed, being held together by a catch."

At the top of the blow mold is a neck mold, in which the neck of the bottle is formed and retained during the entire operation. The specification states:

"The top of the blowing mold is provided with a neck or contraction in which the neck of the glass article being made is formed. * * * The said blowing mold, b, is furnished at top with the neck or contraction, b², in which the neck of the glass jar or bottle is formed."

In operation, this sliding press mold is "first raised into the outer blow mold. * * * The halves of the blowing mold are next closed and fastened together." The glass is then charged into the press mold, and by pressing a plunger therein the melted glass is pressed into the form of the mold; a portion being also forced into the neck-ring section of the outer or blow mold. The plunger is then withdrawn, and the press mold dropped through the base plate. This leaves the press blank held in situ by the neck-ring section of the blow mold. The open bottom of the blow mold, through which

the press mold has sunk, is then closed by a slide, and the press blank blown to shape in the blow mold.

A study of the prior art shows that Windmill first disclosed in this patent three things: First, a combined co-operative compound press and blow mold; second, a sliding press mold; and, third, means for successfully pressing and blowing bulging glass articles in situ and without manipulation. The mold type here shown was neither the press mold of the old art, the blow mold of such art, nor an aggregation of the two. The press mold is a solid piece, as compared with the hinged structure of the old art. By its fixed concentric relation to the neck ring, and its sliding capacity, it is fitted to present the charge to the plunger in the place it remains during the entire operation, and, on withdrawing, leaves the press blank in a place and condition to be subjected to blow action. So, too, the blow mold, by its fixed concentric relation to the neck ring, is functionally adjusted to envelope the press blank and subject it to blowing action in situ. And the neck ring, by its fixed concentric relation to both press and blow mold, forms a new co-operative device and connecting link in the art. Now, while the patent drawings show the blow mold and the neck ring are integral, yet it must be noted that the essential functional relation between them is not that they are integral, but that they are fixedly concentric. When they are integral, they must, ex necessitate, be concentric, and so fulfill the vital functional purposes of the device; but it is also clear that if they are cut in horizontal section, but still remain fixedly concentric, the necessary functional capacity still exists. The blow mold then being composed of two sections, each with separate, individual functions, to wit, the one pressing the neck, the other blowing the body, it is clear the lower or blowing section has no functional part or capacity in forming the press blank or pressing the neck. The specification discloses no operation or part sustained by the blow-mold section during the pressing, and, from observation, it is clear none could be performed, save conservation of heat, and serving as a point of engagement, through its neck-ring section, to hold the press mold in alignment. So understood,—and we think this is the plain teaching of the patent,—it is clear to us that, while the Powers machine varies the form, it still employs the vital characteristic features, of the Windmill device. It uses substantially the same means to perform the same work. In Powers' mold we find the same lower or blow-mold section, and the same upper or neck one. They are not integral, but cut in horizontal section. But they bear a fixed concentric relation to each other, just as they do in Windmill; and, as a result of such fixed relation, they co-operate and perform the same blowing operation in precisely the same way as in the Windmill device. The press mold of Powers is of the solid, unhinged type first shown by Windmill. It is a sliding one, and has the fixed concentric relation to the neck ring. In its rise into engagement with the press ring, in its position during pressing, and in its receding and leaving the press blank in situ and in the grip of the neck ring, its movements and their results are identical with those of Windmill. The only difference is that the size of the

press mold is such as to prevent the blow mold from enveloping it. But, as such increase of thickness would conserve heat, it is obvious that any results in that line obtained by the enveloping blow mold of Windmill would thus be obtained. The absence of the blow mold also prevents charging before the press mold is raised. With these two incidental and nonfunctional differences of construction, we are of opinion the mold of Powers is substantially the same as Windmill, and that it accomplishes the same result in substantially the same method, and by the use of substantially the same means. We are therefore of opinion infringement has been made out.

The patent of Rylands concerns the use of a series of molds of the Windmill type on a rotary table. Thereby the output can be very materially increased. Rylands' device shows a circular table permitting rotary action around a central pillar, a series of compound molds, a pressing plunger, and a blowpipe. The molds shown are of the general type of Windmill, and have a sliding press mold, a neck ring and blow mold, all of which are concentric, and the neck ring or mold holds the glass in situ during the operation. The table carries several of these molds, each of which, co-acting with a plunger and a blowpipe, separately produces a wholly machine-made, bulged-glass article at each revolution. Practically, the only element of skill on the part of operatives was determining the quantity of glass charged into the press mold. We agree with the statement of complainant's expert, who, in describing the Rylands' device, said:

"In short, the table may be considered as a mechanical link which united the press mold, the blow mold, the pressing plunger, and the blowpipe. It mechanically brought all these parts into co-relation, whereby each performed its separate and individual function to produce a completed article, and without changing the initial position of the blank."

It is not here necessary to enter into a description of the specific means used by Rylands; for infringement of but two claims is charged, and these involve but few elements. Claim 1 is as follows:

"In a bottle-making apparatus, the table, 10, capable of intermittent rotary movement, and carrying the sectional mold, 11, successively into the charging, pressing, and blowing positions, in the manner and for the purposes described."

It will be noted the table of the claim is one "capable of intermittent rotary action," and is one of carrying the section mold, 11, successively into the "charging, pressing, and blowing position." The rotary action is intermittent. There are stops, positions, stations, as contrasted with continuous movement. These stops or stations are defined, we think, as the charging, pressing, and blowing positions, respectively. It is in this way alone we give effect to the terms employed. The limitation of intermittent in connection with the term "carrying the mold successively into the charging," etc., "positions," implies that such positions are the successive stops which make the rotary movement intermittent. And, indeed, such carrying forward of the mold into the charging, pressing, and blowing positions successively, and a stop at each such station for the purpose of carrying, pressing, and blowing, are shown in the device, and are essential to its use. In the Powers table we find a different action in these particulars. While the table has an intermittent rotary,

movement, yet it does not carry its mold into the pressing position at all. In point of fact, its single press mold is stationary, and is not carried by the table, but the neck mold is carried to the press position. Then the press mold is charged, and by means of a lever, wholly independent of the movement of the table, it is carried into the press position, and from thence withdrawn. The press mold not being carried to its charging position by the table, and such action being, from the construction of the table, impossible, it follows that this claim does not cover the respondent's device.

The other claim involved (the eleventh) is for "the combination, with a bottle mold, of the pressing plunger, 9, carried by ram, 4, and the rotating table, 10." As already stated, we are of opinion the bottle mold of this combination is of the same general type as the Windmill, and also of the complainant. The pressing plungers of Rylands and Powers are substantially the same. It is true, Powers uses a double-headed one, but this difference is mechanical, and in no sense functional. The mechanical equivalent of ram, 4, is found in the sliding carriage of the Powers mechanism; and the rotating table, 10, of the claim, which is defined in the specification as "a table capable of intermittent rotary movement around the central pillar, 1," is used by Powers. We are therefore of opinion infringement is shown.

The two patents considered above were, as we have seen, granted to Rylands on December 3, 1889. It now appears that prior thereto Rylands had, on October 1, 1889, obtained in Denmark an "eneret," or grant of monopoly for making the Windmill mold, and on November 1, 1889, another for making the Rylands table. The term of protection covered by these grants expired prior to the bringing of this suit, and the infringement therein charged. It is alleged that these grants were prior foreign patents, which, under Rev. St. § 4887, limited the term of the subsequent American patents to the seven-years protection granted in Denmark. The question is novel. It seems that prior to 1894, and when these grants were made, there was no legislation in Denmark providing for the grant of patents for inventions. What was termed "eneret," or monopoly, was granted by the grace of the king, by royal letters patent. It was obtained by petition, on payment of fees. The course of procedure is this (stated in 1 Abb. Pat. Laws of All Nations, 159; 4 O. G. 319):

"Inventions are protected by royal letters patent granted through the ministry of the interior, in accordance with rules prescribed by the traditional practice of that department. A person who wishes his invention to enjoy 'eneret,' or monopoly, must address to the ministry of the interior, accompanying his demand by detailed specifications and drawings. The ministry forwards these papers to the Polytechnic School, with a request that the director will report on the applicant's scheme. The director, after consulting, if necessary, the professors of the institute, reports to the ministry whether the alleged invention is new and deserving of protection. He also stated the period for which, in his opinion, the 'eneret,' or patent, should be granted. The ministry always adopts the director's conclusion. It is understood that a patent will be allowed whenever the alleged invention really contains something novel in principle or practice. Generally speaking, the applicant's request is granted. The patent is forfeited (1) if it is shown that a similar invention has been used in Denmark before; or (2) if the patentee does not carry out his invention within the year, and continue to employ it."

An examination of the letters patent in this case shows that the grant, which is simply "to make and allow to make machines," etc., is narrower than the American statutory patent, which (Rev. St. § 4884) confers "the exclusive right to make, use, and vend." It would seem, also, that under the construction given by the courts of Denmark, which grants, any other person was free to import a machine made elsewhere, and use the same, without liability to the grantee of the royal patent. *Wunstrup v. Minister of War and Finance*, High Court of Justice in Copenhagen, Record, p. 653; Testimony as to Danish Law, Eberth, p. 639. It is therefore urged that a grant so narrow and restricted is not a "foreign patent," as provided in section 4887, Rev. St. After much thought and full consideration, we cannot accede to this contention. That congress meant that only such patents of other countries should be regarded as granted the precise protection afforded by an American one is not reasonable. The wide difference in the scope and protection afforded by the patents of various countries, the liberality and encouragement given to inventors by some countries, and the restricted privileges granted in others, must have been in view when congress considered them as a general class, and styled them "foreign patents." There is nothing definite or descriptive, in itself, in the term "patent." As applied to our American inventions, it may be regarded as a grant issued to fulfill the constitutional provision "of securing for limited times to inventors the exclusive rights to their respective discoveries." The length of the term and the breadth of the exclusive rights are subjects of legislative definition. The vital, substantial features of a patent for an invention are the exclusiveness of the right granted and the definiteness of the term. Such protection was given by the letters patent of the king of Denmark. The term is seven years, and the exclusive right is "to make and allow to make." It is quite clear that a United States patent would be none the less a patent, in the ordinary acceptance of that term, if the length of the term were by act of congress shortened to seven years, and the scope of the exclusive right limited to making alone. By parity of reason, it is equally clear that an invention is none the less "patented in a foreign country," and made the subject of an exclusive grant, because the exclusive right granted is simply "to make and allow to make," and the term for but seven years. In constructing the grants in this case, which are "on condition that he [the patentee], within two years, to be reckoned from the date of this, our allowance, here in the kingdom, has brought the invention named to execution, and later combines [continues?] with it," we are of opinion the grant of exclusive privilege was in *præsenti*, and the provision cited was a condition subsequent. But, being subsequent and not precedent, that condition has no effect on the present question. The Danish grant must be deemed to be for seven years, without reference to its possible lapse or forfeiture under the condition subsequent. *Pohl v. Brewing Co.*, 134 U. S. 386, 10 Sup. Ct. 577, 33 L. Ed. 953. Such being the case, this bill must be dismissed, since the Windmill and Rylands patents have lapsed by reason of the expiration of the prior Danish ones. Let a decree be drawn.

SEILER et al. v. FULLER & JOHNSON MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1900.)

No. 689.

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

To authorize the issuance of a preliminary injunction in patent cases, the right must be clear, and the fact of infringement reasonably certain; and a restraining order, pending hearing on a motion for a preliminary injunction, which, by reason of the time when applied for, will have the effect of preventing the making of sales by defendant for a year, cannot properly be granted when infringement is positively denied in the answer, and no proof is offered. The proper practice in such cases, where complainant's rights are considered to be in peril, is to require a bond from defendant to respond in damages for all sales made if infringement shall be shown on final hearing.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

On motion for stay of injunction.

Charles M. Peck, for appellants.

Wm. R. Bagley and R. M. Bashford, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. The appellants, upon the docketing of the appeal, moved the court for an order to stay an injunction granted by the court below pending the hearing of a motion by that court for an injunction pendente lite. On the 14th of April, 1900, the Fuller & Johnson Manufacturing Company filed its bill against the appellants here for infringement of certain patents for improvements in transplanters, whereupon subpoena issued requiring the defendants to show cause on the 7th day of May why an injunction should not issue according to the prayer of the bill. On that day the defendants appeared, filed a sworn answer denying all the equities of the bill, denying the validity of the patent, denying acquiescence in the patent, and denying infringement. Upon the filing of the answer the complainant seems to have waived its motion, and moved the court for an order to show cause on the 12th day of June why an injunction should not issue; manifestly being unprepared at that time to proceed, and clearly it was not entitled at that time, as the pleadings and proofs stood, to an injunction. Application was also made to the court at that time for an injunction or restraining order pending the hearing of the new motion. It also appeared that the season for the sale of such machines would end by the date fixed for the hearing of the motion, so that the practical effect of the restraining order would be to prevent the defendants for a year from making sales of machines, if they in fact infringed. It appears from the record that the patents in question had been considered by Judge Coxe, of the Northern district of New York, and their validity in large part sustained. It also sufficiently appeared, for the purposes of the motion, that the validity of the complainant's patents had been acquiesced in by the public for many years. The fact of infringement, however, did not sufficiently appear to warrant an injunction. It was alleged in the bill in general terms, and flatly denied by the

answer. No proofs were presented of the character or construction of the infringing machine, or in what respect, if at all, it did infringe. We have declared the grounds which would authorize the issuance of a preliminary injunction in patent cases (*Standard Elevator Co. v. Crane Elevator Co.*, 9 U. S. App. 556, 6 C. C. A. 100, 56 Fed. 718), and that, to authorize a writ, the right must be clear, and the fact of infringement reasonably certain. Here, for the purposes of an injunction, the exclusive right was, perhaps, clear, within the principles of comity as declared by the supreme court in the case of *Mast, Foos & Co. v. Stover Mfg. Co.* (decided April 23, 1900) 20 Sup. Ct. 708, Adv. S. U. S. 708, 44 L. Ed. —; but the fact of infringement, standing merely upon allegations and denial, was not established. It will not do to say that no harm could result from the restraining order because the injunction merely went to the use of infringing machines, and that the defendants could not be harmed if their machines did not infringe. Courts do not issue their writs of injunction because no harm can result from them. They issue them to preserve rights which are shown to have been invaded. It would not be just to put upon the defendants the hazard of being in contempt of court for disobedience of its orders, if they honestly claimed their machine did not infringe, when it might thereafter be determined that it did infringe, and when the court had not considered or determined the question of infringement. We therefore think the court below, in granting the temporary restraining order, exceeded a just discretion in restraining the defendants before it had passed upon the question whether there was in fact infringement. There was no evidence before the court that the machines sold by the defendants were like the machine condemned by Judge Coxe as infringement of complainant's patent. The court required the complainant to give his bond in the sum of \$10,000 to respond to the defendants for the damages they might sustain by reason of the injunction. It would be difficult, if not impossible, for one to show what sales he could have made but for an injunction, and what loss he had sustained by reason of it. It is a delicate matter to interfere with the discretion exercised by the court below in a matter of this kind. The duty to review these orders of injunction is, however, imposed upon us, and that we cannot disregard. It would have been more consistent with justice and the rights of the parties in granting the order to show cause, if the rights of the complainant were considered to be in peril, to have required of the defendants a bond to respond to the complainant for its damages by reason of sales if the machine should finally be determined to infringe the complainant's patented rights. We therefore are of opinion, and it will be so ordered, that upon the defendants filing in the court below a bond in the sum of \$10,000, conditioned as is usual to account for all profits made and all damages which may be sustained by the complainant, and conditioned, if the court below shall deem proper, for the filing in the court of sworn statements of sales, the bond to be approved by the court both as to condition and sureties, the restraining order granted until the 12th of June be vacated. This order will be certified to the court below.

DIXON-WOODS CO. v. BLACK et al.

(Circuit Court, W. D. Pennsylvania. March 19, 1898.)

No. 26.

PATENTS—INFRINGEMENT—GAS STOVES.

The Ballard patent, No. 465,911, for a gas stove designed for the heating of rooms, which shows in front a hollow slab of fire clay or other refractory material, provided with perforations in its face to form passages or burners for the gas, and some of which are filled with asbestos fiber so disposed that lengths of the same will be distributed over the face of the slab, discloses a novel, effective, and useful combination, which was not anticipated, and is valid. Such patent is not restricted to a construction of the stove in which the asbestos is attached in tufts or bunches, but is infringed by one having the same combination of elements, but in which the asbestos is distributed over the whole burner surface.

This was a suit in equity for infringement of a patent. On final hearing.

Bakewell & Bakewell and James K. Bakewell, for complainant.
J. C. Sturgeon, for defendants.

BUFFINGTON, District Judge. The complainants file this bill to restrain alleged infringement of letters patent No. 465,911 (now owned by them), granted December 29, 1891, to Thomas William Ballard for a gas stove. Respondent's stove and the burner have in combination all the elements of the claim, viz.:

"In a gas stove, the combination of the frame, A, with the hollow slab, B, provided with perforations, C, the burner, E, for supplying a mixture of gas and air to the interior of said slab, the asbestos fiber, D, and the outlet flue, A¹."

And therefore the bill should be sustained unless the claim lacks novelty and patentability, is an aggregation and not a combination, or is to be restricted to an arrangement of asbestos fiber such as is not used by respondent. We do not deem it necessary to discuss in detail the alleged anticipations, but a careful study of them all shows us that none of them discloses the Ballard combination of elements, nor does any show such a combination as would suggest to a mere mechanical improver the change and improvement Ballard made. The use in a stove of asbestos in the manner directed in the specification in combination with a perforated hollow slab burner of the Bunsen type secures novel and desirable effects, in a more complete consumption of gas, uniform spread of flame, a highly pleasing appearance, and increased heat from the same amount of gas. To our mind, the improvement thus made was novel and patentable.

It is alleged, however, that the claim is for a mere aggregation, and not a combination of elements; that the elements constituting the burner do not co-operate with the stove; and that the burner would discharge the same function standing alone in a room. Such contention will not stand the test of close scrutiny. Among other desirable objects in a gas burner heating apartments are heating (and therein

is involved a maximum of heat radiation from a minimum of gas); next, a proper disposition of the products of combustion; and, lastly, a pleasing appearance. Now, while it is true that a burner would present the same appearance, whether set in a stove or on the floor in the middle of a room, and while the heat radiated from it in each place would be substantially the same, it is equally true that, when its usefulness as a heater for a room is considered (and therein its whole utility consists), the absence or presence of an additional modifying element, to wit, means of carrying off the products of combustion or of imperfect combustion, becomes a substantial and indispensable element to the successful working of such a burner. The presence or absence of such an element is a test of practicability. The outlet flue of the apparatus being a necessary modifying element to the use of the burner, not for the burning of gas, but for the utilization for heating purposes of the heat produced by such burning, it follows that the function of the outlet flue does co-operate with the burner, and that the joint co-operation of the two produces the desired result, to wit, a practical means of heating an apartment. That the flue performs the same flue function it does in every other fire is conceded, but that is not the test whether, in connection with other elements, it constitutes an aggregation. A wheel, a piston, or a bolt in a combination turn, oscillate, or transmit power just as they always have; but if they exert such function in a relation of elements, or if their functions are modified or qualified by the working of such other elements, then the whole is such a correlation of modifying agencies as constitutes a combination. Applying this principle to the case in hand, to constitute a combination, the flue need not make the burner burn in a different way, nor the burner need not make the flue perform its function other than its normal way; but if the flue so affects the action of the burner as to thus secure the successful use of the burner as a means of heating an apartment, then the outlet flue is not a mere addition which can be used or dispensed with at will,—a mere independent addendum,—but is an intrinsic and indispensable element in securing the desired end. The burner could not accomplish this result alone. No more could the flue. Their union and joint co-operation secured an end which neither could by itself effect, viz. a practical and useful means of heating an apartment.

The objection that the patent contemplates the placing of tufts or separate bunches of asbestos on the face of the slab, and not such an intermingling of asbestos fiber as is shown on respondents' device, is not well taken. That the latter course was taught by the patent is clear from the specifications. Indeed, the avowed purpose of the patentee was "a more even diffusion of flame in heating the asbestos fiber and fire clay over the whole heating surface of the stove." He further says, "Certain of the perforations are filled or partly filled with asbestos fiber, D, so disposed that lengths of the same will be distributed over the front surface of the slab." Further on he adds that the mixture of gas and air "will issue through the perforations left open in the front of the slab, and when ignited at the said perforations the flames will play uniformly over the whole front surface among

the asbestos fiber, and so diffuse a uniform heat thereto." After full consideration, we are of the opinion the patent is valid, and a decree should be entered for complainant.

DIXON-WOODS CO. v. REINEKE et al.

(Circuit Court, W. D. Pennsylvania. November 24, 1899.)

No. 17.

PATENTS—INFRINGEMENT—GAS STOVES.

The Ballard patent, No. 465,911, for a gas stove, *held not anticipated, valid, and infringed.*

This was a suit in equity for infringement of a patent. On final hearing.

Bakewell & Bakewell and James K. Bakewell, for complainant.
James Negley Cooke and John H. Roney, for defendants.

BUFFINGTON, District Judge. This bill seeks to restrain alleged infringement of letters patent for a gas stove, numbered 465,911, now owned by complainant, granted December 29, 1891, to Thomas W. Ballard. This patent was before this court in *Dixon-Woods Co. v. Black* (No. 26, May term, 1897), 102 Fed. 346, where its validity was sustained. The opinion there filed is incorporated in, and made part of, the present one. It was then contended that the claim did not cover spreading asbestos over the whole burner surface; that it was restricted to isolated tufts or separated bunches on the burner face. The additional evidence now before us leads to no change of opinion from the conclusions there reached. It is strongly urged that the English patent of Boggett & Pettit (No. 14,333), of 1852, anticipates Ballard. To do so, it must disclose a substantial representation of Ballard's device, in such full and clear terms as would enable one skilled in the art to practice his invention without the necessity of experimenting. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Hanifen v. E. H. Godshalk Co.*, 28 C. C. A. 507, 84 Fed. 649. Tested by this standard, the Boggett & Pettit patent falls short. We are wholly unable, owing to the vague and indefinite character of Figs. 1 and 2, to ascertain the exact working construction intended. Judging from the drawings alone, it is uncertain whether there is an upward flow of gas over the face of the burner, and a carrying off of the products of combustion by a flue at the burner top. The description, however, states that the bars in which are the gas-emitting holes "are arranged perpendicularly side by side, with a space about a quarter of an inch between, and inclosed in a frame to form the front of a gas fire. The frame is carefully inclosed, except in front; and the air, having no other access to the flues, rushes with great velocity between the bars, and in the direction of the arrows, so soon as the gas is lighted, carrying with it all the products of combustion." As we have said, the exact location of the flues is uncertain, and counsel have plausible

reasons for widely differing ones. But, be they where they may, it is indisputable that, in whatever manner the air carrying all the products of combustion ultimately reaches the flues, such air initially, to wit, "as soon as the fire is lighted, * * * rushes with great velocity between the bars." Such a device is constructively and functionally different from Ballard's in which no air can pass backward through openings in the burner face, but an unbroken front is shown, over which the products of combustion are drawn upward to a single flue in order to secure the desired functional result. The patent being valid, we are of opinion the respondents' burner embodies the elements of Ballard's claim, and infringes the same. Therefore, let a decree be drawn.

REINEKE et al. v. DIXON-WOODS CO.

(Circuit Court of Appeals, Third Circuit. May 14, 1900.)

No. 14.

1. PATENTS—CONSTRUCTION OF CLAIMS—LIMITATION BY REJECTION AND AMENDMENT.

Where an applicant for a patent substitutes a new and narrower claim for one rejected by the patent office, and states that he now claims only his exact construction, he cannot insist on a construction of such claim which would make it the equivalent of the one rejected.

2. SAME—INFRINGEMENT—GAS STOVES.

The Ballard patent, No. 465,911, for a gas stove, covers merely a structural improvement on a pre-existing type of gas stoves; and in view of the prior art, and especially of the English patent, No. 14,333, granted in 1852 to Boggett & Pettit, and of the proceedings in the patent office, if such improvement discloses any patentable novelty at all it is within a very narrow compass, and the claim of the patent must be restricted to the precise construction therein illustrated and described. So construed, it covers only a construction in which the asbestos is attached to the face of the slab constituting the burner surface in tufts or bunches held in place by being inserted in perforations in such slab, and is not infringed by a stove in which continuous strips or banks of asbestos fiber are cemented on the flat face of the slab in such manner as to cover the whole surface.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

John H. Roney and Jas. Negley Cooke, for appellants.

Bakewell & Bakewell and Jas. K. Bakewell, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The bill of complaint in this case charged the defendants, who are here the appellants, with infringement of United States letters patent No. 465,911, granted on December 29, 1891, to Thomas William Ballard for improvements in gas stoves, the title to which patent had become vested in the complainant, the Dixon-Woods Company, here the appellee. At the beginning of the specification of the patent the general nature of the invention is stated thus:

"This invention relates to that class of gas stoves known as 'cosy stoves,' employed for heating rooms or apartments, and the main object of the inven-

tion is the construction of a cosy stove which will give a more even diffusion of flame for heating the asbestos fiber and fire clay over the whole heating surface of the stove, and will also economize the consumption of gas."

Fig. 1

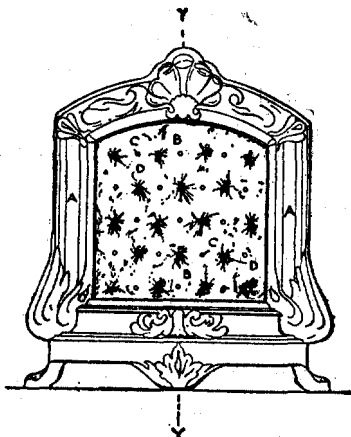
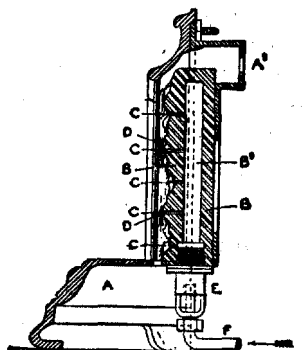


Fig. 2



Then, after referring to the accompanying sheet of drawings showing a cosy stove constructed in accordance with the invention (Fig. 1 showing the front elevation, and Fig. 2 a transverse section), the specification proceeds as follows:

"A is the framing of the stove, of any suitable design, and preferably provided with an outlet, A¹, to which a pipe may be attached for drawing off the products of combustion. B is a hollow slab supported in said framing, and made of fire clay, or other suitable refractory material. The front of said slab may present a lumpy or undulating surface, as shown in Fig. 2, in imitation of pieces of coal or other fuel, or such front surface may be smooth. Through the said front portion perforations, C, are made, communicating with the interior, B¹ of the slab. Certain of said perforations are filled or partly filled with asbestos fiber, D, so disposed that lengths of the same will be distributed over the front surface of the slab. The remaining holes form passages or burners for the emission of the heating gas. In Fig. 1 every alternate perforation, C, is shown as filled with asbestos fiber. But I do not confine myself to such arrangement. Thus, as a modification, one row of perforations may be left open for burners, and the next row filled with fiber, and so on. The bottom of the slab, B, is provided with an atmospheric or Bunsen burner, E, of any suitable design, connected with a gas pipe, F, so that when the gas is turned on it will pass into and fill the interior space, B¹, with a mixture of gas and air, and the said mixture will issue through the perforations left open in the front of the slab, and when ignited at the said perforations the flames will play uniformly over the whole front surface, among the asbestos fiber, and so diffuse a uniform heat thereto. The heat thus diffused raises the temperature of the interior space, B¹, and so rarefies and makes more intense the heating properties of the gas as it escapes from the burners or perforations, thereby economizing the consumption."

The patent has a single claim, of which the following is a copy:

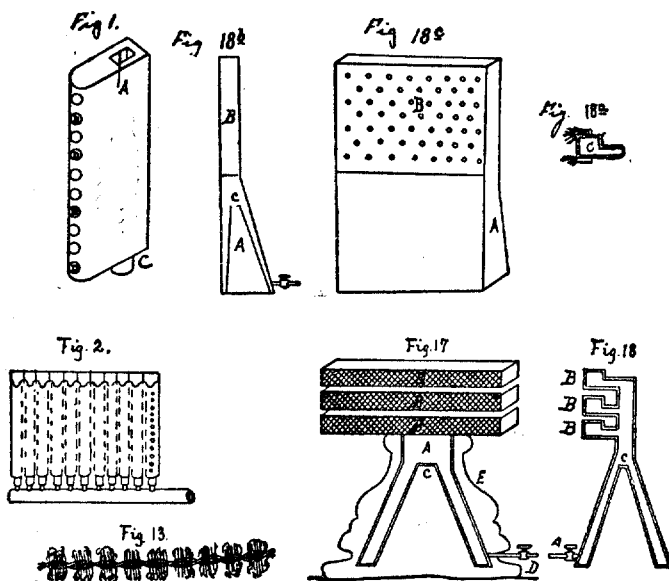
"In a gas stove, the combination of the frame, A, with the hollow slab, B, provided with perforations, C, the burner, E, for supplying a mixture of gas and air to the interior of said slab, the asbestos fiber, D, and the outlet flue, A¹, all substantially as and for the purpose set forth."

We cannot carefully read the specification without seeing that this patent is for a mere structural improvement upon a pre-existing type of gas stoves. The impression thus produced is deepened when we look into Ballard's provisional specification, filed on March 22, 1887, in his application for a British patent for this same invention, which he obtained in 1887. In that English specification Ballard referred to the old style of cosy stoves in the words following:

"The so-called 'cosy stoves,' as at present constructed, are provided at their base or up the sides with a gas pipe from which the flame, when ignited, burns upward amongst the asbestos, thereby burning more intensely at the bottom or base of the stove than at any other part, whereas, according to my construction of a stove, I diffuse the heat uniformly over the whole surface."

It is inferable from the inventor's above-quoted statements, as, indeed, it otherwise appears, that the supposed novelty of Ballard's construction consisted in the perforations in the face of the upright hollow slab, and the distribution of fibrous tufts of asbestos among the perforations. Now, this record is full of proofs touching the prior art, and when they are examined it becomes perfectly clear that, if there is any patentable novelty at all in Ballard's improvement, it lies within the narrowest compass. Let us here consider the British patent, No. 14,333, issued in the year 1852 to Boggett & Pettit, relating to the warming of buildings by means of gas. Those patentees, in their specification, state:

"The principal features in our manner of accomplishing this object consist of various stoves or apparatuses for using asbestos in combination with gas, either carburetted or otherwise, the employment in connection therewith of tubes or hollow chambers, with or without the addition of heat-absorbing substances, to produce warm currents of air, and in constructing the said stoves or apparatuses, and the flues belonging to them, in such a manner as to effect the perfect removal of the heated vapors after having utilized them to the utmost extent before their final escape into the chimney," etc.



These features are illustrated by numerous attached drawings, accompanied by explanatory observations in the body of the specification. For example, Fig. 1 shows a vertical cast-iron burner for a gas fireplace cast with an interior hollow space from top to bottom. The top is tightly closed, and the bottom is provided with a boss connected with a gas supply pipe. In the front of the hollow burner are perforations serving both as outlets for the gas, and as holders of small tubes having asbestos secured to their outer ends. Fig. 2 is a front view of several of these burners, arranged perpendicularly side by side, with a space of about a quarter of an inch between them, and inclosed in a frame to form the front of a gas fire. "The frame," the specification states, "is carefully closed, except in front, and the air, having no other access to the flues, rushes with great velocity between the bars and in the direction of the arrows, Fig. 1c, as soon as the gas is lighted, carrying with it all the products of combustion, and rendering the asbestos vividly incandescent." But Figs. 17, 18b, and 18c are still more in point; the specification explaining them thus:

"Fig. 17 represents an elevation of an apparatus for burning air and gas. * * * The air and gas mixes at A, passing by a tube in the back, as shown in section Fig. 18, to supply the three bars, B, B, B, and issues through perforations in them, as shown in Fig. 18a, in which are also shown the tufts of asbestos. Fig. 18b is a vertical section, and 18c an elevation of a similar method to the preceding of burning air and gas. The air enters at A, as before described, and, mixing with the gas at c, passes into a square iron box, perforated all over with fine holes, through which it burns; some tufts of asbestos, such as shown in Fig. 13, being suspended in front of it."

The words "perforated all over with fine holes" are shown by the drawing to mean all over the front face of the "square iron box."

We need not go outside of this British patent to find all the general features of Ballard's construction. That earlier patent shows, in gas stoves for heating buildings, a frame, an outlet flue, an upright hollow burner, with perforations through its front face communicating with the interior chamber, provision for supplying to this inner chamber a mixture of air and gas which will issue through the perforations, and burn, when ignited, among tufts of asbestos secured to or suspended in front of the burner. The only thing here lacking is Ballard's special arrangement, whereby the tufts of asbestos fiber are attached to the face of the hollow slab by direct insertion in certain of the perforations. Without, then, particularly discussing the other proofs leading to the same conclusion, we here content ourselves with saying that the prior art imperatively requires that the patent in suit be confined and restricted to the precise construction thereby illustrated and described; assuming that the patent can be sustained at all. Such limitation, we think, is also imposed upon the claim of the patent by the proceedings which took place in the patent office. Ballard originally made the following claim, namely:

"In that class of gas stoves known as the 'cosy,' the employment of a hollow slab of fire clay or other suitable refractory material, provided on its front surface with burners and asbestos fiber, so arranged that the mixture of gas and air supplied to the interior of the slab will, when ignited at the burners, uniformly heat the said fiber, and economize the consumption of gas, substantially as herein set forth."

This claim was rejected by the office upon references to several prior patents. The applicant then canceled the above claim, substituting therefor the one now found in the patent. In a letter dated May 21, 1891, addressed by the applicant to the commissioner of patents, canceling the claim first made and substituting the other, Ballard wrote thus: "Applicant now claims his exact construction only, and, as none of the references have this, it is hoped that we will get a speedy allowance." The grant of the patent having been thus procured, certainly the complainant below was in no position to insist upon a construction of the allowed claim which would make it practically the equivalent of the rejected claim. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500. Moreover, the terms of the claim are most specific, and it must be read with reference to the particular description contained in the specification and illustrated by the patent drawings. *Fay v. Cordesman*, 109 U. S. 408, 421, 3 Sup. Ct. 236, 27 L. Ed. 979; *Knapp v. Morss*, 150 U. S. 221, 228, 14 Sup. Ct. 81, 37 L. Ed. 1059. Thus read, no infringement of the claim appears. The construction shown by Ballard is not followed by the defendants. According to Ballard's specification, as we have already seen, the asbestos is inserted directly into certain of the perforations on the front face of the slab, and is thus held in place. These perforations are used as sockets for the asbestos. No other means for securing the asbestos on the slab are suggested. The perforations are widely apart. The asbestos fiber is arranged in isolated tufts, and large surface spaces are entirely bare. The gas stoves manufactured by the defendants are materially different from the stove of the patent in suit. In the defendants' construction the face of the slab is provided with a series of horizontal rows of numerous minute, closely arranged, burner perforations; and between those rows, and in immediate proximity, continuous strips or banks of asbestos fiber are cemented upon the flat, unbroken surface of the slab, in such manner as to cover the whole face of the slab with a coat of asbestos. The asbestos is permanently and effectually secured to the face of the slab by silicate of soda cement, which, it seems, was unknown in the art at the date of the patent in suit. The evidence is quite convincing that the two constructions are substantially different both in form and in results. Waiving the question whether the patent possesses any patentable novelty in view of the prior art, we are clearly of the opinion that it must be confined to Ballard's exact means for securing the asbestos to the slab, and that the defendants do not infringe the patent. The decree of the circuit court is reversed, and the case is remanded to that court, with directions to enter a decree dismissing the bill, with costs.

EMPIRE TARGET CO. v. CLEVELAND TARGET CO.**CLEVELAND TARGET CO. v. EMPIRE TARGET CO.**

(Circuit Court of Appeals, Third Circuit. May 18, 1900.)

Nos. 15, 16.

1. PATENTS—CONSTRUCTION OF CLAIM—TARGET TRAPS.

The Hebbard patent, No. 371,839, for improvements in sending-traps for flying targets, is limited by the prior art to the specific device described in the specification and shown by the drawings. As so limited, *held* not infringed.

2. SAME—ANTICIPATION—SUFFICIENCY OF PROOF—INCONSISTENT POSITIONS OF COMPLAINANT.

In a suit for infringement of a patent, in which anticipation is relied on as a defense, based on the alleged prior invention and use by another of an equivalent device, the only issue as to such defense being as to the sufficiency of the evidence to establish such prior invention and use, where the complainant itself has successfully invoked and urged the same fact of prior invention and use, based upon the testimony of the same witnesses, in defense to a suit against it on a similar patent in another jurisdiction, while such fact may not amount to an estoppel, in the absence of satisfactory explanation of the inconsistent positions of the complainant, the court may properly consider that fact as affecting the burden and degree of proof required upon the issue, and as giving the defendant's testimony a weight to which it might not be entitled as against a different adversary.

3. SAME—TARGET TRAPS.

The Marqua patent, No. 301,908, for improvements in sending-traps for flying targets, *held* void for anticipation.

Appeal from the Circuit Court of the United States for the District of New Jersey.

James K. Bakewell, Webster & Cook, and Thomas W. Bakewell, for Cleveland Target Co.

H. O. Lord, for Empire Target Co.

Before ACHESON and DALLAS, Circuit Judges, and McPHERSON, District Judge.

McPHERSON, District Judge. In the court below, this was a bill filed by the Cleveland Target Company against the Empire Target Company and three other defendants, charging the infringement of letters patent No. 301,908, dated July 15, 1884, granted to Philip Marqua, and of No. 371,839 dated October 18, 1887, granted to C. C. Hebbard, for improvement in sending-traps for flying targets; both patents having become the property of the complainant several years before the bringing of the suit. The charge of infringement was limited to the second, third, and fifth claims of the Marqua patent, and to the first claim of the Hebbard patent. The circuit court came to the conclusion that the Marqua patent had been infringed, but dismissed the bill so far as the Hebbard patent was concerned. 97 Fed. 44. Both parties have appealed, and the correctness of the decree in both of its aspects is now before us for decision.

The appeal of the Cleveland Target Company from so much of the

decree as affects the Hebbard patent may be first considered. The claim charged to have been infringed is as follows:

"(1) In a trap for flying targets, the combination of a V-shaped frame of sheet spring metal pivoted to the throwing-arm at its apex, a strip secured above one arm of the frame in a plane parallel to the same, a hook, and a spring-actuated stud provided with a yielding sleeve upon the other arm, as and for the purpose shown and set forth."

In the opinion of the learned judge who heard the cause, if this claim can be sustained at all, the prior state of the art, taking particularly into account the Hebbard patent, No. 322,714, and the Holtz patent, No. 330,704, requires the claim to be so limited and confined to the specific device described in the specifications and shown by the drawings that the charge of infringement is thereby avoided. In this statement and conclusion we concur, and accordingly so much of the decree as dismisses the bill in so far as it relates to the Hebbard patent, No. 371,839, will be affirmed.

The appeal of the Empire Target Company, however, must be sustained. The claims of the Marqua patent that are charged to have been infringed are as follows:

"(2) In a trap or sending apparatus for flying targets, a sending-arm provided with a pivoted extension carrying the target, and having an independent rotation by centrifugal force, in combination with target holding and releasing mechanism automatically actuated to release the target at the moment of extreme extension of the sending-arm, substantially as set forth.

"(3) In a sending apparatus for flying targets, in combination with a pivoted sending-arm having a pivoted target-carrying extension, a spring-catch adapted to hold the target and release the same automatically at the proper instant of time, as set forth."

"(5) In a target-sending apparatus, the combination of the main arm, A, and pivoted extension, B, provided with automatic holding and releasing devices, with adjustable spring-washer, W, for regulating the frictional resistance to centrifugal action of the carrier, substantially as set forth."

The very careful and painstaking examination of the testimony made by the court below would, we have little doubt, have led to an opposite conclusion upon one controlling question of fact, if the learned judge had not felt constrained to apply to the evidence offered by the Empire Target Company a standard of proof that, under the peculiar circumstances of the case, seems to us to have been unduly rigorous. The question was this: Had the Marqua patent been anticipated by the prior invention and use of A. H. Hebbard?—and upon this point both parties had offered much testimony. The Hebbard use had been set up as a defense, and ordinarily the defendant would have been obliged to assume the burden of proof, and to establish the defense by evidence possessing the qualities required by the appropriate rules of law. Assuming for present purposes that the rule laid down by the court below is usually to be applied, namely, that the evidence taken as a whole must be full, clear, and satisfactory, leaving no substantial doubt concerning priority of invention, we think that the facts of the present controversy relieved the Empire Target Company from the customary obligation that rests upon a party making an affirmative allegation, and, so far as relates to the burden and quality of proof concerning the Hebbard use,

placed that company upon a substantial equality with its antagonist. Our reasons for this view we shall now proceed to state.

This is not the first time the Hebbard use has been before the federal courts in a suit to which the Cleveland Target Company was a party. In 1890, or shortly before that date, the Peoria Target Company sued the Cleveland Company in the circuit court for the Northern district of Ohio, alleging the infringement of certain reissued letters patent granted to the administrator of Charles F. Stock for improvements in target-traps. The Cleveland Company set up the Marqua patent as a defense, but the court sustained the bill and entered an interlocutory decree in favor of the complainant. Not long afterwards the Cleveland Company presented a petition for a rehearing, in which they declared, *inter alia*, as follows:

"That since the interlocutory decree was entered herein, and since the 19th day of August, 1890, they have learned that a target trap containing and embodying the invention described in said letters patent sued upon in this action was invented by A. H. Hebbard, at Knoxville, Tennessee, long prior to the date of the said alleged invention by the said Stock thereof, to wit, in the year 1881; that a trap embodying the said invention was known to and used by the said A. H. Hebbard, at Knoxville, Tennessee, and by others in his presence, at a date long prior to the date of the said pretended invention by the said Stock, to wit, in the year 1882; that the said use of the said trap was known to the following described persons, to wit: Charles C. Hebbard, who resides at Cleveland, Ohio, and Samuel B. Dow, who resides in Knoxville, Tennessee.

"They further state that traps embodying the said invention were used by the said C. C. Hebbard and A. H. Hebbard, by Samuel B. Dow, and by others, in public, at Knoxville, Tennessee, at various times prior to the date of the said pretended invention by the said Stock, and that the said use was known to the following persons, to wit: William Jenkins, who lives at Knoxville, Tennessee; T. O. Eldridge, who lives at the same place; J. W. Slocum, R. Van Gilder, Felix A. Lyle, Cleveland, Ohio; Sara A. Hebbard and Mary E. Hebbard."

A rehearing being granted, the Cleveland Company filed a supplemental bill, or amendment to the answer,—both names being given to the pleading,—containing, *inter alia*, the following averments:

"That the said alleged improvements shown in the said re-issued letters patent, described in the original bill, were not an invention when the same were produced by the said Stock therein named; that the said Charles F. Stock was not the original, true, and first inventor of the same; that a target holding and releasing device embodying the said improvements described in the said letters patent was invented by A. H. Hebbard, now of the city of Cleveland, Ohio, at Knoxville, Tennessee, in the year 1882, and was then known to him and to Charles C. Hebbard, Felix A. Lyle, Mary A. Hebbard, and Sara Hebbard, all of whom reside at Cleveland, Ohio, and to William Powell and Samuel B. Dow, who reside at Knoxville, Tennessee; and the same were exhibited and used in public by the said A. H. Hebbard, C. C. Hebbard, Samuel B. Dow, and Felix A. Lyle, at Knoxville, Tennessee, in the said year."

Depositions upon the question thus raised were thereupon taken, and the priority of the Hebbard invention and use was vigorously urged upon the court by counsel for the Cleveland Company. It would extend this opinion unduly to quote largely from the argument in support of such priority, but we may give one extract to show the position taken by the Cleveland Company:

"Is it not, then, proved, beyond the possibility of a doubt, not only that the third Hebbard throwing device was in existence prior to December, 1882, but

also that a full-sized device, capable of throwing a full-sized target, was made prior to Mr. Hebbard's death, and was used successfully at Hebbard's residence and at the brick yards, in the presence of Mr. Dow, the two Hebbards and others, to throw targets, certainly months before the July, 1883, reduction to practice by Stock at Peoria? If anything can be established by human testimony, this has been."

The contention of the Cleveland Company was sustained by the court in Ohio, as will appear by the following citation from the opinion delivered by Circuit Judge Jackson (47 Fed. 739, 741):

"But it is established clearly, and to the entire satisfaction of the court, that A. H. Hebbard conceived and reduced to practice the 'pivoted' clamping or target-holding carrier prior to December 8, 1882; that said Hebbard's device is shown in the little brass model, which is the identical model made by him in October, 1882; that within about one month thereafter a full-sized device was constructed, and operated successfully and publicly in presence of several persons. This Hebbard device, called in the record 'Hebbard's Third Target-Throwing Device,' shows substantially the 'pivoted' feature of the target holder sought to be covered by claims 3 and 4 of the reissued patent, and, having been conceived and reduced to successful public practice prior to December 8, 1882, anticipated Stock's invention of the same device, which the proof, in its most favorable aspect for the complainant, shows was not reduced to even experimental practice before January, 1883. The evidence establishing this third target-throwing device, and its successful use on a Ligowski trap, prior to Stock's invention, is not contradicted or impeached; and if human testimony, corroborated by the production of the original model, is to be believed, that fact is established,—that Stock's 'pivotal' device was anticipated by that of Hebbard."

The third conclusion of the court was thus expressed:

"(3) That, if said claims 3 and 4 constituted valid reissues, the device they describe and seek to have patented was first invented (that is, conceived and reduced to successful public practice) by A. H. Hebbard prior to the date at which Stock invented his pivotal device, and consequently no valid patent thereon could be issued to said Stock either under the original or reissue application."

The priority of the Hebbard use was strongly urged, also, by the Cleveland Company on the appeal taken by the Peoria Company; but the case was decided on other grounds by the circuit court of appeals, and no reference is made in its opinion to the evidence upon this point.

It will therefore be observed that, while the Cleveland Company is now denying the priority of the Hebbard use, it formerly asserted such priority solemnly and repeatedly, by declarations of record, by offering evidence in support thereof, and by the earnest arguments of its counsel, in a suit involving substantially the same question as is now presented. It was not pretended then that Stock's invention could be carried back to a date preceding the Hebbard use in 1882, and it is not so pretended now on behalf of the Marqua patent. The priority of the Hebbard use is attacked, not because Marqua's date is earlier, but because the witnesses to the use are declared to be either mistaken or not worthy of belief. It may be admitted that no estoppel is made out by the foregoing facts, but we cannot agree that they should have no influence upon the burden or degree of proof required of the defendant in the present case. At the least, they called upon the Cleveland Company for a satisfactory explanation why witnesses whom it formerly relied upon as

truthful and accurate were now challenged as untrustworthy and not to be believed. In the absence of such explanation, we think the court should not have treated the facts referred to as if they involved merely some unimportant inconsistency between the position taken then and the position taken now by the Cleveland Company. It does not agree with our sense of fair dealing that in one jurisdiction a party should succeed by upholding the truthfulness and reliability of witnesses, and should thereafter attack the same witnesses in another jurisdiction as persons not credible, merely because the exigencies of his case require a change of attitude. We do not deny that such change is permissible where the element of estoppel or other sufficient objection does not exist, but to treat the change, when no satisfactory explanation has been offered, as without influence upon the burden or the degree of proof, seems to us to be going too far. In considering the testimony of such witnesses, we think the court may properly remember that both parties at one time or another have vouched the credibility and accuracy of the testimony, and that the court may therefore be justified, in the absence of evidence showing mistake or other reason for distrust, in giving to the testimony of such witnesses a more than ordinary value.

Holding this opinion, it only remains to say that we have examined the case from this standpoint, and are obliged to disagree with the findings of fact upon the important subject of the Hebbard use. Without repeating the evidence in detail, we think it clearly establishes the fact that before the Marqua invention there was a use by Hebbard of a device embodying the essential elements of the claims now under contention. This view being decisive, we have not considered the other questions raised in the briefs and argued by counsel.

In the appeal of the Empire Target Company, the decree is reversed, at the costs of the appellee, with directions to the court below to enter a decree dismissing the bill at the costs of the complainant.

In the appeal of the Cleveland Target Company, the decree is affirmed, at the costs of the appellant.

ATLAS S. S. CO., Limited, v. COLOMBIAN LAND CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 166.

1. PAYMENT—NEGOTIABLE PAPER.

The giving of a consignee's note to libellant, in lieu of cash, for freight, does not constitute a payment, in the absence of an express agreement to that effect.

2. ELECTION TO HOLD AGENT—RECEIVING NOTE.

The fact that a carrier accepted a consignee's paper, in lieu of cash, for freight, knowing that the consignee was acting for another, does not constitute such an election to hold the consignee as will deprive the carrier of his remedy against the consignor on the dishonor of the paper.

3. CARRIER'S LIEN.

Under the terms of a bill of lading giving a lien on the goods for all unpaid freights, the carrier was entitled to a lien on the cargo in question only for the freight due on that cargo, and not for a general balance on previous cargoes.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the Atlas Steamship Company, Limited, against a cargo of goods belonging to the Colombian Land Company. Judgment for libellant, and respondent appeals. Modified and affirmed.

Moses Weinman, for appellant.

Everett P. Wheeler, for appellee.

Chas. H. Russell, for trustee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The principal question presented by this appeal is whether the court below correctly adjudged the Colombian Land Company, the appellant, to be indebted to the steamship company, the libellant, for the freight on the two cargoes carried by the latter, and which arrived in New York, respectively, September 7, 1898, and September 27, 1898. The appellant, a corporation doing business at Santa Marta, South America, was the owner of the cargoes, and, concededly, was indebted to the libellant for the amount, and remains indebted, unless its liability was extinguished by the act of the libellant in receiving the negotiable paper of Hoadley & Co., consignees of the cargoes, upon delivery of the cargoes to them. The paper went to protest, and has never been paid. The consignees were commission merchants at New York City, and were the selling agents there of the appellant; and, as upon previous occasions, the libellant rendered the accounts for its charges to them, and receipted the freight bills on receiving their 60-day paper, payable in London. It is not claimed that there was any express agreement between the libellant and the appellant, or between the libellant and Hoadley & Co., that the paper should be accepted as payment; and the question is whether an implied agreement to that effect can be deduced from the circumstances. It appears that, by the course of business which had prevailed between the libellant and Hoadley & Co. for many years, the former had allowed the latter a line of credit for freight up to \$5,000 on consignments to them; making delivery to them in advance of rendering the bills for freight, and requiring them to pay cash when the \$5,000 credit was exhausted, but otherwise accepting their drafts. By correspondence in the spring of 1898 between the libellant and the appellant it was arranged that cargoes shipped by the latter should be delivered to Hoadley & Co., and the freight should be paid in cash upon the ship's arrival in New York.

It has long been the settled rule in this state that taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid, or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time. He is not obliged to sue upon it. He may return it when dis-

honored, and resort to his original demand. *Thornton v. Payne*, 5 Johns. 74. This is the rule which generally prevails in this country, although it does not obtain in some of the states. Where the note of a third party is taken at the time of a creation of a debt, as upon a sale of goods, the rule is otherwise; and it is held that the presumption is that it was taken in payment, in the absence of countervailing evidence. *Whitbeck v. Van Ness*, 11 Johns. 408; *Noel v. Murray*, 13 N. Y. 167; *Youngs v. Stahelin*, 34 N. Y. 258; *Gibson v. Tobey*, 46 N. Y. 637; *Shaw v. Insurance Co.*, 69 N. Y. 286; *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. 374. In such a case the transaction may be regarded as equivalent to an exchange of property.

In the present case the debt existed before the drafts were taken, and obviously they were taken with a view to accommodate Hoadley & Co., by giving them time instead of requiring them to pay cash. The receipt of the payment of freight bills is a circumstance of little value, and of no more importance than is the balancing of an account upon the books by a creditor when he receives the debtor's note for the amount.

If the libellant had been unaware that Hoadley & Co. were acting as the agents for the appellant in receiving and paying freight upon the cargoes in question, it is entirely clear that the acceptance of the drafts would not have been payment, and that the libellant, upon discovering the relation, could recover the amount of the appellant; the rule being that, where an agent acts for an undiscovered principal, the party contracting with him, upon discovering the principal, may sue either the principal or the agent. This rule does not apply, however, when the relation is known by the contracting party at the time of the transaction, and the circumstances indicate an election upon his part to give exclusive credit to the agent. As declared in this state (*Coleman v. Bank*, 53 N. Y. 388-394), the rule is that "one who deals with an agent is not concluded from resorting to the principal, unless it appears that, with full knowledge of the facts, he elected to take the sole responsibility of the agent, and that he designed to abandon any claim against the principal." *Meeker v. Claghorn*, 44 N. Y. 349; *Foster v. Persch*, 68 N. Y. 400. In *Meeker v. Claghorn* the plaintiffs furnished materials to an architect, knowing him to be the agent of the defendants in ordering them, and charged them to him upon the books; but the court said the affirmative was with the defendants to show that the plaintiffs gave exclusive credit to the agent, and held the defendants liable. What circumstance will import such an election is a question upon which there is much diversity of opinion. *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574; *Thomson v. Davenport*, 9 Barn. & C. 78; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Muldoon v. Whitlock*, 1 Cow. 290; *Jones v. Insurance Co.*, 14 Conn. 501; *Paige v. Stone*, 51 Mass. 160; *Provision Co. v. Tucker*, 8 Mo. App. 95. It was said by Cowen, J., in *Taintor v. Prendergast*, 3 Hill, 72, that "the usual and decisive indication of an exclusive credit is where the creditor knows there is a foreign principal, but makes his charge in account against the agent." Observations to the contrary, however, are found in *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534. Election implies a deliberate intention,—a definite purpose to

accept one debtor, or a particular remedy in lieu of another. The facts here are wholly indecisive of that intention. The libelant made the arrangement to accommodate Hoadley & Co., by giving them credit to a certain limit, without any reference to the appellant, and quite regardless of its effect upon any transaction which might subsequently take place between the appellant and itself. In the course of the business dealings which ensued between the libelant and the appellant, the libelant continued to recognize the arrangement, and permitted it to extend to the settlements for freight upon cargoes of the appellant delivered to Hoadley & Co.

If it had been made to appear that the state of the accounts between the appellant and its agents had been changed to its prejudice in consequence of the dealings between the libelant and Hoadley & Co., different considerations would be presented. As it is, we conclude that the court below properly adjudged the libelant entitled to recover for the unpaid freight.

By the decree of the court below, the libelant was adjudged to have a lien upon a cargo subsequently shipped by the appellant, and delivered in New York November 23, 1898, for the freight unpaid upon the two previous cargoes. The bills of lading under which all the cargoes were shipped contained a clause providing as follows:

"The carrier to have a lien upon the goods, to be made available if necessary for sale, for and until the payment of all duties, expenses, loss, or damages, and all unpaid freights, primages, and charges."

If the libelant was entitled to any lien, it is by virtue of this clause. The words "unpaid freight," in this clause, plainly refer to the goods described in the bill of lading; and the bill of lading is to be read as providing for a lien for all unpaid freights upon these goods. According to the construction of the court below, the clause was intended to secure to the carrier the unpaid freight upon goods which had been delivered to the shipper months before. This is a forced and violent construction. The conditions in such instruments are to be strictly construed against the carrier, who prepares the contract.

Our conclusions in respect to the rights of the other appellee, Wells, trustee, etc., were announced at the argument, and it is unnecessary to recapitulate them. We conclude that the decree below was correct, and should be affirmed, except as it adjudges a lien in favor of the libelant upon the proceeds in the registry of the court arising from the sale of the last cargo. With this modification it is accordingly affirmed, with interest. Costs of the appeal are awarded to the appellee Wells, trustee.

The cause is remitted to the court below, with instructions accordingly.

THE ST. HUBERT.

(District Court, E. D. Pennsylvania. May 21, 1900.)

No. 23 of 1898.

1. SHIPPING—AUTHORITY OF SHIPPER'S AGENT TO MAKE CONTRACT—BILLS OF LADING ON TRANSSHIPMENT.

The foreign agents of an owner of merchandise, authorized to ship the goods, also have implied authority, generally speaking, to agree upon the terms of the contract of carriage; and where they know that transshipment is necessary they may lawfully empower the first carrier to deliver the goods to a connecting carrier upon terms that are not the same as those of the first bill of lading. Where, in such case, the goods are shipped on through bills of lading which authorize the initial carrier to transship and forward by steamer, "subject to the terms and conditions of local bills of lading issued by the agents of such steamer," or contain other equivalent provisions, the owners of the goods are bound by the provisions of bills of lading issued by the connecting carrier to the first carrier therefor on their transshipment, so far as such provisions are lawful and enforceable.

2. SAME—DAMAGE TO CARGO—CONDITION OF BILL OF LADING REQUIRING NOTICE OF CLAIM.

A provision of a bill of lading that "the shipowner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods," even if conceded to be unreasonable and void as to the time within which it requires the notice to be given, is valid, and will be enforced to the extent of requiring notice to be given, and it must be given within a reasonable time, or the right to recover on a claim for damage to the goods will be barred.

In Admiralty. Suit to recover for damage to goods in shipment

Francis S. Laws and John F. Lewis, for libellant.

Convers & Kirlin and George W. Betts, Jr., for respondents.

McPHERSON, District Judge. In July, 1897, Stanley & Co., of Calcutta, acting as agents for Cooper, Smith & Co., of Philadelphia, who were the owners of the goods, shipped 65 bales of goat skins on board the steamships Palawan and City of Sparta; 40 bales going by the Palawan, and 25 by the Sparta. The Palawan was a vessel of the Peninsular & Oriental Steam Navigation Company, and the Sparta was a vessel of the City Line, neither line carrying goods further than the port of London. The skins were shipped upon through bills of lading, and were to be delivered "unto order * * * at the port of Philadelphia." The bales were transhipped at London, and were carried across the Atlantic by the steamship St. Hubert, of the Johnston Line. Upon their arrival in Philadelphia early in October, they were found to be damaged to some extent by water. The Insurance Company of North America, the underwriter of the skins, paid the amount of damage, and brings this action against the St. Hubert, alleging that the goods were injured by the negligence of the ship. Several defenses are set up by the respondent, but, in the view I take of the case, only one defense need be considered.

It cannot be doubted that Stanley & Co., at Calcutta, and Cooper, Smith & Co., at Philadelphia, both knew that the goods would be transhipped. Such knowledge appears clearly from the evidence, and I do not understand the fact to be denied. It is enough to note

—although there is other evidence on the subject—that the orders for insurance given by Cooper, Smith & Co. to the insurance company on August 26th, September 3d, and October 6th expressly state that there is to be “transshipment via London,” or “transshipment via port or ports.” As already stated, transshipment was made at London by the original carriers, and bills of lading were issued to them by the St. Hubert, in which are contained certain limitations upon the carrier’s liability that are not found in the Calcutta bills. One of these limitations is a provision that “the shipowner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods,” and, as no such claim was ever made by Cooper, Smith & Co., or was made by the insurance company for several months after the skins were removed, the St. Hubert sets up this provision as a complete defense. To this the libellant makes two replies: First, that the consignees were not bound by the St. Hubert’s bills of lading, in so far as they differ from the bills issued at Calcutta,—the contention being that, as the provision concerning notice of claim is not in the original bills, it formed no part of the contract of carriage; and, second, that, even if the provision is now to be considered, it is unreasonable, and altogether void. In my opinion, neither reply is sufficient.

With regard to the first, it may be observed that the original shipment was not made by Cooper, Smith & Co. in person. The contract was made by their agents, and not by themselves; but its validity is nevertheless unquestionable. The agents had authority to ship the goods, and therefore they had authority also (speaking generally) to agree upon the terms of the contract of carriage, subject, of course, to have such terms reviewed by any court before which they might subsequently come for consideration. Could these agents in Calcutta, knowing that transshipment was necessary, lawfully empower (either expressly or impliedly) the first carrier to deliver the goods to the connecting carrier upon terms that are not to be found in the first bill of lading? I think it is clear that the agents could thus empower the original transporter. Indeed, it may be doubted whether the first carrier needs any such authority from the consignor. It may be that the power of the first carrier to accept from the second carrier a bill of lading containing the terms upon which alone the latter will continue the transportation is of necessity a part of the first carrier’s obligation to forward at the end of his own line. The first carrier is under a duty to forward even if he does not expressly so agree, and he cannot discharge this duty unless he is able freely to contract with the carrier whose line is next to undertake the movement of the goods. The first carrier cannot impose the terms of the original contract upon the connecting line. The conditions of the respective services to be rendered may differ so much that identical contracts would be unreasonable; but, in any case, as (according to the modern authorities) each carrier is able to limit his liability in such directions as he may see proper, subject to certain restrictions upon the right, it is clear that neither the shipper nor the original carrier has the power to prescribe to the second carrier the terms upon which the carriage is to be continued. To say that the first bill

of lading binds the second carrier is to require him to submit to a contract concerning which he was not consulted, and to which he did not agree. But, even if the first carrier is to be regarded as without power to accept a bill of lading from the second carrier, unless the owner of the goods confers an express or implied authority thus to accept, I see no reason to doubt that an agent making a shipment upon a through bill of lading is able to give to the first carrier all the authority concerning the terms of transshipment that the owner himself could have given. Cooper, Smith & Co., if personally present at Calcutta, could certainly have authorized the Palawan and the Sparta to agree to the transatlantic bills of lading; and there is nothing in the case to show that Stanley & Co. were not completely the representatives of Cooper, Smith & Co. for the same purpose. No limitation upon the agents' authority is proved, and I think none is implied by the course of business. On the contrary, it seems to me that the interests of commerce require that (in the absence of evidence showing his power to be restricted) an agent for the shipment of goods should be able to contract for their transportation in the same manner and to the same extent as the owner might contract, and that the owner should be bound by the agent's agreement in this regard. For authorities bearing upon the preceding paragraph, see Hutch. Carr. § 108, and the cases cited in 2 Am. & Eng. Enc. Law (2d Ed.) 306.

What contract, then, did Stanley & Co. make in Calcutta concerning the transshipment of the goods in question? Turning to the through bills of lading, the answer is as follows: The Sparta bill contains these clauses: "To be transshipped or landed at London (with liberty to warehouse there), and from London to be forwarded by steamer at the risk of the shipper, but at ship's expense, and to be delivered, subject to the exceptions and conditions at the foot hereof, in the like good order and condition at the port of Philadelphia. * * * The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, proceeding either directly or indirectly to such port, and to transship or land and store the goods, either on shore or afloat, and reship and forward the same at the owner's expense, but at merchant's risk." And, in addition, the following special clause: "The goods to be carried to Philadelphia, subject to the terms and conditions of local bills of lading issued by the agents of such steamer or steamers." The bill of lading also contains this note: "N. B. Inquiries respecting this cargo transshipped at London to be addressed to Messrs. Montgomerie & Workman, 36 Grace Church St., London, E. C."

The Palawan bills are quite as clear concerning the power to transship. The goods were to be delivered at Philadelphia "via London," and "the company are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to the company or to other persons, proceeding either directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to transship to land and store the goods either on shore or afloat, and reship and

forward the same at the company's expense, but at merchant's risk. In cases where the ultimate destination at which the company may have engaged to deliver goods is other than the steamer's port of discharge, the company reserve the right to forward such goods by rail. The company act as forwarding agents only from that port, and in all cases their liability is to cease as above provided." The Palawan bills do not contain the special clause found in the Sparta contract, but (as already said) I think the authority to agree to the terms of the second carrier's bill of lading is necessarily implied therein.

The first carriers were each under obligation to transship at London for the Atlantic voyage, and each was as fully the agent of the consignees for this purpose as were Stanley & Co. when the shipment was originally made at Calcutta. The Johnston Line was an independent carrier, under no duty to receive goods except upon its own terms; and therefore, if the forwarding carrier had no authority to agree to the St. Hubert's bill of lading because it differed from the Calcutta bills, nothing could be done except to store the goods until a steamship could be found that would receive them on the precise terms contained in those bills, or until the owner should give order concerning their disposal. I need scarcely say that such a result is out of the question, especially since no consignee was named in the through bills of lading, and it would have been difficult to learn who had become the owners of the goods. Without prolonging the discussion, my conclusions are these: The first carrier, under the through bills of lading in question, was bound to forward by the next succeeding carrier, and had authority to agree to the latter's terms of shipment. For this purpose the first carrier was the consignees' agent, and the consignees were bound by the agreement with the St. Hubert, even although they did not know of its terms at the time when it was made. Cooper, Smith & Co. were bound by the contracts made in Calcutta by Stanley & Co. as consigning agents before they knew what terms were contained therein, and they were equally bound by the terms of the London contract, made in that city by their carrying agents. That they did come to know of the Calcutta contracts, including the agreement concerning transshipment, is apparent; and that they also came to know of the transshipment by the St. Hubert appears from the orders for insurance, in which the St. Hubert's name is given as the vessel that is to bring the goods forward to Philadelphia. The consignees could have obtained a copy of the Atlantic bill of lading without difficulty from the Philadelphia agents of the Johnston Line, although the original bill remained, of course, in the hands of the first carrier. The ship's copy would also be available upon the arrival of the vessel, and the consignees' banking agents in London—by whom the through bills were forwarded—could have been instructed to obtain copies of the Atlantic bills. In my opinion, therefore, the consignees were bound by the conditions of the St. Hubert's bill, so far as they may be enforceable in the federal courts.

This brings me to the second reply to the steamship's defense, namely, that the requirement concerning notice is unreasonable, and altogether void. I am unable to agree to this proposition.

Precisely what may be the scope of the requirement—just what may be meant by the phrase “before removal of the goods”—it is unnecessary to determine now. The libellant’s construction is that this phrase, in connection with other provisions of the bill, means removal from the ship, and, as this would require a claim to be made before the consignees could see and examine the goods, the provision is attacked as unreasonable. I doubt the correctness of this construction,—remembering the rule that limitations upon the carrier’s liability are to be construed in favor of the shipper or the consignee,—but, in any event, even if it be assumed for present purposes that the time limitation is so unreasonable that a court would not enforce it, the result would merely be that the limitation would fall, while the provision for notice would still remain, to be complied with before the expiration of a reasonable time. The courts have often upheld conditions requiring notice of similar claims to be given, and the reason for sustaining the condition is that the carrier, or insurer, or telegraph company should have an opportunity to inquire into the circumstances and amount of the loss at a time when inquiry may be of service. A number of cases are collected in the note to *Capehart v. Railroad Co.*, 31 Am. Rep. 509, and in 5 Am. & Eng. Enc. Law (2d Ed.) 321. This being the reason for supporting the requirement, it would be most unfair if, where a limitation had been found unduly short, and therefore invalid, the claimant might still delay giving notice of his claim until the last day allowed by law for bringing a suit. I think the proper rule should be that, where there is a provision for notice of claim without limiting the time within which the notice must be given,—and, of course, the limitation no longer exists after a court has set it aside,—the requirement for notice still remains, and that such notice must be given within a reasonable period. In the present case the period was not reasonable, three more voyages having been made before any claim was presented.

If this view of the case is correct, it is decisive of the controversy, and the remaining questions—concerning the law of the flag, the Harter act, the provision with regard to insurance upon the goods, and the cause of the damage—need not be considered.

The libel must be dismissed, at the costs of the libellant.

THE WESTMINSTER.

(District Court, E. D. Pennsylvania. May 23, 1900.)

No. 32 of 1898.

SHIPPING—DAMAGE TO CARGO—CONDITION OF BILL OF LADING REQUIRING NOTICE OF CLAIM.

A provision of a bill of lading that “neither the steamship owners nor their agents, nor any of their servants, are to be liable * * * for any claim notice of which is not given before the removal of the goods,” imposes a reasonable and valid condition precedent to the right to maintain a suit for damage to the goods in shipment, either against the owners personally or in rem, at least to the extent of requiring notice to be given within a reasonable time; and a failure to comply with such condition

is not excused by the fact that the ship had knowledge of the damage, the chief purpose of the requirement being to advise the owners that they are charged with liability therefor.

In Admiralty. Suit in rem to recover for damage to cargo in shipment.

Horace L. Cheney and John F. Lewis, for libelant.

Convers & Kirlin, Henry R. Edmunds, and George W. Betts, Jr., for respondents.

McPHERSON, District Judge. In March, 1898, the Philadelphia Transatlantic Line received at Dundee 18 bales of jute cloth consigned to John T. Bailey & Co., of Philadelphia, and 20 bales of burlaps consigned to the Farr & Bailey Company, of the same city. The goods were carried to London by the steamship Perth, and were forwarded from that city by the Westminster to the port of destination. Upon arrival of the vessel at Philadelphia early in April, after a stormy voyage, the bales were found to have broken out of stowage, and to be torn, and otherwise injured, by reason of being tossed about in the hold. These injuries were clearly visible, and were known by the libelant, the Insurance Company of North America, which was the underwriter of the goods, immediately upon the arrival of the ship. The libelant's surveyor saw some of the damaged bales in the hold of the vessel, and some upon the pier alongside. There is no direct evidence concerning the consignees' knowledge of the injury, but it cannot be doubted that they were as well and as speedily informed as the libelant. No notice of a claim for damages was given by either the consignees or the insurance company before the removal of the goods or afterwards. The insurance company, having paid the loss to the consignees, brings this action against the ship to be reimbursed, alleging that the goods were injured by reason of negligent stowage.

Defense is taken upon several grounds, of which I think it necessary to consider only one, namely, the clause in the bill of lading, that "neither the steamship owners, nor their agents, nor any of their servants, are to be liable * * * for any claim notice of which is not given before the removal of the goods." I have recently decided in *The St. Hubert* (No. 23 of 1898) 102 Fed. 362, that a similar clause was a binding condition, and that failure to comply was a bar to recovery. I need not repeat the reasons there given, but I may add that the present case is less favorable to the libelant than was *The St. Hubert*, for the damage here was known to the insurance company while some of the goods were still in the hold, and there was nothing to prevent its giving immediate, or at least a very prompt, notice of the claim. The case much resembles *Angel v. Steamship Co.* (D. C.) 55 Fed. 1005. The libelant contends, however, that notice would have been superfluous, because, it is said, the purpose of such notice is to inform the vessel that the goods have been injured, and because it appears in proof that the ship already had such information. But, as I understand it, this is not the chief purpose of the notice. It is not merely the fact of injury that is to be

communicated, but also the further fact—much more important to be known by the owner of the vessel—that he is charged with liability for the injury. Goods may be injured from many causes during a voyage, and for some injuries he might be liable, while for others—such, for example, as might happen from perils of the seas—he might not be liable. The clause therefore requires that notice of a claim for damages must be given,—notice that the carrier's liability is relied upon to make good a loss; for only if such a claim is made does the fact of injury become important to the carrier, and call for his investigation. In the present case notice was not given, and I regard this default as fatal to the libelant's right to recover.

It is also argued that the clause requiring notice does not apply to a suit in rem, and in support of this argument I have been referred to a decision by Judge Morrow in *The Queen of the Pacific* (D. C.) 61 Fed. 213, in which the following provision in a shipping receipt was considered:

"It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damages to or loss of any of the within merchandise, must be presented to the company within thirty days from the date hereof; and that after thirty days from the date hereof no action, suit, or proceeding in any court of justice shall be brought against the said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

This was held to be a condition precedent to maintaining a suit in personam, but not to affect a suit in rem against the vessel. I assume the correctness of the decision upon the peculiar language of the condition, but I think there is an obvious difference between the provision there passed upon and the provision now under consideration. The clause in controversy declares that neither the steamship owners nor their agents or servants are "to be liable" for any claim notice of which is not given before the removal of the goods; and this, I think, cannot properly be construed so narrowly as to exempt the shipowner if he should be sued personally in a form of proceeding that may end in seizing his property by one kind of writ, and to deny him exemption if he should be sued in another form of proceeding that seizes his property in the beginning by a different writ. He is "liable" if he may be sued, and I think it can make no difference by what kind of action the liability is sought to be enforced. Ultimately, his property is to be reached in order to satisfy the libelant's claim; and if he is "liable" when his property is exposed to the danger of a final writ of execution in a personal action, I can see no ground for holding that he is any the less "liable" when his property is seized in limine by a proceeding in rem. It is familiar law that exemptions are to be strictly construed against the carrier, but even in an exemption a strained construction should not prevail over the plain meaning of words.

The libel must be dismissed, at the costs of the libelant.

YARNELL v. FELTON et al.

(District Court, E. D. Tennessee, S. D. June 12, 1900.)

1. REMOVAL OF CAUSES—TIME OF APPLICATION—STATE STATUTE—JUDICIAL NOTICE.

On consideration of a motion to remand a cause to the state court because the petition for removal was not filed in time, the federal court cannot take judicial notice of a rule of the state court by which the time in which pleadings may be filed is extended beyond the date fixed by the general statute of the state.

2. SAME—PETITION BY ONE OF SEVERAL DEFENDANTS.

Under Act Cong. 1887-88, providing for the removal of causes from the state to the federal courts where the controversy is between citizens of different states, an application by one only of two defendants of different citizenship from the plaintiff will not entitle the petitioning party to a removal.

3. SAME—FEDERAL QUESTION INVOLVED.

The objection, to a petition for the removal of a cause, that all of the defendants have not united in asking for the removal, is valid as well where the removal is sought on the ground that a federal question is involved as where the application is based on diversity of citizenship.

4. SAME.

Whether an action in a state court against a receiver to recover damages for a personal injury resulting from alleged negligence in the operation of a railway, and involving only a question of liability for negligence, is removable, as a case arising under the constitution or laws of the United States, solely on the ground that the receiver was appointed by a federal court, is reserved.¹

W. T. Murray, for plaintiff.

Head & Anderson, for defendant.

CLARK, District Judge. This case is now before the court on motion to remand to the state court. The action is against the Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation organized under the laws of the state of Ohio, and defendant Felton, as receiver, appointed by the circuit court of the United States for the Southern district of Ohio. The action is to recover damages, presumably for personal injury resulting from negligence, although the declaration had not been filed at the time of the order of removal. The petition for removal was on behalf of Felton, the receiver, alone. The jurisdiction of this court is objected to—First, upon the ground that the application for removal was not made at or before the time within which the defendant is required to plead by general statute of the state upon the subject; and, second, upon the ground that one of the two defendants does not join in the application for removal.

For the defendant it is insisted that by a general rule of practice adopted by the state circuit court under statutory authority, the time in which the pleadings may be filed was extended beyond the date fixed by general statute, which would apply only in the absence of a regular rule of practice established by the state circuit court. The further contention by the defendant is that it is not necessary, under Act

¹ Jurisdiction of federal courts in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

Cong. 1887-88, for a co-defendant or defendants to unite in the application for removal. The rule of practice adopted by the state circuit court extending the time for filing a declaration or plea, if it were effective to extend the time in which to apply for removal, is no part of the record, and this court cannot judicially know such a rule. *Harris v. Burris*, 1 Tenn. Cas. 80. But the omission to prove the rule in the court below, and incorporate the same in a bill of exceptions, does not change the result in the case at bar. The removal in this case was applied for on the sole ground of diverse citizenship. But the application for removal is on behalf of only one of the two defendants sued. It should be remarked that it is not insisted, and, indeed, could not be, that there is in the suit a separable controversy. *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528. Under the various acts of congress for the removal of causes on the sole ground of diverse citizenship it has been uniformly held that, where there is a plurality of plaintiffs or defendants, every necessary party on the one side of the controversy must be a citizen of a different state from every necessary party on the other side of such controversy. *Gage v. Carraher*, 154 U. S. 656, 14 Sup. Ct. 1190, 25 L. Ed. 989; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685; *California v. Southern Pac. Co.*, 157 U. S. 260, 15 Sup. Ct. 591, 39 L. Ed. 683; 18 Enc. Pl. & Prac. 193, and cases there cited.

Under removal acts prior to that of 1875 as well as under that act, the rule was that, where diversity of citizenship was relied on as ground for removal, it was necessary for all defendants brought before the court by service of process to unite in the petition or application for removal. *Hanrick v. Hanrick*, 153 U. S. 195, 14 Sup. Ct. 835, 38 L. Ed. 685; *Wilson v. Oswego Tp.*, 151 U. S. 63, 14 Sup. Ct. 259, 38 L. Ed. 70; *Fletcher v. Hamlet*, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. Ed. 679; *California v. Southern Pac. Co.*, 157 U. S. 260, 15 Sup. Ct. 591, 39 L. Ed. 683.

And it is not to be seriously doubted that it is necessary for all defendants duly served to join in the application to remove under the act of 1887-88, although the question is one upon which there have been conflicting decisions in the circuit courts, and the question was reserved in *Hanrick v. Hanrick*, 153 U. S. 197, 14 Sup. Ct. 835, 38 L. Ed. 685, and again in *California v. Southern Pac. Co.*, 157 U. S. 260, 15 Sup. Ct. 591, 39 L. Ed. 683. *Smelting Co. v. Cowenhoven* (C. C.) 41 Fed. 450, and *Thompson v. Railway Co.* (C. C.) 60 Fed. 773, are cases supporting the view that it is necessary, in the absence of a separable controversy, for all material defendants before the court to join in the application for removal. *Thompson v. Railway Co.* was referred to with approval in *Whitcomb v. Smithson*, 175 U. S. 637, 20 Sup. Ct. 248, Adv. S. U. S. 248, 44 L. Ed. —. In *Railway Co. v. Martin*, 20 Sup. Ct. 854, Adv. S. U. S. 854, 44 L. Ed. —, this question must be regarded as determined, although the removal under consideration was on the ground that the case arose under the constitution and laws of the United States, and not on the ground of diverse citizenship, the

petition for removal in that case, as in the one at bar, having been presented by the receivers, in which their co-defendants did not join. The opinion, in view of the grounds on which it proceeded, is just as applicable to the one case as the other. The proper construction of both the second and third clauses of section 2 of the act of 1887-88, was both discussed and determined; the court, through Mr. Chief Justice Fuller, saying:

"And, in view of the language of the statute, we think the proper conclusion is that all the defendants must join in the application under either clause."

It is insisted by the defendant that, although removal was sought on the ground of diverse citizenship, the suit being against the removing defendant, Felton, in his official character as receiver, the record discloses a federal question, and that in such case it is not necessary that other defendants sued should join in the petition for removal. If it were permissible to sustain jurisdiction upon grounds other than those stated in the petition for removal, the objection that the other defendant does not unite in the petition for removal is applicable to a case in which removal is sought on the ground of a federal question equally with a case in which diversity of citizenship is the ground of removal. This somewhat vexed question has just been finally settled by the supreme court of the United States in *Railway Co. v. Martin*, *supra*. However, precisely this question was suggested and reserved in *Railway Co. v. Martin*, and, as the case at bar is satisfactorily disposed of on the ground that one of the two defendants properly before the court did not join in the application for removal, it is not now material to consider or determine this point in the case. The motion to remand is accordingly granted.

OLIVER v. IOWA CENT. RY. CO. et al.

(Circuit Court, S. D. Iowa, C. D. May 31, 1900.)

REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—TIME FOR FILING PETITION.

A cause is not removable on the ground of diversity of citizenship, where the petition therefor was not filed until three months after an answer was due from the petitioning defendant in the state court, and such petition, when filed, failed to disclose the citizenship of a co-defendant, or the existence of a separable controversy.¹

On Motion to Remand to State Court.

Bolton, McCoy & Bolton, for plaintiff.

Geo. W. SeEVERS, for defendants.

SHIRAS, District Judge. From the record in this case it appears that the original petition was filed in the state court on the 30th of September, 1899, to which petition the Iowa Central Railway Company was the sole defendant. On the 6th of October following an amendment to the petition was filed, making one Richard Pender a co-defendant to the action, and on the 14th of October an answer on

¹ Diverse citizenship as ground for removal, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullaghan*, 27 C. C. A. 298.

behalf of Pender was filed. On the 15th day of January, 1900, a petition for removal of the case to the United States circuit court was filed on behalf of the railway company on the ground of diverse citizenship. In this petition no reference is made to the defendant Pender, nor is it shown in any way what his residence and citizenship are, nor is it averred that there exists in the case a separable controversy between the plaintiff and the defendant railway company. Furthermore, the action was brought to the October term, 1899, of the state court, the answer from defendant being due on October 16th; whereas, the petition for removal was not filed until January 15th. The state court rightly refused to grant the order of removal under these circumstances. The motion to remand to the state court is therefore granted.

WILLIAMS v. GAYLORD et al.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 581.

1. CORPORATIONS—MANNER OF CONVEYING REAL ESTATE—REGULATION BY STATE STATUTE.

The manner in which real estate may be transferred by a corporation, either domestic or foreign, is a matter which it is within the power of the state in which such real estate is situated to regulate.

2. SAME—MORTGAGE BY MINING CORPORATION—CALIFORNIA STATUTE.

The California act of April 23, 1880 (St. 1880, p. 131, § 1), which provides that "it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, * * * unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation," having been construed by the supreme court of the state to apply to foreign as well as domestic corporations owning mining ground in the state, and to render such ratification, in the manner prescribed by the statute, absolutely essential to the power of the directors to convey or mortgage such mining ground, such construction is binding upon the federal courts.

Appeal from the Circuit Court of the United States for the Northern District of California.

Thomas S. Ford (C. Walter Artz and Edward J. McCutchen, of counsel), for appellant.

Curtis H. Lindley, Henry Eickhoff, and Frederick Searls, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity to foreclose a mortgage or deed of trust executed July 1, 1890, by the Gold Hill Mining Company, a corporation organized and existing under and by virtue of the laws of the state of West Virginia, in favor of G. Livingston Morse, as trustee, to secure the payment of certain bonds issued by the corporation upon certain mining property situate in Nevada county, Cal. Morse died in 1891, and Frederick Williams, appellant

herein, was substituted as trustee of the trusts mentioned in the mortgage or deed of trust. He commenced this suit in 1897 to foreclose the indenture against the Gold Hill Mining Company. The appellees Gaylord, Maddrill, and Rolfe were made parties to the suit under an averment that they had, or claimed to have, some interest in, or lien upon, the premises sought to be foreclosed, as judgment creditors, which interest or lien, if any, was alleged to be subsequent in time to the lien of appellant's mortgage. The evidence upon this point shows that the judgments obtained by them were entered in the years 1896 and 1897, long subsequent to the execution and recording of the indenture sought to be foreclosed. The corporation made default, and a decree pro confesso was entered against it in January, 1898. The judgment creditors, in their answer, among other things, alleged that the indenture was void because not made in conformity with the requirements of "An act for the further protection of stockholders in mining companies, approved April 23, 1880" (St. Cal. 1880, c. 131). This statute reads as follows:

"Section 1. It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain, in any way, any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting called for that purpose."

The circuit court sustained this defense, and entered a decree dismissing the bill of foreclosure. From this decree the appeal herein is taken.

If this statute applies to foreign as well as domestic corporations, our duty is at an end. We are foreclosed by the decisions of the supreme court of California from giving any independent consideration to the construction of this act. In *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, the court was called upon to construe the act above quoted. In so doing the court said:

"We think that the provision of said act goes to the power or authority of the directors. It cannot be construed to relate merely to their personal liability, for no penalty is imposed upon them; and to so construe it would be to practically nullify the act. In our opinion, the directors of mining corporations have no power or authority to convey the mining ground without the consent of holders of two-thirds of the stock, given as prescribed by the act; and it follows without such consent the title does not pass. And if this be so, the question can be raised by any one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof. Nor can the consent of the stockholders be presumed from the mere fact of the conveyance, whether under the corporate seal or not, for such consent or 'ratification' may be after the deed is executed, and hence is not necessarily or presumptively involved in the execution of such deed."

Under this decision there is no room for any discussion as to whether or not there has been any substantial compliance in the present case with the provisions of the statute. There was no literal compliance. And this is held absolutely essential by the decision in *McShane v. Carter*. This decision was followed in the subsequent cases of *Milling Co. v. Kennedy*, 81 Cal. 356, 362, 22 Pac. 679 (in which the principles

were applied to a foreign corporation); *Mining Co. v. Maginness*, 118 Cal. 131, 137, 50 Pac. 269; and *Johnson v. California Lustral Co.* (Cal.) 59 Pac. 595; and has, therefore, become the settled law of this state. The national courts are not permitted "to run counter to the decisions of the highest state court upon questions involving the construction of state statutes or constitutions on any alleged ground that such decisions are in conflict with sound principles of general constitutional law." *Irrigation Dist. v. Bradley*, 164 U. S. 112, 155, 17 Sup. Ct. 56, 41 L. Ed. 369. That we are absolutely bound by the decisions of the supreme court in *McShane v. Carter and Milling Co. v. Kennedy* is too well settled to require any citation of the numerous authorities upon this subject. It matters not that the courts of other states, in the construction of similar statutes, have expressed more liberal views with reference to compliance with the same statutory provisions. Were it an open question, such decisions would have, and have had, great weight and force in determining it. But, whatever our individual views may be, the fact remains that it is always our duty to follow the decisions of the highest court of a state in the construction of its own statutes, where no question of general or commercial law, or right under the federal constitution is involved. In such cases the question is not how the statute should be construed, but what construction has been given to it by the supreme court of the state? When that is ascertained, as here, by clear, plain, and unmistakable language, it is the duty of the national courts to follow it. Each state has the unquestioned right to determine for itself under what circumstances and upon what conditions property situated within the state may be conveyed, and the extent of the right conferred thereby.

In *Brine v. Insurance Co.*, 96 U. S. 627, 636, 25 L. Ed. 858, following the decision in *McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545, it was expressly held that the laws of the state in which land is situated control exclusively its descent, alienation, and transfer, and the effect and construction of instruments intended to convey it. The principles therein announced have been universally followed. *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 235, 10 Sup. Ct. 1013, 34 L. Ed. 341; *Etheridge v. Sperry*, 139 U. S. 266, 276, 11 Sup. Ct. 565, 35 L. Ed. 171; *Cutler v. Huston*, 158 U. S. 423, 429, 15 Sup. Ct. 868, 39 L. Ed. 1040; *Wilson v. Perrin*, 62 Fed. 629, 631, 11 C. C. A. 71; *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U. S. 91, 100, 20 Sup. Ct. 33, Adv. S. U. S. 33, 44 L. Ed. —.

In *Etheridge v. Sperry* the court, upon this subject, said:

"The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily, at least, a matter of state regulation. We are aware that there is great diversity in the rulings on this question by the courts of the several states. But, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein."

In *Chicago Union Bank v. Kansas City Bank*, *supra*, the court quoted, with approval, the language of Mr. Justice Field in *Christy v. Pridgeon*, 4 Wall. 196, 203, 18 L. Ed. 322:

"The interpretation within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different states to a similar local law, that law, in effect, becomes by the interpretations, so far as it is a rule of our action, a different law in one state from what it is in the other."

In *Forsyth v. Hammond*, 166 U. S. 506, 518, 17 Sup. Ct. 665, 41 L. Ed. 1095, the court said:

"The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the supreme court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

See, also, *Brown v. New Jersey*, 175 U. S. 172, 174, 20 Sup. Ct. 77, Adv. S. U. S. 77, 44 L. Ed. —.

The law is well settled that each state has the power to exclude any foreign corporation from entering into its limits for the transaction of business except upon such terms and conditions as it may see fit to impose. As was said in *Hooper v. California*, 155 U. S. 648, 656, 15 Sup. Ct. 210, 39 L. Ed. 301:

"The power to exclude embraces the power to regulate, to enact, and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the constitution of the United States."

The constitution of California (article 12, § 15) declares that:

"No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

This constitutional provision declares the public policy of the state; and, the supreme court having applied the provisions of section 1 of the statute under consideration to foreign corporations, and the words "any mining corporation" in said section being broad enough to include foreign as well as domestic corporations, we are not at liberty to say that such was not the intention of the legislature because the other provisions of the act are made applicable solely to domestic corporations. This brings the construction of the statute in harmony with the provisions of the constitution. *Supervisors v. Brogden*, 112 U. S. 261, 269, 5 Sup. Ct. 125, 28 L. Ed. 704. The second and third sections of the act provide that the stock in each mining corporation shall stand in the books of the company in the names of the real owners, or in the names of the trustees of the real owners, and provision is made as to how the stock of the corporation shall be voted. By these provisions the legislature sought only to regulate and control the internal affairs of the domestic corporations, as it had the right to do. Under the provisions of section 1 the legislature did not attempt to regulate the internal affairs of a foreign corporation. It had no power to do so. *Miles v. Woodward*, 115 Cal. 308, 311, 46 Pac. 1076. It sought to

regulate and control the business affairs of all corporations, both foreign and domestic, with reference to the manner in which their property situate within the state may be disposed of by deed or mortgage. This it had the power to do. The decisions of the supreme court of California have disposed of all the questions presented herein adversely to the views contended for by appellant. Our duty ends, as it began, by determining the extent and effect of these decisions. The decree of the circuit court is affirmed, with costs.

PALMER et al. v. LANSBURGH.

(Circuit Court, D. West Virginia. May 31, 1900.)

1. ADVERSE POSSESSION—POSSESSION OF TENANT—EVIDENCE—ACTION TO QUIET TITLE.

Proof of possession of land under color of title for more than 10 years by roving squatters as tenants, who were told to remain on the land, to cut and build where they pleased, and to hold possession for plaintiffs or their testator, or to stay on the land until turned off by plaintiffs, but with whom no definite agreement was made as to their tenancy, and some of whom either repudiated the rights of plaintiffs, or told contradictory accounts of their possession, when taken in connection with evidence of possession by tenants under written lease from plaintiffs for 5 or 6 years, with one formerly in possession under claim of independent title, is not sufficient to show such open, notorious, and continuous possession for a period of 10 years as will give title by adverse possession.

2. QUIETING TITLE—ILLEGAL DEED—CHAIN OF TITLE.

A deed which is illegal, but not void, is not sufficient to invalidate the title of one holding by an otherwise regular chain of title from the patentee.

Holmes Conrad and David E. Johnston, for plaintiffs.

E. L. Buttrick and S. L. Flournoy, for defendants.

JACKSON, District Judge. This is a bill filed by the plaintiffs to remove a cloud upon the title of the testator to 15,000 acres of land lying and being on Panther creek, and the waters thereof, in the county of McDowell and state of West Virginia, conveyed to John Handley in his lifetime by E. C. Fuller and wife and by Edward L. Fuller and wife, by deeds bearing date April 22, 1886; and it is alleged that the Fullers derived title through various intermediate deeds from Minard W. Wilson, and that they also claimed that Wilson derived title from one James W. Everette. It appears that John Handley departed this life on the ——— day of ———, 18—, in the state of Pennsylvania, having first made his will, which was duly probated in the state of Pennsylvania, an authenticated copy of which was recorded in the clerk's office of the county court of McDowell county, W. Va.; that up to the death of the said Handley he was in the actual possession of the 15,000 acres of land under his deeds therefor, and that his executors, since his death, have continued in the actual, exclusive, continuous, notorious, uninterrupted, adverse, and peaceable possession of the said 15,000 acres for more than 15 years prior to the institution of this action. It is further alleged that a deed made by P. R. Spracher, commissioner of the circuit court of Tazewell county, Va., conveying 50,000 acres of land to

Max Lansburgh, which, it is alleged, covers the land in controversy, "is illegal, but not void, but gives color of title to the said Lansburgh." The plaintiffs also introduce a deed from James W. Everette to Wilson, as a part of the chain of title that they rely upon, but there is no allegation in the bill which tends to connect the title of Everette with the commonwealth; and the deed under which Everette claimed was held by the circuit court of McDowell county to be a forgery, and by a decree of that court was canceled and annulled, thus destroying the chain of title derived through Everette. The other allegations of the bill it is not deemed material to notice. The plaintiffs must rest upon their bill, and the chain of title which they have set out therein and rely upon. Their title commences with one E. L. Fuller, who, it is alleged, was the owner of the tract of land in controversy, and in the year 1888 placed W. Taylor Payne and other tenants in possession of this land or certain portions thereof. In 1883 Fuller sold and conveyed this tract of land to John Handley, who recognized the possession of the tenants that Fuller claimed he had placed on the land before he sold it to Handley. The defendant, in his answer, claims a regular chain of title from the commonwealth of Virginia, by patents issued to Robert Morris on March 4, 1795, for 320,000 acres, and March 23, 1795, for 480,000 acres, and that by mesne conveyances he holds a regular chain of title from the patentee down to himself. The only question in this case is one of an adverse possession under color of title claimed by Handley's executors to have been derived from the two Fullers.

Daniel H. Harman testifies that Taylor Payne, Henry Allen, and James L. Payne were placed in possession of the 15,000 acres in 1880 or 1881 by the agent of Fuller, who conveyed this land to Handley, and that the same parties were placed in possession of the land by John Handley in the year 1884. This deposition of Harman was taken on the 10th day of January, 1899, and he testifies that he "saw Handley in this country about six or seven or eight years" before the taking of the deposition. Harman states that Taylor Payne, Henry Allen, and James Payne were living and remained on the land from 1881 or 1882 to 1893, and that they first claimed under Fuller, and afterwards under Handley. He also testifies that he was agent for Handley, had frequent communications with him by letter, and paid taxes for him on the land. D. H. Harman, Jr., testifies that he knew Taylor Payne and James L. Payne, and that they both lived on the 15,000 acres claimed by Fuller; that Taylor Payne told him he lived there under John Handley, and that Taylor Payne had cleared "quite a good lot of land,—fifteen or twenty acres"; and that he was living there when he (the witness) made the survey of the 15,000 acres with D. H. Harman, Sr. W. Taylor Payne states that he purchased the land where he resides from James L. Payne about 9 or 10 years prior to March 1, 1892, as appears by his affidavit of that date. He denies in that affidavit that he ever held this land, or any other land, under either Fuller, Handley, Lansburgh, or any other party, since he purchased it. This claim of title upon the part of Payne to the land which he purchased, and upon which he lived, was an assertion of his own right to the land, and a disavowal of any other claim of title,

either under Handley or Fuller, and overthrows the statement of Harman that Payne ever held possession of that land under Fuller or Handley. The court treats this affidavit as the declarations of a man, who lived upon the land at the time, as to how he claimed it. Harman's evidence does not disclose any agreement, either verbal or in writing, between Fuller and Payne, whereby Payne agreed to become the tenant of Fuller. His evidence does not show that there was any agreement for a specific time, nor the boundaries of the land that he was to hold, and the most that can be said of it is that it was a declaration upon the part of Payne that he would become his agent. It must be apparent to every one that, if Fuller understood that Payne was to be his tenant for the purpose of holding the land, there would have been a term of years agreed upon, and that the boundaries of the tract of land that he was to hold should have been stated in the agreement, so as to locate the land that Fuller laid claim to. The statement of Harman, contradicted as it is by Taylor Payne, is unsatisfactory. It does not of itself disclose such a possession as the law defines to be an adverse possession. James L. Payne, according to his evidence, had lived upon the land for upwards of 20 years, at the time of the taking of his deposition, as a roving squatter; having lived at three different places upon the land. He states that some 17 or 18 years before January 10, 1899 (the time of the taking of his deposition), a man by the name of Silkman came along, claiming to represent Fuller, before Fuller had sold to Handley, and that Silkman told him to remain upon the land, "to cut where he pleased, and build where he pleased, and to hold possession for him." This is what Harman refers to when he states that Fuller placed James L. Payne upon the land. Payne did not remain at the point he was living when Silkman told him to remain there and hold possession for him, nor does he state that he agreed to remain there as a tenant of Fuller. He left the place where he and Silkman had this conversation, and went to other places, which he supposes were on the 15,000-acre tract; but on cross-examination he admits that he does not know where the boundaries of the 15,000-acre tract are, and that the other places he moved to had been occupied by parties who were squatters, whose rights he purchased, and who were not claiming under anybody but themselves. His evidence is very unsatisfactory, but if he had taken possession under Silkman, as the agent of Fuller, that possession was interrupted and broken when he left the place upon which he was then living, and went to other places. It is to be observed that his testimony merely says that Fuller told him "to hold possession for him," and to "cut where he pleased and build where he pleased." There was no understanding between them as to the terms upon which he was to hold possession of the land for him, nor the time that he was to hold it. In fact, nothing passed between the parties so as to create a legal relation of landlord and tenant. The witness states that he sold his improvement that he made on the 15,000 acres to Taylor Payne, but denies having sold the land; but his deed made on the 24th day of October, 1891, shows that he sold 325 acres of land, by metes and bounds, to W. T. Payne, "to have and to hold all the

above-described land, with its appurtenances, with covenants of special warranty, forever." This deed is an assertion upon his part of a right to the land and of his right to dispose of it; for he makes an absolute conveyance of it, and contradicts his statement that he claimed under Judge Handley, and that he never had any other claim. It does not appear that he had any written agreement with Handley, as his tenant. He does not disclose that he ever had a conveyance from Handley for this land, and yet he makes an absolute conveyance of it. He states that the understanding between him and Silkman, as the agent of Fuller, whatever it was, was a verbal one; but the statement that he makes in the first part of his deposition is that he was merely requested to hold possession,—“to cut where he pleased and build where he pleased,”—and there was no agreement entered into at that time that he would hold possession for Fuller, and become his tenant of the property. This witness (James L. Payne) made an affidavit before a notary public on the 20th day of February, 1892, after he had made the deed to W. T. Payne, and long before he gave his deposition in this case, in which he stated that he purchased the land he sold to Taylor Payne from Albert Payne; that he never claimed title to or possession of said land under any person called Fuller; that he had lived upon the land, prior to selling it to Taylor Payne, about 14 years, and he gave Taylor Payne possession of the land a short time after he purchased it, and made him a deed of the said land; that he purchased the improvement from one James Cooper, and took possession of it in his own right, and not under the right, title, or claim of Fuller, Handley, or any other party. This evidence of James L. Payne is contradictory, and of an unsatisfactory character. He even states that he does not remember of having sold the land to Taylor Payne, but merely the improvement. His affidavit made in 1892, when he had no motive or interest other than to state what the exact facts were in relation to his claim of title of the land, and how he held it, tends to contradict the statement that he did not sell the land to Taylor Payne. It is apparent to my mind that some unusual influence had been brought to bear upon Mr. James L. Payne which led him to make the statements he did in his deposition taken in this case. First. He states that he never held under anybody, and then he says afterwards that he held under Handley. Second. He states that he never sold the land to anybody, but sold the improvement; but, when he was confronted with his deed, it is shown that he sold the land by metes and bounds. Third. He states in his affidavit taken in February, 1892, that he purchased the property of one James Cooper, and took possession of it in his own right, and not under the right, title, or claim of Fuller, Handley, or any one else; and yet in his deposition taken as late as 1899 he contradicts all these statements. What credit can a court give to a witness who makes the reckless statements that James L. Payne does in his deposition, which are contradicted by his previous declarations as to how he held the property, and by record evidence of the fact, showing that at no time, up to the date of the giving of his deposition, had he ever held the property either as a tenant of Fuller or Handley?

Henry Allen testifies in his deposition that a man by the name of Webster came to see him while he was living on the 15,000-acre tract of land, and about 15 or 16 years before the taking of the deposition, in January, 1899, and asked him to become the tenant of Handley. He says this conversation took place in the year 1884; that Webster told him to stay on the place until he turned him off, and, if he did not turn him off, to stay right there, and he had been on the land ever since that conversation occurred between them, but he moved from the place where this conversation took place, and where he had lived, and went down to another point on the land, some two or three miles away. Since the making of the agreement with Webster, he says, he has claimed under Fuller. This man seems to be another roving squatter. If there was any contract at all between him and Webster, it did not assume such a form as to create the relation of landlord and tenant. All Webster said was that he wanted Allen to stay on the place until he (Webster) turned him off. He had no understanding with him as to the extent of his lease, if it could be called a lease,—whether it was confined to the very small piece that he was living on, or whether he was to hold possession of the whole 15,000 acres, and to live there, or the length of time, or anything. It was a very indefinite arrangement, if it was an arrangement at all. It amounted simply to little or nothing. It does not appear that Allen ever saw this man Webster afterwards, nor does it appear in the testimony that he ever saw Judge Handley or his agent after Handley purchased the land. He did not even know at the time he had this conversation with Webster whether he was on what was afterwards known as the "Handley Tract." All he knew was that Webster said that Fuller claimed the land. The witness Allen states in his deposition, in answer to question 10, that Webster represented Judge Handley; but in reply to question 13 he states that he was claiming under Fuller. Plaintiffs' counsel asked him, in his fifteenth interrogatory, "Did you, or not, agree with Webster to take and hold said land as his tenant or the tenant of Fuller, or did you merely agree to hold such land for a short time?" and his reply was, "We didn't set no time. He just told me to stay on until he put me off." This is the only evidence tending to show the relation of landlord and tenant between Allen and Handley and those under whom he claims. As I have before said, it lacks every element of a contract creating a relation of that character.

The next witness for the plaintiffs is Mr. William P. Payne, a lawyer who lived in McDowell county, W. Va., up to February, 1898, and who was retained by Judge Handley in 1892 and 1893 as his counsel in connection with the 15,000-acre tract of land. He knew Webster, and the last time he saw him was in April, 1892. The testimony of this witness refers to leases to be drawn in connection with the tract of land, but those leases were all drawn in 1892, 1893, and 1894. In this connection there are three leases offered,—one dated the 12th day of April, 1892, signed by W. T. Payne; another dated the 10th day of February, 1893, signed by W. T. Payne; and another dated the 3d day of February, 1894, signed by W. T. Payne. These leases purport to be leases for the 15,000 acres of land, and

recognize the title of John Handley to it. This is the first time in the history of the possession of this property that any evidence has been presented to the court which tends to show a contract between the claimants of this land and the parties upon the land whom the plaintiffs claim to be their tenants. It is a little remarkable that, in the history of this title, gentlemen of the experience of Judge Handley and those who represented him should have relied upon merely verbal instructions and directions that they gave all those parties who they claimed were tenants upon the land, without ever having reduced the agreement to writing, so as to clearly define the contract of lease between them and the owners of the 15,000 acres. A fair inference from this fact is that up to the time of these leases there was no established relation of landlord and tenant existing between the Paynes and Allen and Handley and those under whom he claims. When we look at the evidence of W. T. Payne, who says that he bought the place where he lived from his brother, and that about the time he purchased it Webster came along, professing to be acting for Handley, and that Webster told him to stay on the land and hold possession for Judge Handley, we find that he did not fix any time, nor was there any consideration agreed upon. He says that a part of the time he was on the land he held it for himself, but that since 1892 he has been holding it for Handley; that when he purchased it of his brother he considered the property as his own, and did not hold it as the tenant of any one until he executed the lease of April 12, 1892, with Handley. This is the substance of the evidence for the plaintiffs in this connection.

The defendant took the deposition of Walter L. Taylor, who speaks of the affidavits of James L. Payne and W. Taylor Payne, which are filed as exhibits in this case, and states that those affidavits contain, as he now recollects, the facts as he learned them from conversation with affiants when the affidavits were taken.

This is all the evidence of both the plaintiffs and defendant that tends to throw any light upon the subject of the possession under a color or claim of title by Handley. It must be obvious that there is no such possession as the law requires, upon which to found an adverse title or adverse possession to establish a rightful title to this land under a color and claim of title. The chain of title in Landsburg is complete, from the commonwealth down. To enable the plaintiffs in this cause to maintain their action, and to defeat the defendant's right to the lands in controversy, there must be open, notorious, continuous, and unbroken possession for a period of 10 years prior to the institution of the suit. The evidence does not disclose the fact that any of the claimants to this land were ever upon the land for a period of 10 years prior to the institution of this suit, claiming and holding the lands as their own, or that they put tenants in possession who held continuous possession of it for them. The Paynes and Allen, who were upon it in the first instance, were all squatters, and stayed there asserting a right and claim to the land. They never did enter into any contract, either in writing or by parol, so far as the evidence in this case discloses, that created the relation of tenant under either Fuller or Handley. All that Webster

did as the agent of either of these parties was to say, "Stay there and hold it until I tell you to get off." The mere fact of telling a man to stay upon a piece of land does not prove that he remained there as a tenant under the party he represented. If these parties had intended to become the tenants of Fuller or Handley, why did not Webster have them enter into a written agreement to hold possession of the property for Fuller or Handley, as Handley and his executors in 1892, 1893, and 1894 did with the Paynes? The fair and legitimate inference from all this proof is that at the time Webster was there he was unable to have these parties enter into an agreement to become the tenants of Fuller or Handley. The suit was brought in 1898. There is no continuous possession, as disclosed by the evidence in this case, of the plaintiffs in this action by their tenants. There is no continuous possession, as disclosed by the evidence in this case, of the tenants of the plaintiffs in this action for the period prescribed by the statutory bar. It is alleged that the deed made by Spracher, a commissioner of the circuit court of Tazewell county, Va., conveying the 50,000 acres of land to Landsburg, is illegal, but not void, but gives color of title to the said Landsburg. I do not concur in this position. I think the deed is not illegal, but, if it were, it is not void, and does not break the continuity of the title from the commonwealth of Virginia to Landsburgh. For the reasons assigned, I am of opinion to dismiss this bill.

**NEW YORK SECURITY & TRUST CO. v. LOUISVILLE, E. & ST. L.
CONSOL. R. CO. et al.**

(Circuit Court, D. Indiana. May 19, 1900.)

No. 9,125.

1. RAILROADS—RECEIVERSHIP OF CONSOLIDATED ROAD—RIGHT TO APPORTIONMENT OF PREFERENTIAL DEBTS.

Where a court, on application of a mortgagee, has taken possession of and operated by its receivers a railroad formed by the consolidation of different lines, and such receivers, under orders of the court, procured or assented to by the complainant, have paid operating expenses, taxes, debts for equipment, and interest on prior divisional mortgages on certain of the constituent lines, and in so doing have incurred a preferential indebtedness, the complainant is not entitled, on the subsequent foreclosure and adjustment in the same suit of all the various mortgages on the property, to have such preferential debt apportioned between the several mortgage interests, or to require an accounting between the several constituent lines of the receipts and disbursements on account of each during the receivership, and prior to its extension to the divisional mortgages, which would result in the displacement of the liens of some of such mortgages in favor of its own; but having the junior lien, and having procured the receivership in its own interest, the debt thereby created is primarily a charge upon its interest in the property.

2. SAME—MORTGAGES—AFTER-ACQUIRED PROPERTY CLAUSE.

An after-acquired property clause in a railroad mortgage extends only to property subsequently acquired by the mortgagor, and, where the mortgagor company becomes merged by consolidation in a new company, such clause cannot be construed to cover equipment acquired by the consolidated company as against a mortgagee of such company.

3. SAME—EXCHANGE OF BONDS—NOVATION.

Articles of consolidation between railroad companies provided for an issue of bonds by the consolidated company to be exchanged for outstanding bonds of the constituent companies. They authorized the directors of the new company, in case any of the old bonds remained unexchanged, to "make such arrangement in regard thereto, not inconsistent with these articles, as in their opinion the interest of said consolidated company may require," and also, in another article, to "adopt such plan, not inconsistent with these articles, as shall protect the rights of the holders of new bonds issued in such exchange, as against the holder of any bond of any of such constituent companies who shall not exchange the same as herein provided." No action was ever taken by the directors under either of said provisions. Holders of a portion of the second mortgage bonds of one of the constituent companies delivered their bonds to an agent of the new company in exchange for new bonds, nothing being said as to the disposition to be made of the surrendered bonds. *Held*, that the exchange worked a novation of the debt, and operated as an extinguishment of the bonds surrendered.

4. SAME—EQUITABLE RIGHT TO ENFORCE SURRENDERED BONDS.

No action having been taken by the consolidated company indicating an intention to keep the surrendered bonds alive, but it having subsequently issued a second series of bonds secured by a new mortgage, the recitals of prior indebtedness in which showed such bonds to have been paid, the equities of purchasers of bonds of such new issue, and of subsequent purchasers of unexchanged bonds secured by the same mortgage, in reliance upon the extinguishment of a large part of the debt thereby secured, were superior to any equity in favor of the holders of the first consolidated bonds, whether acquired by exchange or purchase, to have the surrendered bonds kept alive and enforced as collateral security to their holdings.

On Exceptions to Master's Report.

Hornblower, Byrne, Taylor & Potter and Charles W. Fairbanks, for complainant.

Humphrey & Davie, Miller, Elam & Fesler, Wm. Marshall Bullitt, Alexander Gilchrist, St. John Boyle, Iglehart & Taylor, and Bluford Wilson, for defendants.

WOODS, Circuit Judge. The Louisville, Evansville & St. Louis Consolidated Railroad Company had its origin on May 21, 1889, in an agreement for the consolidation of railroad companies in Indiana and Illinois. For convenience, its road may be said to have been made up of two divisions,—the eastern, extending from New Albany, Ind., opposite Louisville, Ky., to Mt. Vernon, Ill.; and the western, extending from Mt. Vernon to East St. Louis. The eastern division, itself in part the result of a prior consolidation, includes two branch roads, the Evansville, Rockport & Eastern, called here the Evansville, and the Huntingburgh, Tell City & Cannelton, called the Huntingburgh. Until the consolidation of May, 1889, the Huntingburgh road remained an independent organization. It was subject to a mortgage for \$300,000. The Evansville road, subject before to a separate mortgage for \$900,000, had been consolidated with the road constituting the main line of the eastern division, under the name of Louisville, Evansville & St. Louis Railroad Company, which on December 26, 1886, executed two mortgages, called the first and second; the first for \$2,000,000, and the second for \$3,000,000. Included in

the western division were the Illinois & St. Louis Railroad & Coal Company, which on June 1, 1875, had executed a mortgage for \$200,000, and the Venice & Carondelet Railroad Company, which, prior to the consolidation, had executed two mortgages, each for \$150,000. The bonds secured by the mortgages mentioned were each for \$1,000, and were all outstanding and unpaid at the time of the consolidation. The second of the articles of consolidation is to the effect that existing mortgages on the properties of the constituent companies "shall be taken up." The fourth article required the issue by the consolidated company of "8,000 consolidated first mortgage, five per cent, fifty year, gold coupon bonds, of \$1,000 each," secured by a mortgage on the entire property of the consolidated company, derived from the constituent companies, to be placed in a safe place, by direction of the board of directors of the consolidated company, and "thereafter held in trust for the purpose of exchange, according to the terms of these articles of consolidation," except 925 thereof, intended for another designated use; "and," as the article concludes, "in case any holder or holders of any of the bonds or stock of said constituent companies shall neglect or refuse to exchange any of such bonds or stock for the said consolidated bonds, as herein provided, the directors of said consolidated company shall be empowered to make such arrangements in regard thereto, not inconsistent with these articles, as in their opinion the interest of said consolidated company may require." The eighth article provided that the "bonds, being prepared and ready for issue," were to be deposited as follows:

"(a) To be used in taking up and in satisfaction of the first mortgage bonds of said Louisville, Evansville & St. Louis Railroad Company, and in redemption thereof, two thousand (2,000) of said bonds; (b) to be used in taking up and in satisfaction of three thousand (3,000) second mortgage bonds of said Louisville, Evansville & St. Louis Railroad Company, and in the redemption thereof, twenty-two hundred and fifty (2,250) of said bonds, exchanging old bonds at seventy-five (75) cents for new bonds at par; (c) to be used in taking up and in satisfaction of the first mortgage bonds on the Evansville division of the said Louisville, Evansville & St. Louis Railroad Company, and in the redemption thereof, nine hundred (900) of said bonds; (d) to be used in taking up and in satisfaction of the first mortgage bonds of said Huntingburgh, Tell City & Cannelton Railroad Company, and in the redemption thereof, three hundred (300) of said bonds."

In like manner it was provided that 500 of the bonds should be used "in taking up and in satisfaction" of the mortgage bonds of the constituent parts of the western division, and that 925 bonds should be sold and the proceeds used for the purpose of constructing and equipping the railroad of the Belleville, Centralia & Eastern Railroad Company, necessary to the construction of the line of the western division between Mt. Vernon and Belleville, a distance of about sixty-four miles.

The ninth article reads in this wise:

"Such of the bonds of any of said constituent companies as may be surrendered and exchanged as herein provided shall be stamped and defaced so that they shall not be negotiable; and the board of directors of said consolidated company may adopt such plan, not inconsistent with these articles, as shall protect the rights of the holders of new bonds issued in such exchange, as against a holder of any bond of any of said constituent companies who

shall not exchange the same as herein provided, and upon the surrender of all of said bonds of all of said constituent companies they shall be destroyed."

The consolidated mortgage bears date July 1, 1889, and, after reference in its preamble to the agreement of consolidation, asserts authority for the consolidated company to issue bonds "for the purpose of exchanging the same for bonds now secured by mortgage upon any of the property of the constituent companies contemplated by said agreement and in said articles of consolidation."

The bonds secured by the consolidated mortgage were delivered into the possession and custody of the New York Security & Trust Company, one of the two trustees in that mortgage, for disposition according to the agreement of consolidation; and before January 11, 1890, the bonds secured by the second mortgage upon the eastern division to the number of 2,330 had been surrendered by the holders to that company in exchange for consolidated bonds, and on surrender had been stamped on the back thereof "Canceled." An assistant secretary of the company has testified that when the surrendered bonds were so stamped the secretary of the company gave instruction that the bonds were to be held by the security and trust company as against the second mortgage; that they were to hold the bonds until they all came in, and then destroy or so cut and deface them as to make them nonnegotiable, and destroy the mortgages; that they examined the articles of consolidation at the time the bonds were received. There is other testimony to the same effect. The remaining 670 of the bonds secured by the second mortgage on the eastern division have never been presented for exchange, and are represented in this litigation by the Louisville Trust Company, trustee, successor to the original trustees named in the trust deed by which they are secured. Bonds secured by the consolidated mortgage were issued and are outstanding to the amount of \$3,797,500, including, to the amount of \$1,747,500, those exchanged for the 2,330 surrendered seconds.

On March 1, 1893, the consolidated company executed to the New York Security & Trust Company and Erastus P. Huston, trustees, a second mortgage, called in this record the "general mortgage," to secure bonds for \$15,000,000, designed primarily for the purpose of taking up, dollar for dollar, all bonds secured by prior mortgages on the consolidated road and its constituent parts. Bonds secured by that mortgage to the amount of \$2,000,000 or more were issued and are outstanding, but no exchange thereof for bonds of a prior issue was effected. In that mortgage the number of seconds outstanding is stated to be 670, the redemption of that number only is authorized, and it is further provided that the bonds surrendered for exchange "shall be so canceled and defaced as to destroy their negotiability, and shall be held and kept alive by the New York Security & Trust Company, to the end that the holder of said bonds hereby secured may be subrogated in the outstanding mortgages, respectively, to the rights of the holder of said bonds now outstanding, and so exchanged and surrendered for said new general mortgage gold bonds hereunder issued." Each of the mortgages mentioned contains the customary after-acquired property clause.

On January 4, 1894, on the petition of Thomas Barrett and James H. Wilson, E. O. Hopkins and Wilson were appointed receivers of the consolidated property by this court. That was done in confirmation and extension of the previous action of the United States circuit court for the Southern district of Illinois. The bill on which the appointment was made purported to be brought by the complainants "on their own behalf and on behalf of all creditors and stockholders" of the consolidated company; Barrett, it was alleged, being the owner of 5,069 of the 40,000 authorized shares of common stock and of \$300,000 of general mortgage bonds, and Wilson the owner of 450 shares of the common stock. The insolvency of the company, its inability to meet its obligations, including a floating indebtedness of \$900,000, and other reasons for the appointment of receivers, were alleged, and the appointment was sought "for the purpose of preserving the unity of the system, and preventing the disruption thereof by separate executions, attachments, or sequestrations, the occurrence of which," it was alleged, "will be inevitable, in view of the unavoidable defaults in payments of interest and other obligations which will presently occur." The consolidated company, the sole defendant named in the bill, appeared and answered, consenting to the appointment of receivers.

The road was operated under this receivership until November 26, 1894, when another appointment of the same receivers was ordered under a bill brought on the preceding September 6th by the New York Security & Trust Company, trustee, for the foreclosure of the consolidated mortgage, alleged to have been matured by reason of defaults in the payment of interest. That bill, to which only the consolidated company and Erastus P. Huston, co-trustee with the complainant in the general mortgage, were made defendants, without referring to the existing receivership, prayed that receivers be appointed with the usual powers. The order of appointment was granted, but upon the express condition that the receivers should pay all wages of employes, all indebtedness already created or liability incurred in the operation of the road by the receivers under their appointment in the Barrett suit, and particularly any sums of money borrowed under order of court for payment of interest upon bonds or other indebtedness of the company, should carry out and perform all contracts made under order of court in that suit for the betterment of the property of the company, and should pay for materials and supplies used in the operation of the property and furnished within six months prior to January 2, 1894; "to which condition imposed by the court the trust company," says the order, "objects, excepting that portion thereof which directs the payment of wages of employes." On the next day this suit and the suit of Barrett and Wilson were consolidated.

On December 28, 1894, Huston, as trustee therein, filed in the consolidated cause a cross bill for the foreclosure of the general mortgage; praying, among other things, that that mortgage be declared a first lien upon certain after-acquired property, and that receivers be appointed, but no order to that effect was entered. The receivers so appointed under the bill of the New York Security & Trust Com-

pany continued in charge until March 9, 1896, when bills were brought by the respective trustees to foreclose the first and second mortgages on the eastern division and the mortgage on the Huntingburgh road. Each bill prayed for a separate receiver, and accordingly the appointment of George T. Jarvis was ordered, to take effect on the 1st of the ensuing May, and, Wilson and Hopkins having resigned on April 29, 1896, Jarvis was made receiver under each of the bills which had been brought; the order of appointment providing for a reference to W. P. Fishback, master, to ascertain and report upon the following subjects: (1) What debts due by the Louisville, Evansville & St. Louis Consolidated Railroad Company have been paid by the receivers, James H. Wilson and E. O. Hopkins? (2) On what division or part of the road those debts were specially chargeable, if they were chargeable upon any particular division? (3) What was the indebtedness of the said receivers, Hopkins and Wilson, on the 1st day of May, 1896, and in what does it consist? (4) How should that indebtedness be chargeable,—that is, upon what divisions or portions of the road should the same be considered a lien or charge,—and of any debt which is in form a charge against the whole line, or was incurred for the benefit of the whole line, what portion should be chargeable against the several divisions? A somewhat similar order had been made upon the petition of the New York Security & Trust Company, filed in the consolidated cause on December 23, 1895, praying that the receivers be required to keep and file accounts showing the earnings of each portion of the road under separate mortgage, and of the expenditures thereon for current expenses and for betterments or otherwise.

On July 20, 1897, the trustee of the mortgage on the Evansville road filed a bill for the foreclosure of that security, and obtained an order extending the receivership to that suit. On April 27, 1898, the causes were all consolidated, and, being at issue, were referred to the master by an order containing, besides other provisions, requirements, substantially like those recited above, for an accounting between divisions. The master accordingly, on February 22, 1900, filed a report, bringing the account to December 31, 1898, and exceptions thereto were filed by the trustees, respectively, of the mortgages upon the eastern division and the Evansville and Huntingburgh branches; but at the beginning of the argument, on April 20, 1900, it was announced that the bonds secured by the first mortgage on the eastern division had been acquired by the owners of the consolidated mortgage bonds, and the counsel representing the exceptions taken in the interest of the first mortgage bondholders urged a decree on the basis of the master's report. The net result of the account reported by the master is a charge against the main line of the eastern division of \$548,940.25, against the Huntingburgh road of \$58,280.50, a credit to the Evansville road of \$31,643.74, and to the western division as an entirety a credit of \$59,740.64. The chief items of the account are payments of taxes, which in part were delinquent when the receivers were first appointed, interest on mortgage bonds, and charges for betterments, equipment, rentals, terminal expenses, and interest on the values of terminals. The in-

debtedness of the receiver, not including certain receiver's certificates otherwise specially provided for, which were issued for the purchase of equipment, the belt line at New Albany, and the Louisville & St. Louis Railway, was not far from \$300,000, including receiver's certificates to the amount of \$280,000, issued in 1897 to take up certificates issued in 1895. On equipment purchased by the consolidated company there was due on January 4, 1894, \$302,958.60, on which Hopkins and Wilson paid \$147,821.25, and Jarvis paid \$139,212.35. The payments were made out of the income of the property or out of proceeds of the receiver's certificates mentioned. The receivers have also paid as it became due semiannually the interest on the mortgages executed by the Illinois & St. Louis Railroad & Coal Company and the Venice & Carondelet Railroad Company, amounting in the aggregate to as much as \$200,000, and also have paid considerable sums upon equipment purchased under the orders of the court and on the purchase price of the New Albany Belt & Terminal Railroad and of the Louisville & St. Louis Railway.

There is here no question directly between general creditors and mortgagees of railroad property. The dispute is between the trustees of different mortgages, or, more definitely stated, between the trustees in mortgages executed by the original companies before the consolidation on the one side, and the trustee in the consolidated mortgage on the other side. There is a receiver's indebtedness of something more than \$300,000, in respect to which the question is whether it shall be charged primarily upon the interest in the property covered by the consolidated mortgage or be apportioned between the different mortgage interests, and, if so, on what basis. The further question, involving a number of subordinate inquiries, is whether on the master's accounting the eastern division and the Huntingburgh road shall be compelled to pay to the receiver the several sums charged against them. There is no available method of effecting such payment without a sale of the respective properties, and, when the sale shall have been made, the proposition of counsel representing the consolidated mortgage and the first mortgage on the eastern division is that the proceeds shall be used, first, to pay to the western division and to the Evansville road the respective amounts credited to them by the master, and the remainder applied in discharge of receiver's indebtedness. If the entire indebtedness should be so paid, to that extent the question of apportionment between divisions would, of course, be eliminated. The result, it is evident, would be to the advantage of the consolidated mortgage; and so, too, any sum paid in discharge of the credit to the western division, it is obvious, would go to those interested in that security. When it is remembered that in the account reported are included, besides the customary expenses of operation, rentals for cars and other equipment belonging to the consolidated company and covered by the lien of the consolidated mortgage, and interest on the value of terminal property at East St. Louis, it will be perceived that the court is now asked to displace mortgage securities in favor of claims of a character never before deemed entitled to such preference. In the Kneeland Case, 136 U. S. 92, 10 Sup. Ct. 950, 34 L. Ed. 379, and

in the Thomas Case, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, claims for car rentals were denied priority, in the latter case on the ground "that the car company contracted upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity" (*Virginia & A. Coal Co. v. Central R. & B. Co.*, 170 U. S. 355, 370, 18 Sup. Ct. 657, 43 L. Ed. 1068); but now it is proposed that a railroad company, created by the consolidation of lines of road already under mortgage, may, by a course of operation entirely under its own control, fasten upon the corpus of the constituent lines a charge, prior in equity to mortgage liens of antecedent date, for its expenses of operation, for the use of its equipment, and for interest on the value of its terminals. If that be possible, then, indeed, is it true, as was said in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C. C.) 46 Fed. 26, 35, that "a mortgage upon a railroad, instead of having stable value, according to the fixed principles of law and equity applicable to mortgages upon real estate, is subject to displacement at the will of the mortgagor, as well for his own interest as for the benefit of other parties to contracts of subsequent date, which upon principles hitherto supposed to be established should be subject to existing and recorded mortgage liens." For the time since the extension of the receivership under the bills brought for the foreclosure of the underlying mortgages such an accounting between the divisions of the road under distinct mortgages may be justifiable, but for the period covered by the operations of the first receivers it is, as I conceive, only in respect to the sums expended in the payment of delinquent taxes and interest on the prior mortgage bonds, and in permanent betterments of the divisional lines, that the argument in favor of an accounting, which involves a displacement of mortgage securities, can be said to be even plausible; but, while in those respects plausible to a degree at first blush, it is, I think, inconsistent with sound principles, and in its tendency necessarily unjust.

Counsel for the security and trust company have relied chiefly upon the rulings in *Ames v. Railroad Co.* (C. C.) 74 Fed. 344, and *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963. These cases will be referred to again. In a general sense, it is, of course, true, as stated in the Ames Case, in reiteration of what had been said in the case under the same title (60 Fed. 966), that receivers of an insolvent railroad corporation, appointed to preserve its property and operate its roads, do not stand in the shoes of the corporation; are neither the representatives of the corporation, nor of its creditors or stockholders, but are officers and representatives of the court,—the hands of the court, in which it holds the property while it operates the roads for the benefit of those ultimately entitled to the property and the income. To the same effect, in *Union Nat. Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013, 34 L. Ed. 341, the supreme court said that "a receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed, and the utmost effect of his appointment is to put the property from that time into his custody as an officer of

the court, for the benefit of the party ultimately proved to be entitled to it, but not to change the title, or even the right of possession, in the property." While, in the broad sense intended, this is unquestionable, yet it is equally certain that the doctrine of *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, often reaffirmed in the later cases, has put railroad receiverships, in respect to preferred claims, upon a distinctly modified basis. In the *Kneeland Case* (136 U. S. 92, 10 Sup. Ct. 950, 34 L. Ed. 379), the doctrine was more fully elaborated, and more distinctly defined, perhaps, than in any case before or since. The principles there enunciated were carefully considered and applied by this court in the *Wabash Case*, referred to *supra* (46 Fed. 26), and they seem to me to be determinative of the present questions. With slight variation from the language, but not from the sense, of the opinion of Justice Brewer, the propositions now especially relevant may be restated as follows: (1) It is the exception, and not the rule, that priority of liens can be displaced. (2) A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations. (3) The expenses which the court creates in the discharge of those obligations are burdens necessarily on the property taken possession of; and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may have invoked the receivership. (4) So if, at the instance of any party entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under obligations to the public of continued operation, in the administration of such receivership it may rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien upon the property itself. (5) When the holder of a lien upon the realty alone of a railroad asks the court in chancery to take possession, not only of the real, but also personal property, and for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the railroad shall be paid in preference to its own claim. (6) If the holder of a lien upon a railroad does not think the continued possession of the personalty a benefit to him, he should omit it from his bill, and ask the court to take possession of the railroad alone. (7) The court is not to be assumed to be an experienced railroad manager. It is a mistake to suppose that the duties of trustees in a mortgage in respect to the foreclosure proceedings are formal merely, or limited to the employment of counsel and the handling of securities. "They assume all the obligations of a party to the suit. They are charged with the care of the entire mortgage interest. * * * It is a part of their duty to make examination and to become fully informed in respect to the property, its liens, what is needed for its operation, and what can prudently and safely be dispensed with. Upon such information their application should be based." Though not concluded by their representations, the court's information is in the first instance derived therefrom, and it may and does generally act upon them. (8) Any action of the court, based on the representations of trustees in a mortgage

in process of foreclosure, "must be held to be conclusive, so far as concerns the interest they represent, in respect to all liabilities and obligations flowing from the possession of the receiver."

Under the first appointment the receivers in this case, as in the Wabash Case, and in the case of New England R. Co. v. Carnegie Steel Co., 21 C. C. A. 219, 75 Fed. 54, "stood practically for the corporation itself"; but when on November 26, 1894, the security and trust company asked for the appointment of receivers upon its bill, and "submitted to the order" of that date, it assumed retroactively, I am inclined to think, the position of original complainant; certainly, by subsequent conduct, and by force of the principles enumerated in the fifth, seventh, and eighth propositions, *supra*, it became responsible for what was done in the receivership from the beginning; and the orders of court, under which the large sums reported by the master were paid out by the receivers, for taxes and operating expenses, for repairs of equipment, for betterments, and for interest upon the several mortgages on the eastern division and on the Evansville and Huntingburgh lines, may properly be held to be conclusive so far as concerns the consolidated mortgage interest. The payments on interest, taxes, and betterments were made largely after November 26, 1894, and the orders for the issue of receivers' certificates made necessary by such expenditures were all made in 1895, under the second appointment. By assenting to the issue of the certificates, the security and trust company, even if not otherwise bound, should be deemed to have ratified what had been done. There is no consideration of justice or equity which calls for a review of the orders of the court under which the liabilities were incurred. The motive for the payment of interest on the underlying divisional mortgages, it is clear, was to make it impossible that the trustees therein or the bondholders should seek to obtain possession of their respective properties, and so acquire the advantages of control and "be charged with the responsibility of operation." To permit a recharge upon the several portions of the road of the interest so paid, to repeat the expression of the supreme court in the case of Morgan's L. & T. R. & S. Co. v. Texas Cent. Ry. Co., 137 U. S. 179, 196, 11 Sup. Ct. 61, 34 L. Ed. 625, "would be to permit the speculative action of third parties to defeat contract obligations, and to concede power over the property of others which even governmental sovereignty cannot exercise without limitation." This is applicable to the whole theory of making an apportionment between subdivisions of the consolidated road of the preferential debts antedating the appointment of receivers, and of an accounting for income and expenditures after the appointment, for the purpose of creating a charge upon any division in favor of another to the displacement of mortgages of prior date.

The purpose of the supreme court not to depart in any wise "from the force of the intimations contained in the recent utterances" in the Kneeland and Thomas Cases was declared in *Virginia & A. Coal Co. v. Central R. & B. Co.*, 170 U. S. 355, 370, 18 Sup. Ct. 657, 42 L. Ed. 1068; and in respect to the Kneeland Case it was there remarked that "particular attention was called, among other things, to the

fact that the receivership at the suit of the judgment creditor was not for the benefit of the mortgage bondholders, so that it could not be asserted that the expenditures of such receivership were payable in any event out of the income or corpus of the property." Of like significance in respect to responsibility for what is done by receivers is the expression in *Morgan's L. & T. R. & S. Co. v. Texas Cent. Ry. Co.*, supra, that "by the payment of interest, the interposition of the bondholders was averted, they could not take possession of the property, and should not be charged with the responsibility of its operation."

With the benefit of his experience in the Wabash Case, illustrated by his opinions in 23 Fed. 863, 30 Fed. 332, 34 Fed. 259, and 38 Fed. 63, no one could have been better prepared than Justice Brewer to declare the scope and limitations of the new doctrine of preferred claims, and to define the resulting duties and responsibilities of parties who should invoke or instigate the appointment of receivers of railroad properties. In the last of the Wabash Cases decided at circuit (38 Fed. 63), reversing a ruling made in the case reported in 34 Fed. 259, he held that until the preferential debts had been paid the income over expenses derived from a branch line should not be used to pay interest due upon mortgage bonds secured by a mortgage on that line. This ruling was the result of the construction placed upon previous orders of the court, but it necessarily involved the principles now under consideration. The opinion concludes with the remark, "I am also inclined to think that possibly one or two other reasons given by the respondents are sufficient to compel the ruling we now make, but I do not care to enter into any discussion of them." The compelling reasons which this court found for a like ruling against the trustees in the mortgage upon the Peru Branch of the Wabash System were deduced from the opinion in the Kneeland Case, then but recently published, and parts of the opinion of this court then delivered are sufficiently pertinent to the present discussion to justify quotation:

"If the application for the appointment of receivers had been by a mortgagee of the Wabash Company, instead of the company itself, the applicant might have so framed his bill as to escape responsibility, on the theory of consent, for any action of the court or its receivers in respect to the leased roads. In this respect the opinion in *Kneeland v. Trust Co.* is quite as explicit as in the recognition of the doctrine, in which the cases following *Fosdick v. Schall* agree, that the mortgagee or lienholder who procures a receivership thereby consents to the subjection of his interest in the property, of which possession is taken at his instance, to the discharge of all liabilities and expenses incurred by the receiver under the proper orders of the court. When, therefore, as in this case, receivers are appointed upon the petition of an insolvent debtor, and there is behind the court no responsible party who has an interest in the property which may be applied to the payment of court debts and expenses, the situation is essentially different, and the administration of the trust and the adjustment of liabilities for past and current expenses, it would seem, must be upon principles somewhat different from what should otherwise govern. It is certainly not true in this case, as counsel for the intervener have strenuously insisted, 'that the court took possession of the leased road for the benefit of the Wabash Company and its mortgagees and creditors, and not for the benefit of the lessor companies and their mortgagees.' On the contrary, under the contracts of lease, the

lessor companies and their mortgagees were themselves creditors of the Wabash Company, and the action of the court in appointing receivers, upon the motion of that company, was necessarily, in law and equity, as much for their benefit as for the benefit of any other mortgagee or creditor. And it follows that the rights of all the parties must be determined and enforced with due reference to the respective contracts and mortgages under which they claim, or out of which their rights have arisen. * * * [After reference to the Miltenberger Case, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117:] When, however, as in this case, the lease is for a long term, the practical result is an incorporation of the leased line into the body and ownership of the principal line, and in no just sense is the value of the use of one more than of the other an operating expense of the combination. * * * If, upon the filing of their cross bill, the court had granted the motion of the trustees of the general mortgage for the appointment of receivers in their interest, or had sustained any of the like motions which they afterwards made, they would have become responsible, I suppose, for the conduct of the receivership from that time, as if the appointment had been made upon their own motion in the first instance, and so, perhaps, the interest represented by them might have been subordinated to the intervenor's claim thereafter accruing; but, the court having denied all their efforts to obtain charge of the receivership, it cannot be said that any order of the court rests upon their implied consent. * * * The Wabash Company, by making the contract of June 1, 1881 (by which the Peru road was acquired), certainly neither conferred nor acquired any rights which, in respect to the mortgaged properties, were not subject to the mortgages theretofore made; and the court, by appointing receivers at the instance of that company, did not, as I conceive, acquire power to change the order of priority in that respect."

There are many later cases in the circuit courts and in the circuit courts of appeals which have been cited as bearing upon the subject. Special reference has been made already to some of them. They are: *Ruhlender v. Railroad Co.*, 62 U. S. App. 1, 33 C. C. A. 299, 91 Fed. 5; *New England R. Co. v. Carnegie Steel Co.*, supra; *Railroad Co. v. Harrison*, 32 C. C. A. 130, 88 Fed. 913, 924; *Bound v. Railway Co.* (C. C.) 47 Fed. 30; *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.* (C. C.) 53 Fed. 182, 192; *Phinizy v. Railroad Co.* (C. C.) 62 Fed. 771; *Lloyd v. Railroad Co.* (C. C.) 65 Fed. 351; *Hook v. Bosworth*, 12 C. C. A. 208, 64 Fed. 443; *Farmers' Loan & Trust Co. v. Iowa Water Co.* (C. C.) 78 Fed. 881. Reference has also been made to *Morgan's L. & T. R. & S. Co. v. Texas Cent. Ry. Co.*, supra; *Wood v. Deposit Co.*, 128 U. S. 416, 424, 9 Sup. Ct. 131, 32 L. Ed. 472; *Railroad Co. v. Humphreys*, 145 U. S. 105, 114, 12 Sup. Ct. 787, 36 L. Ed. 632.

The principles stated, if sound and applicable, either eliminate or afford a clear solution of the questions raised by the exceptions to the master's report in this case.

The effect of the consolidation, it is admitted and seems to be well established on authority, was practically, if not legally, to extinguish the original railroad companies, and to bind the consolidated company for the payment of all liabilities of the constituent companies, including the mortgage debts, as if they had been originally of its own creation. *Railway Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; *Railway Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367; *Railway Co. v. Hall*, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231; *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 644, 42 N. E. 153; *Railway Co. v. Ashling*, 160 Ill. 373, 43 N. E. 373. See, also,

C'learwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Pullman Palace-Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499. The constituent roads were merged into one, and, as if so constructed in the beginning, became a unit, under one management and one ownership. After the consolidation, whatever was expended by the consolidated company, whether in the payment of local taxes, or in the making of local improvements or betterments, was for its own interest in an entire single property; and, if it paid interest upon bonds secured by divisional mortgages, it simply discharged its own obligations, and correspondingly enhanced the value of the security given to the holders of its bonds. It could neither incur, nor put it in the power of another to create, any liability which should have preference over an existing mortgage lien, except to the extent allowable by a court of equity when it should become necessary to put the road in the hands of a receiver, and of that possibility any subsequent grantee or mortgagee was bound to take notice. Current debts, for whatever consideration, do not become a lien in the first instance, of course; but, if for labor or supplies necessary to the continuous operation of the road, they may become a lien prior, if necessary, to any and all mortgages or other rights resting in contract, and so must every one understand who deals with a railroad company. Under no circumstances can there be an innocent purchaser entitled to protection against the power of the court to compel the payment of preferred claims. By virtue of that power of the courts such claims, though of undetermined identity and amount, are secured in effect as if by a recorded mortgage, of which the world must take notice. This, obviously, is true of all mortgages, prior and junior alike. The purchasers of bonds secured thereby must all be deemed to have accepted them with notice of what might lawfully be done with the property. For instance, the divisional mortgagees here concerned were bound to know that the consolidation which was afterwards effected was a possibility, and that, in case of the insolvency of the consolidated company, receivers might be appointed, and questions of the apportionment of income and liabilities be raised, as they have been. The power of the court to displace a first mortgage is no more open to question than its power over a second mortgage. The point now to be determined is upon what particular mortgage interest or interests shall the amount to be paid be primarily charged. When successive mortgages are upon the same property, as in most reported cases probably they have been, the question is not important, since by the prevailing practice the burden falls upon the holder of the junior security if the amount realized from the sale of the property proves insufficient for the payment in full of all liens in addition to the preferred debt. Such was the *Miltenberger Case*, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117. In the present case the question is important, because the consolidated mortgage covers the western as well as the eastern division of the road, and the western division has a value largely in excess of the mortgages thereon which antedate the consolidated mortgage. It may be, too, that the equity of redemption from the underlying mortgages on some portions of the eastern division is

also valuable. If the consolidated company had unmortgaged property, that, of course, should be exhausted before resort to the power of courts of chancery to displace mortgages. The liabilities existing at the time of the appointment of receivers were liabilities of the corporation, and those arising out of the receivership are justly chargeable to it. The equity of redemption which it had in the entire property on July 1, 1889, it conveyed to the trustees in the consolidated mortgage, and the inquiry is whether the interest covered by that mortgage ought to be made the primary fund for the payment of the preferred debt, there not being income sufficient for the purpose. I think it should, both on equitable principles and by force of the order under which the trustee obtained an appointment of receivers.

Different portions of mortgaged land conveyed by deeds of warranty to different grantees are charged with the mortgage debt in the inverse order of the several conveyances, and there seems to me to be even stronger reason for holding that before disturbing underlying mortgages the interest covered by the last mortgage upon a railroad property must be subjected to the payment of preferential claims. This is practically so, as already suggested, when the mortgages all embrace the same property, and there is equal or greater reason that it should be so when the last mortgage covers property not touched by the earlier liens. Otherwise it will be possible for railroad companies, which have unincumbered property or interests, when they find themselves approaching insolvency, to mortgage whatever of value they may have left, with the intention that the burden of preferred claims shall be imposed upon prior mortgages. Such a course, it may be said, would be fraudulent on the part of the mortgagor, but, with the bonds secured by the new mortgage on the market and in the hands of innocent purchasers, on what ground could the transaction be assailed by the trustees in the earlier mortgages? It would not be impossible to make an apportionment between successive mortgages upon the same property by charging to each a percentage of the preferred debt equal to its share of the proceeds of the sale of the property, but that manifestly would be unjust to the owners of the prior security,—so palpably so that it does not appear ever to have been even proposed; but I do not perceive that it is less unjust to impose a part of the burden upon the prior mortgage to the advantage of the junior when the latter happens to include property not covered by the first. It is a simple and just rule, of easy and uniform application, that the burden of a railroad receivership shall fall first upon the corporation, and then, in the inverse order, upon its successive grantees or mortgagees. It is fair that the one who takes a mortgage upon the last tangible interest in a railroad company's property, knowing that there are or may arise unsecured debts which may be adjudged prior to mortgage liens, should take it subject primarily to that possible burden, because he thereby knowingly appropriates what otherwise would be the means, and the only means, of protection of the prior mortgagees against that burden. Between mortgages of the same date and rank it would be possible to effect a fair adjustment, but successive mortgages cannot, on equal terms and conditions, have come under the risk of being displaced; and

there cannot, therefore, be a just basis for an apportionment of the burden between them, when there turns out to be a preferred debt for which provisions must be made.

The Midland Case, instead of deciding the contrary, lends implied support to the proposition. The contest there, in so far as now relevant, was over receivers' certificates issued for the cost of improving that portion of the road between Paris and Decatur, the order authorizing the expenditure expressly providing that the certificates should be a first lien upon that portion of the road; but the trustees of the mortgage on that division, coming into the case at a later date, contended "that all the receivers' debt should be borne primarily by the Peoria, Atlanta & Decatur Company, in exoneration of the Paris & Decatur mortgage, on the ground that, by the terms of the conveyance of the Paris & Decatur Company to the purchasing company, the latter assumed 'all the bonded and floating indebtedness' of the selling company." The commissioner, whose opinion was confirmed by the circuit court, and finally approved by the supreme court, thought it "equitable that each property should contribute its just proportion towards defraying the necessary expenses" (a proposition as indisputable as any conceivable truism), and "that, as the Peoria, Atlanta & Decatur mortgage was executed more than two years before the purchase of the Paris & Decatur road, and as the obligation of operating the latter road, assumed by the purchasing company, was an ordinary liability and an unsecured obligation, the equities of the Peoria, Atlanta & Decatur bondholders require that the expenses of operating the purchased road, whether before or after the appointment of a receiver, should not take precedence, out of the corpus of the property of the purchasing company, over its bonds, issued and negotiated before the transfer, to the exoneration of the bonds of the purchased road." Of this proposition there could be no question, and it followed logically, as stated, "that it is more equitable that the expenses of the receivership, incurred under the direction of the court for the benefit of one road as well as the other, should be borne proportionally by each." But the plain implication accords with the deduction of reason that if the mortgage upon the Peoria, Atlanta & Decatur road had been executed, and its bonds issued and negotiated, after the transfer and after the contract of assumption, the equity of the case would have been reversed. The Ames Case, as reported, is not essentially different. It is said in one of the briefs before me that the Union Pacific Railway Company, the principal party in that case, had a large amount of personal property which was not incumbered, and in proof that the fact was urged upon the consideration of the court an extract is quoted from the brief of counsel who represented the Gunnison mortgage in that litigation; but, presumably for good reason, the point was not noticed by the court, and the force of the case must be determined upon the opinion as it stands. In the earlier case, under the same title (60 Fed. 966), it was stated "that the railroad of the Pacific Company proper, comprising about 1,800 miles, with the lands and property appurtenant to it, is incumbered by liens on various parts

of it aggregating more than \$117,000,000." Attention has also been called to the fact that in the Wabash Case, as shown in 30 Fed. 332, 339, there was a large amount of unmortgaged property, including 485 miles of road; but it appears, too, that the unmortgaged portion was sold, with the other parts of the road, subject to the entire preferential debt, which remained unpaid to the amount of \$2,425,000. "All this, by the terms of the decree," says the opinion, "the purchasing committee must pay before they get undisturbed possession of the property bought," and there seems never to have been a thought on the part of court or parties in the Wabash Case of charging any portion of the preferred indebtedness upon the corpus of leased lines under separate mortgages, even though operated by the receivers at a loss, so long as it should be possible to provide for its payment out of the property of the Wabash Company.

It results from these views that, no matter what the receipts and expenditures, the trustee in the consolidated mortgage is entitled to no accounting between divisions of the road during the time of the receivers for whose appointment and operations it became responsible, and it is equally without right to an apportionment between the several mortgage interests of the receivers' debt which remained unpaid at the end of that time.

This conclusion is justifiable on another and independent ground. The property was a unit, incapable practically or rightfully of dismemberment. The entire income, no matter whence derived, was primarily applicable to the payment of the expenses of the receivership and of prior preferential debts, and out of its application in that way there could arise no obligation of one part of the road in favor of another to the displacement of a mortgage lien. There should be no apportionment of the unpaid receivers' debt, not much exceeding \$300,000, because it appears that on the equipment purchased by the consolidated company, which passed under the consolidated mortgage, the receivers have paid nearly an equal amount (\$287,033); and when the amounts are considered which have been paid upon equipment purchased during the receivership, on the purchase of the New Albany Belt & Terminal Railroad and the Louisville & St. Louis Railway, and the interest paid during the whole receivership upon the mortgages upon the western division of the road, all of which outlays have been, or in the end presumably will be, to the direct advantage of the consolidated mortgage, it will be evident that the holders of the latter security, though charged with the outstanding certificates and the remaining current indebtedness down to May 1, 1896, will be without substantial ground for complaint.

Still another view might be taken, namely, that, notwithstanding the bills brought to foreclose the underlying mortgages and the appointment of the receiver under each, yet since, in view of the consolidation, a dismemberment of the system would have been impracticable, and the continued operation of the road as a unit was unavoidable, the income of the entire property to the time of sale should be devoted to the payment of the outstanding certificates and current debt, and the unpaid remainder, if any, properly appor-

tioned, and that otherwise than for that purpose there should be no accounting between divisions. That was the course pursued in the Wabash Case. It is perhaps the logical result of the doctrine that income is the primary fund for the payment of current expenses and of all forms of preferred liabilities. The order here, however, will be that the liabilities prior to May 1, 1896, be charged primarily upon the consolidated mortgage interest, and, for the several periods since the extension of the receivership under the bills brought to foreclose the underlying mortgages, respectively, there shall be an accounting on the basis reported by the master, except that there shall be no charge for interest on the value of terminal properties; and the rental for equipment, in view of the fact that repairs have been made by the receiver as a part of current expenses, shall not exceed seven per cent. of the cost price, but in no event shall there be a displacement of a mortgage upon any division except for the cost of permanent betterments, unless it be shown that the operation of that division, including the payment of the taxes thereon, resulted in an absolute loss to the receivership, in which event a charge against the proceeds of the sale of the division or branch for the amount of that loss shall be allowed.

It is contended that, of the equipment purchased by the consolidated company, a proportionate part should be deemed to have come under the several divisional mortgages, and especially enough thereof to replace equipment of the original companies which passed into the possession of the consolidated company, and has been since worn out, destroyed, or lost; but the court abides by its ruling on this question made upon a former report of the master. The after acquired property clause in each of the mortgages can rightly be construed, I think, to extend only to property subsequently acquired by the mortgagor. The consolidated company is a new and different organization. The case of *Hinchman v. Railway Co.* (Wash.) 44 Pac. 867, is quite in point, and in principle the question seems to be covered by the decision in *Pullman's Palace-Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499.

The remaining question is whether the second mortgage on the eastern division of the system remains a security for the entire original issue of 3,000 bonds, or only for the 670 which were not exchanged. It was alleged in the cross bill of the New York Security & Trust Company that the intention of the provision in the ninth article of consolidation was "that any holder of a bond of a constituent company, who surrendered the same in exchange for a bond of the consolidated company, should have the bond so surrendered by him kept alive as additional security for the consolidated bond which he had accepted"; but at the hearing and in the briefs the contention of that company has been that it holds the surrendered bonds as additional security or collateral to the entire issue of consolidated bonds. Most of the decisions cited touching the question have been made in cases where there was an express agreement or provision that the original bonds, surrendered in exchange for new, should be kept alive, either for the benefit of those who surrendered them, or perhaps, more commonly, as collateral to the

entire issue of new bonds. *Ames v. Railroad Co.*, 1 Fed. Cas. 760; *Barry v. Railway Co.* (C. C.) 34 Fed. 829, 833; *Central Trust Co. v. Marietta G. N. R. Co.* (C. C.) 73 Fed. 589; *Mowry v. Trust Co.*, 22 C. C. A. 52, 76 Fed. 38; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 472, 6 Sup. Ct. 809, 29 L. Ed. 963; *Gibbes v. Railroad Co.*, 13 S. C. 228; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co.* (Va.) 9 S. E. 759. The question is one of contract or intention, and little aid is to be derived from the cited cases, since in every instance they have turned upon the construction or force to be given to a writing or contract quite different from the articles of consolidation by which the present dispute must be determined. In *Mowry v. Farmers' Loan & Trust Co.*, supra, decided by the United States circuit court of appeals for the Seventh circuit, it was said that, "where a novation is thus sought to be established, it must be shown that the substitution of the new obligation was with design and intent to extinguish the old obligation, and as such an act would, upon its face, appear to be against the interest of the holder of the bond, such intent will not be presumed, but must be clearly established"; but the more relevant and dominant proposition was added that "where the new bonds are secured by a new mortgage, and the old bonds are surrendered to the debtor, generally a prima facie case would be established of novation when no purpose of the parties appeared to retain the elder security." The citation in support of this was *Jones, Corp. Bonds*, §§ 319, 320; but that author, on the authority of *Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co.*, supra, makes, in section 320, the broader statement, that if "a bondholder gives up his bonds, and accepts other securities in their place, there is, in the absence of any agreement governing the transaction, a novation of the debt, a payment of the former obligations, and a substitution of the latter." The bonds here in question were surrendered for exchange to the New York Security & Trust Company, one of the trustees in the consolidated mortgage, designated presumably by the board of directors of the consolidated company, in accordance with the fourth article of consolidation, as the custodian to receive and hold the new bonds "in trust for the purpose of exchange, according to the terms of the articles of consolidation." For the purpose of that exchange, the trust company was the representative of the consolidated company, and, though named also as one of the trustees in the consolidated mortgage, was performing no function or duty of trustee in that instrument; and since, by force of the consolidation, the consolidated company became responsible for all liabilities, including the bonded debt, of the several constituent companies, when any holder of divisional bonds surrendered them to the trust company for exchange, the surrender, in legal contemplation, was to the debtor, and by the rule stated in the *Mowry Case* the effect was to extinguish the old bonds unless there was at the time a contrary purpose.

There was, of course, no purpose on the part of the consolidated company to exercise the power, declared by Chief Justice Waite in *Claffin v. Railroad Co.* (C. C.) 8 Fed. 122, "to put out and keep out the

entire issue [of seconds] up to the time the bonds became due." On the contrary, the intention was to substitute the new bonds and mortgage for the old in accordance with the plan of consolidation. No proof of an intention inconsistent with the articles could prevail, and the proof reported by the master need not be regarded as going further. The secretary of the trust company, it was testified, instructed his subordinates that the bonds surrendered were to be held by that company "as against the second mortgage"; but that instruction, the report says, followed an examination of the articles of consolidation made at the time the bonds were received for exchange, and can signify no more than a conclusion of the secretary that the bonds should be so held. There is no evidence that any holder, when surrendering his bonds for exchange, expressed a desire or intention that they should be kept alive for his own advantage, or for the benefit of the company, or as an additional security for all or any part of the consolidated bonds. Except, therefore, as inferable from the articles of consolidation, there was no reservation. As the agent of the consolidated company to effect the proposed exchange of bonds, the limits of authority of the trust company were defined in the articles of consolidation, and could not be exceeded. An absolute exchange, whereby, subject to the power of the directors to act in the interest of the company, the surrendered bonds should be extinguished, it is clear was not beyond the authority conferred, but any attempt to restrict the effect of the exchange could not lawfully go beyond the provisions of the fourth and ninth articles,—of the fourth, that in case of bonds or stock of any of the constituent companies remaining unexchanged "the directors of the consolidated company shall be empowered to make such arrangement in regard thereto, not inconsistent with these articles, as in their opinion the interest of said consolidated company may require"; and of the ninth, that "the board of directors of said consolidated company may adopt such plan, not inconsistent with these articles, as shall protect the rights of the holders of new bonds issued in such exchange, as against the holder of any bond of any of such constituent companies who shall not exchange the same as herein provided." These provisions point in different directions; the first to the interest of the consolidated company, and the second to the protection of the rights of the holders of new bonds issued in exchange for old ones, as against the holder of any unexchanged bonds of whatever issue of any of the constituent companies. Upon the latter provision is based the contention that the surrendered bonds were not extinguished, but are held as collateral security for all of the consols issued, and, while it is admitted that the board of directors of the consolidated company never adopted any plan or made any declaration on the subject, it is insisted that the case falls within the rule that equity will treat as done what ought to have been done, and so give effect to what was intended. For manifest reasons the doctrine is not applicable. It was not definitely prescribed what should be done, and therefore cannot be judicially declared what ought to have been done. The board of directors had a manifest election between the two provi-

sions. They could have made arrangements according to the first in the interest of their company, or according to the second for the protection of the rights of holders of consols issued in exchange for seconds against the holders of unexchanged bonds, not seconds alone, but of any or all of the constituent companies. It is not for the court to say what arrangement would have been best for the consolidated company, or that the interest of that company and the contemplated protection of the rights of bondholders could both have been best conserved by the same method. Even if we had to do with the ninth article alone, it is not evident but that different plans might have been adopted for effecting the contemplated protection of the rights of holders of the consols as against the holders of unexchanged bonds of the constituent companies, and the impossibility, on that supposition, of a remedy in a court of equity for the failure of the board of directors to act is not less evident than upon the articles as they are. It is not clear, too, but that the arrangement or plan contemplated, in order to be availing, should have been adopted by the board of directors before the exchanges were made; but if it be accepted, as perhaps it may, that the provisions in the articles should be presumed to have been known to those who surrendered bonds for exchange, and that the exchanges effected were all made upon the condition that the board of directors might exercise thereafter the authority conferred or reserved by those provisions, yet the fact being that the power was capable of being exercised in two or more ways, was therefore discretionary, and was not exercised at all, the posture of the case is the same as if the articles had provided simply for the exchange of the old bonds secured by the respective underlying mortgages for new bonds secured by the mortgage upon the entire property.

It is to be observed, further, that of the consols issued, amounting to \$3,947,000, only to the amount of \$1,747,500 were they issued in exchange for bonds of the earlier issue, leaving consols outstanding to the amount of \$2,199,500, the holders of which, if identified, could not rightfully be included in the plan of protection contemplated by the ninth article.

It would be of little use, though perhaps not difficult, to suggest plausible reasons for the failure of the board of directors to exercise the power which it possessed in the interest either of the company or of its bondholders. It is enough that nothing was done; and it is clear, upon the master's report, that neither the directors of the consolidated company, nor the holders who exchanged their bonds, had any intention or understanding, at or near the time of exchange, that the surrendered bonds were to be kept alive for any purpose. There was at that time no strong motive for that course. The seconds were already dishonored. They were subject to a prior mortgage of \$2,000,000 on the main line and of \$900,000 on the Evansville Branch of the eastern division, and were regarded as worth but seventy-five cents on the dollar; while the proposed consols were rated at par, and, except for the seconds, were to be exchanged dollar for dollar for all prior bonds, most of which were secured by first mortgages upon property of ample value. It must have been per-

ceived from the first that in proportion as the number of unexchanged seconds was reduced the probable ability of the holders thereof to take care of the prior liens would be lessened; and, on the other hand, it must soon have come to be understood that in proportion as the number increased of consols put out, by exchange or otherwise, the greater would be the ability and disposition of the holders thereof, for the protection of their own interests, and necessarily to the disadvantage of the holders of unexchanged seconds, to acquire, as but recently they have done, the control of the first mortgage bonds. It is at least certain that in respect to seconds the proposed exchange was deemed by all concerned to be of an inferior for a better security, and when by the exchanges effected the new bonds were issued, on the basis of seventy-five for one hundred retired, there naturally seemed to be no necessity for action by the board of directors, either in the interest of the consolidated company or of the holders of consolidated bonds. When surrendered for exchange the bonds were stamped "Canceled," and that, it is fair to infer, was done with the knowledge and acquiescence of the owners. To quote from the opinion in the Midland Case, 117 U. S. 474, 6 Sup. Ct. 830, 29 L. Ed. 977: "There was no contingency and no reservation on the part of those surrendering. The surrender was for cancellation and was cancellation." It is said that in that case it was contemplated in the plan of reorganization that some of the old bonds would not be surrendered, and for that reason express provision was made that a corresponding number of the proposed new bonds should be canceled. But in what respect is the present case different? The provisions quoted from the fourth and ninth articles show that it was contemplated that some of the old bonds might not be exchanged, and it necessarily resulted that pro tanto the new bonds deposited with the trust company for exchange should remain unissued; and, if in both cases the surrendered bonds were extinguished, then in both alike there was, nominally at least, a corresponding enhancement of the security of the unsurrendered bonds, though not really and to the same extent in this case, because of the large prior liens to which the second mortgage was subject.

Besides the facts already stated, there is in the record ample proof, not only that the exchanged seconds were surrendered without condition or reservation, but that to treat them as alive would be inequitable. The bonds were a negotiable security, transferable by delivery from hand to hand, and, in dealings upon the exchanges or elsewhere, it is to be presumed have changed hands, or, if not, have been held by the owners, on the faith of public representations made by those entitled to speak on the subject. On January 11, 1890, the secretary of the New York Security & Trust Company wrote to Mr. Boyd, making inquiry on the subject: "We have already retired \$2,330,000 of second mortgage bonds of the Louisville, Evansville & St. Louis Railroad Company, and can offer you seventy-five cents, or \$750, in new consolidated five per cent. bonds, should you desire to exchange them now. These terms are much better than we have offered before, and I trust they may meet your approval." (This indicates that prior exchanges were not made according to the articles

of consolidation.) In the general mortgage, executed on March 1, 1893, the consolidated company, whose directors alone had had power to keep the surrendered bonds alive, and the New York Security & Trust Company, which represented whatever vitality there was in the surrendered bonds, joined in the declaration that 670 of the bonds were outstanding. A like statement is contained in the bill of Barrett and Wilson, upon which the first appointment of receivers was made, and it is repeated in the answer of the consolidated company, and in the answer of Huston to that bill, in subsequent petitions of the receivers to the court for orders to pay interest, in the bill of the trust company brought on September 6, 1894, to foreclose the consolidated mortgage, in the cross bill of Huston on December 28, 1894, in petitions and reports of the receivers in March and October, 1895, and by implication in the petition of the trust company on December 23, 1895, in which it was alleged that the bonds secured by the first and second mortgages on the eastern division were outstanding "to the amount of over \$2,670,000,"—a statement which could not well have been made, as it was, under oath and without explanation, if the true amount had been understood to be \$5,000,000. Not until the filing of the cross bill of the trust company, on November 11, 1896, does there appear to have been an assertion or suggestion that the surrendered bonds had been kept alive for any purpose, and the purpose then alleged was broadly different from that now asserted. It was asked at the hearing, what necessity or propriety was there for an utterance on the subject at an earlier time? Merely as a matter of pleading, clearly none; but under the circumstances something was due to those who owned or might invest in the unexchanged bonds. If, in fact, there had been an intention at the time of exchange to keep the bonds alive, and a purpose when the proper time should come to insist upon the fact, it does not seem to me that the declaration of the trust company to the contrary would have been made, or that the like declarations by others would have been allowed to go unchallenged. Under the circumstances, there is certainly no substantial equity in favor of the contention that the surrendered bonds were kept alive for any purpose.

To the extent that the master's report is inconsistent with these views the exceptions will be sustained; otherwise, overruled. The form of decree which has been submitted may be modified to conform to this opinion.

FAHRNEY v. KELLY et al.

(Circuit Court, W. D. Arkansas, Texarkana Division. May 21, 1900.)

1. CORPORATIONS—TRANSFER OF STOCK—EFFECT OF STATUTORY REGULATIONS. Act Ark. April 12, 1869 (Sand. & H. Dig. § 1338), which requires a certificate of the transfer of stock by a stockholder in a corporation to be filed for record, and provides that "no transfer of stock shall be valid as against any creditor of said stockholder until such certificate shall have been deposited," is plain and unambiguous, and a court has no authority to restrict its operation by construction. Under such provision, the legal and equitable title to stock transferred remains in the transferor, as to his creditors, until the required certificate is filed; and the title of a creditor

who purchases such stock at a sale under execution or attachment against the transferrer, although he pays no cash therefor, but merely credits the amount of his bid on his judgment, as he may lawfully do, cannot be impeached, in the absence of fraud, by a prior transferee, who failed to file a certificate, on the ground that the purchaser had actual knowledge of the transfer.

2. ATTACHMENT—VALIDITY—FRAUDULENT COLLUSION.

The attachment and sale by a creditor of stock in a corporation which had been transferred by his debtor, but which, owing to the failure of the transferee to have the transfer recorded as required by statute, remained the property of the transferrer as to his creditors, such action having been taken in accordance with an understanding between the debtor and creditor and the corporation for the double purpose of collecting the debt and of getting the stock attached out of the hands of the transferee, who was regarded as hostile to the existing management, cannot be held in law as a fraud upon the transferee where the proceedings were regular, since all that was done was perfectly legal in itself, and there can be no such thing as fraudulent collusion to do a legal act.

8. JUDICIAL SALE—CONSTRUCTIVE FRAUD—INADEQUACY OF PRICE.

A transferee of \$285,000 of the stock of a corporation worth at least \$200,000 failed to record a certificate of the transfer, as required by the state statute, to render the transfer valid as against creditors of the transferrer. Such a creditor, having a claim of \$12,000, brought suit thereon, attached such stock, and obtained a judgment and an order for its sale. Under such order, which required the stock to be sold in solido or in blocks to suit the purchaser, he caused the entire amount of stock to be sold in bulk, and became the purchaser for \$1,000, which he credited on his judgment. It was an admitted purpose of both creditor and debtor to devert the transferee of his stock. *Held*, that the action of the creditor in causing the sale in bulk of property so largely exceeding in value the amount of the judgment, and in purchasing it for a price so inadequate, operated as a constructive fraud upon the transferee, which vitiated the sale, and that the fact that the transferee had knowledge of the sale did not deprive him of the right to relief against it in equity.

In Chancery.

Rose, Hemmingway & Rose, for complainant.

Scott & Jones and E. D. Owen, for defendants.

ROGERS, District Judge. The facts in this case which are important to its decision are these: In the year 1896 the complainant, William H. Fahrney, by various transfers from the defendant W. J. Kelly, became the owner of \$287,500 of the capital stock of the White Cliffs Portland Cement & Chalk Company, one of the defendants in this suit. It appears that this stock had been transferred as a bonus by William J. Kelly to the complainant, William H. Fahrney, and other members of the Fahrney family, and others, who had become purchasers of certain bonds of the defendant company, and the proceeds of the bonds had gone into developing and improving the plant of the defendant company, situate in the Texarkana division of the Western district of Arkansas. This stock was transferred in writing by the said William J. Kelly to the aforesaid purchasers of the bonds, as above stated. On the 29th of April, 1898, the defendant D. B. Coulter, who was familiar with these transfers of stock at the time they were made and up to that date, instituted a suit by attachment against W. J. Kelly and John Kelly in the circuit court of Little River county, Ark., and caused an attachment to be issued and levied on

said stock as the property of W. J. Kelly. Afterwards he recovered a judgment against the said defendants William J. Kelly and John Kelly, and said stock was condemned to be sold to satisfy said judgment, which was accordingly done, and the sale approved by the Little River circuit court. At that sale D. B. Coulter, the judgment creditor, became the purchaser of all of said stock, which was, at his request, sold in a lump for the sum of \$1,000. He paid no money, but his judgment was credited with that amount. As stated, he knew when the attachment was levied that W. J. Kelly had assigned this stock, and was not the real owner thereof. He also was notified at the sale, and before the sale was made, that the complainant was the owner,—a fact which it is fair to say, from the proof in the case, he knew beforehand. It is not found that there were any irregularities in the levying of the attachment on the stock. This bill is filed to vacate that sale, to quiet complainant's title to said stock, to cause the title of the said Coulter to be canceled, and to enjoin the corporation and its secretary from transferring said stock on the corporate books to the said Coulter, and to register the same as the stock of the complainant, and for other proper relief.

On the 12th of April, 1869, the legislature of Arkansas passed an act entitled "An act to provide for the creation and regulation of incorporated companies," the twelfth section of which is in the following words:

"The president and secretary of every corporation, organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July, next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the fifteenth day of February or of August, with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose; and whenever any stockholder shall transfer his stock in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk, as aforesaid, who shall note the time of said deposit, and record it at full length in a book to be kept by him for that purpose; and no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been so deposited."

This section of that act has been divided by the digester into two sections, namely, sections 1337, 1338, Sand. & H. Dig. Ark. At the time said attachment was levied that provision of the section of the statute above quoted, which is as follows: "Whenever any stockholder shall transfer his stock in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk aforesaid, who shall note the time of said deposit, and record it at full length in a book to be kept by him for that purpose; and no transfer of stock shall be valid as against any creditor of said stockholder until such certificate shall have been so deposited,"—had not been complied with by the complainant. In other words, from the time of the transfer of this stock, in the year 1896, down to the institution of the attachment suits, in the year 1898, the certificate required by the

statute which is quoted had not been filed with the county clerk of Little River county, Ark., where said corporation transacts its business and its properties are located.

The question, therefore, arises whether, under the facts of this case, the defendant Coulter acquired any title to said stock as against the complainant in this suit. In view of the elaborate briefs and oral arguments and the exhaustive examinations of the decisions of the various state and federal courts throwing light upon this subject by the eminent counsel interested therein, if time permitted it would be an unprofitable work for the court to enter upon the discussion, either upon principle or upon authority, of the numerous cases which have been cited, or to review the able and exhaustive arguments, oral and written, which have been made upon the subject. The court in this case must content itself with stating its conclusions.

It may be admitted that the very able and persuasive arguments of the eminent counsel for the plaintiff, if addressed to a legislative body, would be well-nigh conclusive of the manifest impropriety of permitting the section of the statute quoted above to continue longer upon the statute books without amendment. A literal interpretation of that statute practically paralyzes the handling of the stocks of corporations, organized under the statutes referred to, by the commercial world, and the statute itself is entirely out of harmony with the great mass of statutory law of the different states in this country, and is hostile to that free transfer of corporate stocks found essential to the commerce of the country at this day. But, while this is true, it is the province of the court, not to amend the statute, but to interpret and enforce it.

An effort was made in two cases (*Deutschman v. Byrne*, 64 Ark. 111, 40 S. W. 780, and *Batesville Tel. Co. v. Myer Schmidt Grocer Co.* [Ark.] 56 S. W. 784) to secure an interpretation of this statute by the supreme court of Arkansas. The first case passed off upon an irregularity in the levy of the attachment, and the second was disposed of, as was also the case of *Masury v. Bank*, 35 C. C. A. 476, 93 Fed. 603, decided by the United States circuit court of appeals for the Eighth circuit, in both of which cases it was held that the word "transfer," found in the statute, did not embrace stock assigned as collateral security; so that the precise question now presented in this case, of an absolute sale of stock, has never been passed upon either by the supreme court of this state, or by any other appellate tribunal. There is little in either of these decisions from which the court can obtain any light as to what construction this statute should have, except that in *Batesville Tel. Co. v. Myer Schmidt Grocer Co.* there was a dissenting opinion by two of the judges, who held that the word "transfer" embraced not only stock absolutely sold, but also that which had been transferred as collateral security.

After the most careful consideration which I am capable of giving this case, I have reached the conclusion that the language of this statute is so plain as to forbid the court to place any interpretation upon it which would have the effect of interpolating into it any change whatever. It states in so many words that "no transfer of stock shall be valid as against any creditor of such stockholder until such certifi-

cate shall have been so deposited." It limits the provisions of the statute to a creditor. By its terms it makes it applicable to all creditors of such stockholder. To uphold the contention of the complainant, the court would be compelled to interpolate into this statute language so as to make it read: "And no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been so deposited, unless such creditor had notice before or at the time the attachment was levied (or at some subsequent time that the court must arbitrarily adopt) that the judgment debtor had made a transfer of the stock attached." It is insisted that this is precisely what the supreme court of Arkansas did in the case of *Byers v. Engles*, 16 Ark. 543. This is not strictly true, because the statutes are worded differently, although the court did import, by construction, into the terms of that statute, language equivalent to that which is now contended for with reference to this. The statutes, however, are different. It is, however, a difficult thing, notwithstanding the difference in the terms of the statutes, to draw a well-defined distinction, upon any well-recognized principle, between the construction which should be placed upon the statute under consideration and the one which was under consideration in *Byers v. Engles*, supra; and it is equally as difficult a thing to draw any well-defined distinction, upon any well-recognized principle, between the statute now under consideration and the statute under consideration in *Main v. Alexander*, 9 Ark. 112, where a different construction was placed upon a similar statute. It is not deemed essential to the decision of this case that the court should undertake it. It is enough to say that in the statute under consideration the legislature has said that "no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been deposited." It is not within the province of the court to define what shall be the public policy of the state with reference to the transfer of corporate stocks. That is a matter which should be remitted to the legislature of the state. In *Erwin v. Turner*, 6 Ark. 17, the court approvingly quote the language of Lord Coke to the effect that, "where the legislature have made no exceptions, the judge can make none, and that infants and feme covert would have been barred by the common act of limitations had they not been excepted therein."

The case at bar presents one of great hardship,—one which does not address itself to the moral sense of the chancellor; but it is not for the chancellor to nullify a statute because he does not approve the principle it establishes. The statute of this state regulating the transfer of stock has been in force for more than 30 years, and if persons who deal in stocks fail to inquire into the methods of transfer as fixed by the statutes of the state where the corporations are created, and elect to sleep upon their rights, it is their own fault, and they must suffer the consequences which follow their own neglect. *Bank v. Morris*, 13 Ark. 291; *Pryor v. Ryburn*, 16 Ark. 694; *Bennett v. Worthington*, 24 Ark. 493; *Railroad Co. v. Carley*, 39 Ark. 246; *Sims v. Cumby*, 53 Ark. 421, 14 S. W. 623.

But it is insisted that Coulter, purchasing under his own attachment, having paid nothing, but only crediting his judgment with the amount

of his bid, is not an innocent purchaser, but acquired only such title as the judgment debtor had in the property purchased. The general principle may be conceded; but, in the absence of fraud, is the complainant in an attitude to raise that question as against Coulter? If the court has not misconstrued the statute, as against an attaching creditor complainant acquired nothing by his purchase of the stock from Kelly. As to an attaching creditor, Kelly held both the legal and equitable title to the stock claimed by complainant. There was nothing in the statute prohibiting Coulter from purchasing at the sale. If it be conceded, therefore, that Coulter is not an innocent purchaser, his title, such as it is, is not open to assault by plaintiff on that ground, since as to Coulter, he being a creditor of Kelly, complainant had no title, either legal or equitable. To hold otherwise is to practically nullify the statute. It is to say, in effect: "Coulter's debt was honest, his levy by attachment legal and in conformity to the statute, his judgment against Kelly, his order sustaining the attachment, and the sale under it were regular and legal, but nevertheless he acquired nothing by his purchase as against complainant, who had no title, although Coulter had a perfect right, under the law, to become a purchaser at the sale." The fact is, the principle contended for has no application to a case such as this, and that question must relate back to the question of the proper construction of the statute. It must be borne in mind that what is here said proceeds upon the assumption that the proceedings in the attachment suit were free from fraud. But it is insisted that Kelly and his counsel and Coulter and his counsel colluded together to have Coulter, who knew that W. J. Kelly did not own the stock in controversy, attach it, not for the bona fide purpose alone of collecting Coulter's debt, but for the further purpose of sweeping away Fahrney's stock, thereby depriving him of a voice in the control of the defendant company. An examination of the proof leads the court to the conclusion that, when Coulter first placed his note upon which the judgment in the attachment case was rendered in the hands of Scott & Jones, it was done with the purpose of taking such steps as would make the debt safe, and because he was apprehensive of the financial condition of the Kellys, to whom he had made concessions until he had no security whatever for the note.

Mr. E. D. Owen, who was the attorney for the White Cliffs Portland Cement & Chalk Company, which was under the management of the Kellys, being questioned by Mr. Jones, attorney for Coulter, testifies:

"When was the first time that the relation of attorney and client ever existed between you and Col. Coulter? A. At the time that the question came up in regard to this attachment I was consulting with Mr. Kelly as to the attitude of the White Cliffs Portland Cement & Chalk Company and of themselves towards such an attachment. We went to your office to talk the matter over. You at that time advised that you thought the attachment would be legal. I hesitated. Afterwards I became convinced that the attachment would stand, and then consented to join forces in this matter, in view of the fact that my clients would be benefited by the transaction. But up to that time I never represented Col. Coulter in anything. Q. In what manner did you consider that your clients would be benefited if Coulter succeeded in his attachment? A. The Fahrneys had, for a good while, been taking steps lead-

ing towards the foreclosure of their mortgage. The antagonism of the Fahrneys to the Kellys and the general stock of this company was well known to me. They held at that time the first mortgage. The company had no money to pay the interest on that mortgage. There was danger of the stock being wiped out by the Fahrneys, which was the effort on their part. It was better for the stockholders of the White Cliffs Portland Cement & Chalk Company, and better for the Kellys, and better for me as a stockholder, outside of this stock that has been spoken of, that this stock should be in the hands of a friend of the company, rather than in the hands of an enemy, who was trying to destroy it. It was therefore obviously to the interest of all concerned, so far as those I represented were interested, that Col. Coulter should have this stock in preference to the Fahrneys. I knew all about the various transactions between the Kellys and the Fahrneys, and I knew all about the claims of the Kellys in regard to the violation of their contracts. In view of all those facts, I considered it to the advantage of the White Cliffs Portland Cement & Chalk Company and all the rest of us that Col. Coulter should have this stock."

D. B. Coulter, being interrogated by Mr. Jones, in his evidence testifies as follows:

"Q. Now state, Col. Coulter, the reasons you had for levying upon the Fahrney stock, and not upon the other stock, in which Kelly had an interest, and which had been assigned to Edenborn. A. To have levied upon the Kelly stock would have embarrassed that stock. Fahrney had a mortgage upon this property, and if he foreclosed that it would have made the balance of it worthless, and squeezed me out. * * * Q. Now, levying upon the Fahrney stock, and leaving the other stock unincumbered, what effect, in your judgment, would that have upon the value of the stock? A. Upon the stock I would levy on, or the other stock? Q. The stock of the entire plant? A. I think it would have made it more valuable by getting hold of this stock. I would leave the other stock unincumbered, and it would be in the hands of parties who would raise the money on it. Q. After we arrived at this conclusion as to what stock it was better to levy upon, state if you gave your attorneys any further instructions, or whether they, after that, managed the case according to their judgment. A. They managed it nearly entirely. I don't think I had but one or two little interviews. We had correspondence on the subject, and very little of that. I merely carried out your instructions. * * * Q. You say that up to the time you went to Chicago, Judge Owen had never represented you as attorney? A. No, sir; I had never met Judge Owen. Q. Had he ever represented you as attorney up to the time that you met him in Scott & Jones's office? A. No, sir. Q. Was he your attorney then? A. Yes, sir; he was in the case from that time on. Q. Then, in that interview at Scott & Jones's office, Judge Owen and Messrs. Scott & Jones were all advising in your interest? A. Yes, sir. Q. Judge Owen was the attorney for the Kellys and for the White Cliff Portland Cement & Chalk Company also? A. I suppose so. Scott & Jones had the meeting, and did most of the talking. I presume he was. I don't know what interest he had. I never employed him in that business. I could not testify what he had to do with the White Cliff Portland Cement & Chalk Company. Q. That was for the purpose of enabling you to sell this stock? A. Yes, sir; they advised me to attach that stock. Q. Judge Owen with the others? A. Yes, sir; I think Judge Owen with the others. * * * Q. What efforts have you made since you recovered the judgment to enforce its collection, outside of the levy upon the stock which was sold? A. I presume that there has been no effort further than that, that I know of; that I remember of. Q. Why was it, colonel, that you didn't levy upon the stock held by the Kellys, or which appears on the books of the company to belong to Kellys, at that time, and why didn't you levy upon the stock which had been sold to Edenborn, or upon that which had been assigned to Edenborn as collateral? A. I believe I stated that; that I didn't want to embarrass that part of the stock, and I was acting entirely under the advice of my counsel about the stock. Had I done the other, and embarrassed that, that would give Mr. Fahrney an opportunity to foreclose the mort-

gage, and doing what he said he was going to do, and close the mortgage out. Q. If you had levied upon the stock, could not the person who afterwards purchased at the sale, or could not you have purchased at the sale, and permitted it to be used as it was used? (Objected to as asking for a conclusion, immaterial, and argumentative.) A. I am not sufficiently posted as to the law points in this case, and I was acting entirely under the advice of my counsel. I left it entirely with them. I told them to save me in the matter, if they could, and collect my money. I have done all along what they said, as near as I could."

It is impossible to read this testimony without the conviction that from the time of the meeting in Scott & Jones' office, at which it was determined what stock should be levied upon, that both Owen, who was the attorney for the White Cliffs Portland Cement & Chalk Company, and also for William J. Kelly, became also, in conjunction with Scott & Jones, the attorney of D. B. Coulter, and that the attachment proceedings had in view two objects: First, to wipe out the stock of the Kellys by transferring it through the attachment proceedings to Coulter; and at the same time to collect Coulter's debt. It is impossible to avoid the conclusion that, whatever may have been Col. Coulter's desire, it was a war between the Kellys and the Fahrneys as to who should control the stock of the company, and thereby its management. Otherwise, the attachment might have been levied upon the stock of Kelly and that of other persons, which latter occupied precisely the same attitude as that of the Kellys.

The query, therefore, arises whether or not the institution and prosecution of this attachment suit for the double purpose stated constituted a fraud upon the rights of the complainant in this suit. In the argument, as the court understood it, it was broadly conceded that the object of the suit was to collect the debt, and also to get the stock of the Fahrneys into hands friendly to the existing management of the company, and it was contended that, admitting that to be true, it fell far short of establishing a fraud. Assuming, therefore, that there were no irregularities in the levy, or in any of the proceedings, up to the time of the sale, the court is of opinion that such joint action upon the part of Coulter, of the White Cliffs Company and the Kellys, and their respective counsel, did not, in law, of itself constitute a fraud; for the reason that there can be no such thing as a fraudulent collusion to do a thing which in itself is perfectly legal, if done in a legal way. In other words, the institution and prosecution of the attachment suit, and the levy of the attachment upon the stock of the complainant for the purpose of satisfying the debt of the Kellys, with the full knowledge of all the parties that Kelly had transferred his title to the stock to Fahrney, was not a fraud, because the statute made the assignment of the stock of Kelly to the Fahrneys invalid until a certificate thereof had been filed with the county clerk of Little River county. Nor does the mere fact that the White Cliffs Company, the Kellys, and Coulter had also the ulterior purpose of depriving the Fahrneys of their stock, of itself, constitute a fraud, for the reason above stated. And this brings us to the consideration as to whether or not, keeping in view the double purpose of these attachment proceedings, it was a fraud against the rights of the complainant to cause to be sold in bulk \$285,000 of stock to satisfy a debt of about \$12,000. It is somewhat

difficult to place an accurate estimate upon the value of this stock, but the court is satisfied, from an examination of the evidence, that it was worth many times the value of Coulter's judgment.

In the case of *Byers v. Surget*, 19 How. 306, 15 L. Ed. 671, the court stated the facts of that case as follows:

"Upon this extraordinary judgment, the appellant, as the attorney for the defendant in the inferior court, assumed to himself the power to tax the costs adjudged to the defendant; to tax them, not in the capacity of clerk, the agent created by law for the performance of that service, nor in that of the legal deputy or subordinate of that officer, but, as it has been asserted, as a sort of amicus clerci, and with equal benevolence, or in order to remedy the ignorance and imbecility which, by way of justification of the appellant's acts, it is attempted to be shown characterized the ministers of the law in that unfortunate locality, assumed to himself the power and the right not only of selecting the final process, but of prescribing also the description and the quantity of the property which he chose to have seized in satisfaction of the process; of furnishing a list of the parcels and amounts which he chose to have thus seized; of ordering the sheriff to levy upon the whole of what he had so described; of preparing himself and furnishing to the officer such advertisement for the sale of the property levied upon as he approved; of requiring of the sheriff, under peril of responsibility for refusal, towards the satisfaction of an execution for thirty-nine dollars and ten cents, peremptorily to make sale of more than fourteen thousand acres of land, estimated by the witnesses from forty to seventy thousand dollars; and finally, under a proceeding irregular in its origin, commenced by himself, and by him controlled and managed to its consummation, of becoming the purchaser of the property estimated as above for the sum of nine dollars thirteen and one-half cents."

In that case the judgment was criticised by the court as being irregular, but the opinion of the court in that case was not based upon any irregularities in the judgment, for the court say:

"It is true that, with respect to the regularity of that judgment, or of any legal errors in obtaining it, this court or the circuit court could not take cognizance, nor exercise any appellate power for its reversal, and, in any collateral attempt at law to impeach that judgment, it must be regarded as binding and operative. But with any fraudulent conduct of parties in obtaining a judgment, or in attempting to avail themselves thereof, this court can regularly, as could the circuit court, take cognizance. Such a proceeding is within the legitimate province of courts of equity, and constitutes an extensive ground of their jurisdiction. The true and intrinsic character of proceedings, as well in courts of law as in pais, is alike subject to the scrutiny of a court of equity, which will probe, and either sustain or annul, them, according to their real character, and as the ends of justice may require."

The court then proceeds to criticise various irregularities in the proceedings.

It should be stated in this connection that no irregularity in the proceedings of the court, down to the recovery of the judgment, has been called to the attention of the court, and it must also be assumed that the judgment which Coulter recovered was upon a bona fide debt. But with reference to the gross inadequacy of consideration the court in *Byers v. Surget*, supra, said:

"To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience; for this qualification implies necessarily the affirmation that if the inadequacy be of a nature so gross as to shock the conscience it will amount to proof of

fraud. Again, in answer to the same objection, it is insisted that, whatever presumption arising from inadequacy of consideration may be permitted with respect to transactions strictly limited to vendor and vendee, no unfavorable inference from that cause is permissible with respect to sales made under judicial process. Certainly the facts that sales are made by the officers or ministers of the law, and under its authority, may properly weaken the usual presumption arising from gross inadequacy; but to declare that such inadequacy, connected with other facts and circumstances evincing fraud or unfairness, could never be regarded as affecting sales under process, would be as rational as the assertion that process of law could never be abused, and that the ministers of the law must necessarily be intelligent and upright, and incapable of being ever willingly or unwittingly made the instruments of fraud or oppression. But the transaction now under review can with no show of propriety be tested by the single fact of inadequacy of consideration, however gross and extraordinary that inadequacy has been. We perceive in this transaction other ingredients, that have been mingled therewith by the appellant, that give to the objection of inadequacy an effect that, standing isolated and alone, could not be ascribed to or deduced from it. Thus, when we advert to the irregular and extraordinary character of the judgment procured through the agency of the appellant; to his eagerness, that could not await the action of the officer of the court; his assumption of the functions of the clerk, in taxing the costs, and in writing out the execution; his preparation and delivery to the sheriff of a description and list of the lands of the appellee, amounting to more than fourteen thousand acres; his requisition of a seizure of the whole of those lands in satisfaction of the sum of thirty-nine dollars; his inflexible demand upon the sheriff, under threats of prosecution, to expose to sale the entire levy; his purchase of all these lands for the sum of nine dollars and thirteen and a half cents; and his refusal after the sale and purchase to accept, in redemption of these lands so sacrificed, a sum of money tendered to him much more than equal to the costs, with all the expenses incident to the judgment,—when all these acts on the part of the appellant are adverted to, they impel irresistibly to the conclusion that gross inadequacy of consideration in the sale and purchase of these lands was the premeditated result which the proceedings by the appellant were put in practice to insure. They betray that *malus dolus* in which the design of the appellant was conceived, which appears to have presided over and regulated the progress of the design from its birth to its consummation, to which design the appellant has tenaciously clung, in the seeming expectation that it was beyond the corrective powers of law or justice.”

While there are striking differences between the case of *Byers v. Surget*, *supra*, and the case at bar, it cannot but be observed that there are striking similarities also. It does not appear what motive influenced *Byers* to levy upon 14,000 acres of land for the purpose of satisfying a judgment for costs amounting to less than \$30, nor is it important to inquire, since it could not possibly alter the result. In the case at bar, however, it was not simply the collection of a debt that was sought, but there was a war between the *Kellys* and the *Fahrneys*, and the claim of *Coulter* (though perhaps not so intended when it was first placed in the hands of *Scott & Jones* for collection) afterwards became an instrument of warfare, offensive and defensive; and the court cannot resist the conviction that the terms of the order of sale (which I cannot think was ever called to the attention of the court, providing that “11,500 shares of capital stock be sold for cash, and that the same be sold in *solido*, or in blocks to suit the purchaser, of not less than 1,000 shares in each block”) were taken, and the sale in bulk of \$285,500 of stock estimated to be worth \$200,000 had to satisfy a judgment of \$12,000, because of a desire not alone to collect the debt, but also to get the stock of *Fahrney* into the

hands of some one friendly to the Kelly interests. Nor does the fact that the statute does not prohibit or direct how personal property shall be sold palliate the injustice of this order, nor does the additional fact that the sale was made in conformity with the terms of the order alter the situation.

In *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839, the court laid down these two propositions:

"A judicial sale of real estate will not be set aside for inadequacy of price unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness. Great inadequacy of price at a judicial sale of real estate requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise a presumption of fraud."

In the body of the opinion they say:

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

In that case the property sold was worth \$10,000, and it was sold for a paltry sum of less than \$200. In that case the defendant knew that her property had been sold, but she let the year expire in which she could redeem it. The parties who bought it, after the purchase used various devices for the purpose of lulling to security the owner of the property until the year had expired, and then procured the deed thereto, but the court vacated the sale, and allowed her to redeem; the effect of which was to absolutely set aside the terms of the statute because of the fraud which had been perpetrated upon her by lulling her into security until the year for redemption had passed by.

In paragraph 296, 2 Freem. Ex'ns, the author lays down the rule that:

"Where several distinct parcels of real estate or several articles of personal property are to be sold, what is called a 'lumping' sale can rarely be justified. Such a sale, when objected to in due time, will not be upheld, unless special circumstances can be shown from which it can be inferred that such sale was either necessary or advantageous."

Upon this precise point, and where no fraud, either actual or constructive, is involved, the authorities are not entirely uniform. In some states the sale is held absolutely void where two or more tracts, or two or more articles of personal property, are sold in a lumping sale. In others it is held that the sale is not absolutely void, but only voidable. But it is believed that the great weight of authority in both state and federal courts is to the effect that, where fraud has entered into the transaction, neither execution sales, nor judicial sales, even where the sale itself has been confirmed by the court, or decrees or judgments of any kind, will be permitted to stand in the way of the vacation of sales, where the proper remedy is sought in apt time. At all events, such is the rule established by the supreme court of the United States. The case of *Monger v. Shirley*, 22 L. Ed. 449, is a case strongly in point. In that case, like this, the proceeding was by attachment in the circuit court of Hamilton county, Tenn. The note upon which the suit was brought was a forged note.

Judgment was recovered upon it by Monger, and the farm belonging to Shirley sold, and bought in by Monger. A bill was filed in the federal court to annul the whole proceeding upon which the judgment was recovered and the land sold. The court in that case say:

"The power of a court of equity to annul judgments and decrees, and all titles acquired under them, for fraud, where the rights of bona fide purchasers have not intervened, is too well settled to require discussion. *Freem. Judgm.* §§ 486, 489, 491; 1 Story, Eq. § 252."

In conclusion the court add:

"It would be a reproach upon the administration of justice if such a title, thus acquired, could avail to defeat the rights of the complainant, and give triumph to the iniquity which has been practiced upon him."

In *U. S. v. Steenerson*, 4 U. S. App. 332, 1 C. C. A. 552, 50 Fed. 504, the court said:

"Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist. *The Amistad*, 15 Pet. 518, 10 L. Ed. 826; *League v. De Young*, 11 How. 185, 13 L. Ed. 657."

Jennings v. Carter, 53 Ark. 242, 13 S. W. 800, was a case of this kind: Three separate plaintiffs had recovered judgments against Carter. Executions were sued out and levied on Carter's homestead, without his knowledge. The sale of the property was advertised in a paper remote from the homestead, but in the same county, and with no circulation likely to reach Carter. Notice of the sale was posted on a fence rail on Carter's fence, some distance from his residence. It was also posted on a tree, a quarter of a mile from Carter's residence. The sheriff explained this conduct by saying it saved distance, and he wanted to avoid the unpleasantness of publishing the notice where Carter's family could see him. At the sale, West, who was the attorney for one of the plaintiffs in execution, and who conducted all the proceedings for the sale, bought the land for Devin. Under another judgment in favor of Jennings, Jennings became the purchaser, and Vernin and Skillern, the other judgment creditors, also became purchasers under a third sale. Subsequently Jennings purchased the interests of Devin, Vernin, and Skillern, got deeds from them, and agreed to pay for the land in case of recovery. The defendant knew nothing of either levy or sale until the sale of his homestead had been made. Jennings brought ejectment against Carter to recover the land. Carter filed a cross bill, had the case transferred to equity, and the court canceled all the various deeds. The supreme court, in passing upon the case, said:

"Upon a careful reading of the evidence in this case, we are led to the conviction that the proceedings before the sale were conducted under the direction of the plaintiffs in execution with the hope and to the end that the appellee would never learn of the pending sale, and thereby lose his homestead. In order to accomplish the wrong, they attempted to defeat the purpose of the law in providing notices for a sale, while making a pretense of observing it. They could acquire no rights through such a proceeding. It is contended that title passed, untainted with fraud, to Devin, who was a stranger to the proceeding, and from him to appellant. To this it is a sufficient answer that Devin purchased through West, his attorney, who placed the proceeding to sell upon foot, and consummated it after the relation was fixed. Devin is affected with the knowledge of West, and on trial he testified that he 'thought it likely

the notice had been published with the intent of preventing appellee and his friends from seeing it.' We think the appearances justified that impression. Creditors cannot take advantage of the temporary absence of their debtors to obtain execution, give notice of sale, which will never reach the debtors or their friends, and thereby deprive them of their constitutional exemptions. Such efforts should not be made, and can never receive the countenance of the court. As the land has not passed to a bona fide purchaser for value, the appellee was entitled to the relief asked [and the judgment was affirmed]."

It will be observed that in this case every requirement of the statute was literally and punctiliously observed, but the method in which the notice was given was a fraudulent device to defeat the very objects for which the notice was given. The court pronounced it a fraud, and set aside the sale. Perhaps no stronger case can be found in the books of how a fraud may be perpetrated, and yet every requirement of the law be observed, than that case, which met the condemnation of the supreme court of Arkansas.

In *Atkins v. Dick*, 14 Pet. 119, 10 L. Ed. 381, the supreme court of the United States say:

"The question is whether a party who has received payment of his debt shall be permitted by a court of equity to avail himself of a judgment at law to enforce a second payment, and that, too, against a party who did not know of that payment until after the judgment was obtained. To state such a proposition is to answer it. The bill further charges the defendants with fraud, and this, too, is admitted by the demurrer. If there be any one ground upon which a court of equity affords relief with more unvarying uniformity than another, it is an allegation of fraud, whether proved or admitted."

It must be admitted that in the case at bar there was no concealment, so far as the record discloses, in the actions of the counsel who conducted the attachment proceedings for Coulter. What they did seems to have been done openly, and with the conviction that no legal right of the complainant was invaded thereby, nor is the court prepared to say that either Coulter or they intended by the attachment proceedings to commit any fraud upon the rights of the complainant. But the question is not what their conviction of the law was nor what they intended. The question now under discussion is, was the action of Coulter, under the advice of his counsel, in taking the order of sale referred to, and in causing \$285,000 of stock to be sold in bulk for the payment of a judgment of but \$12,000, such an action as would operate as a constructive fraud upon the rights of the complainant? It is, of course, conceded that, as between W. J. Kelly and all other persons, except the creditors of Kelly, Fahrney was the owner of this stock; and, while he is not in an attitude to assail the attachment proceedings so long as they are free from fraud and are regular, it is equally clear that, being the real owner of the stock as to all persons except a creditor, he has the right to be heard before he can be deprived thereof by any proceedings (even by a creditor fortified by the statute) which are not free from either actual or constructive fraud.

In view of the decisions which I have quoted, and the principles which they establish, and which are sustained by ample authority, the court is of opinion that the sale of this stock in bulk was a constructive fraud upon the rights of the complainant. The order of sale by the Little River circuit court, directing the stock sold in solidio

or in blocks to suit the purchaser of not less than \$25,000, was, of itself, to say the least, unusual; and it must be assumed that if the facts had been fully understood by the court, instead of the stock having been sold in blocks of \$25,000, it had been sold in bulk, and that the stock, shown by some of the evidence to be worth 80 cents on the dollar, had been sold for one cent on the dollar, it would not have confirmed the sale, notwithstanding the terms of the order, since such action upon the part of a court would scarcely comport with enlightened judicial procedure. The probabilities are that the court never read the order of sale or the report. It was doubtless, as is customary in such cases, prepared by counsel and entered by the clerk, and the report filed, and, no exceptions having been interposed, indeed, none desired, by Kelly, and Fahrney not being a party, it was approved by the court without explanation or representations of any kind. Such is the practice as it generally obtains in the courts in some circuits,—a practice which might well be abandoned.

This stock was ordered sold in bulk by Mr. Coulter himself. He testified that he followed the advice of his attorneys in the management of this suit, and presumably they advised him on this point, and it is certain that his and their purpose was to collect the debt as far as the stock sold would bring it, and also to wipe out the stock, and silence the voice of the complainant in the affairs of the company. In a proceeding having in view such a purpose, and where the price the property brought was grossly inadequate, careful scrutiny should be had by a court of chancery of every step taken, and if it appears that the interests of the complainant have been unfairly or unjustly dealt with at any stage of the proceedings, whether it resulted from an improper motive or an error in judgment, however honest, the wrong should be righted by vacating the sale. The sale of \$285,000 of stock, variously estimated in value at from \$200,000 to par, at a county seat in an interior county, in bulk, upon a judgment amounting in the aggregate to \$12,000, must, of necessity, have had the effect of destroying all competition in bidding. The object of every judicial sale should be to secure the highest price for the property sold, thereby relieving the debtor as much as possible of his indebtedness, and paying the creditor the largest possible amount upon his judgment. This object, purpose, and policy of the law was defeated by the course pursued, and \$285,000 of stock belonging to a person not indebted to the complainant to the amount of a single cent was sacrificed for the paltry sum of \$1,000. The proceeding is such as to shock the conscience of a chancellor, and where such a sale is made in bulk, so as to destroy all competition, that fact alone, taken in connection with the gross inadequacy of price, is sufficient to raise a presumption of constructive fraud, and vacate the sale, without regard to what may have been the motives or purposes of the parties conducting the same. But when it is made to appear that the ulterior, if not the primary, object of the attachment proceeding was to subject Fahrney's stock to the payment of Kelly's debt to Coulter, and at the same time get rid of Fahrney, it is difficult to resist the conclusion that the stock was sold in bulk for the purpose of destroying competition, and of accomplishing the premeditated purpose of get-

ting rid of Fahrney in the management of the company, and that otherwise the stock would have been sold in such a way as to have made it pay as much as possible upon Coulter's debt.

It is said that Fahrney was present by his counsel at the sale, and made no requests that the stock should be sold in quantities otherwise than in solido, and also caused notice to be given that the stock belonged to him, and not to Kelly, the necessary effect of which was to cause the stock to sell at a lower price than it otherwise would have done, and that, therefore, the sale should not be set aside because of inadequacy of price. To this it may be answered that Fahrney was not a party to the proceeding. The law enjoined upon him nothing in regard to that suit. He elected, as he had a right to do, to stand upon his rights, and to test the construction of the statute as well as the regularity and validity of the proceedings in the attachment suit. This he did, and in so doing he waived nothing.

The conclusion reached by the court makes it unnecessary to consider other questions presented and argued by complainant's counsel. The sale in this case will be vacated, set aside, and held for naught, and such title as the said D. B. Coulter acquired by the sale in the stock sold, and which belonged to the complainant in this suit, will be canceled, and the defendant corporation restrained from transferring said stock on the corporate books of the said company to the said Coulter, and the defendant company required to register said stock on the books of the said company as the same stood on the day the attachment was levied.

GAMEWELL FIRE-ALARM TEL. CO. v. CITY OF LAPORTE.

(Circuit Court of Appeals, Seventh Circuit. June 5, 1900.)

No. 649.

MUNICIPAL CORPORATIONS—ULTRA VIRES CONTRACTS—REMEDY OF PARTY IN EQUITY.

Complainant installed and delivered to the defendant city, for municipal use, a fire-alarm telegraph system, under a contract which was void because it created an indebtedness on the part of the city beyond the constitutional limit. *Held*, that a court of equity could not change the contract into one giving to complainant an implied franchise to maintain and operate the system for its own benefit, or authorizing a recovery by complainant of possession of the plant as an entirety, where certain of the apparatus was furnished by the city, and the wires over part of the lines were strung on poles owned by the city.

Appeal from the Circuit Court of the United States for the District of Indiana.

The appeal is from a decree, entered on demurrer, which dismissed the bill of complaint, as amended, for want of equity. 96 Fed. 664. The bill alleges substantially the following facts as the grounds for equitable relief: The complainant is a New York corporation, and engaged in the business of making and installing "fire-alarm and police telegraph systems," and on July 16, 1890, made proposal, in writing, to furnish to the city of Laporte, for the

sum of \$3,500, its "system of automatic fire-alarm telegraph," according to specifications stated in the proposal, to be completed and ready for operation within four months. The apparatus, material, and work to be supplied by the complainant included a "tower bell striker," but not the bell, and all the new poles "necessary to complete the line circuit." Payment of the contract price was to be made by the city on May 1, 1891, and on receipt thereof the proposal states that "unrestricted license to use and perpetuate the apparatus" is thereby conveyed to the city. It further provides that the city shall furnish a suitable room for the station, and "shall secure the right of way through the public highways for the wire circuit, give the use of all poles now standing that may be owned or controlled by said city, and the use of such bell as may be selected for giving alarms." This proposal was accepted on behalf of the city after an opinion was given, in writing, by the city attorney to the effect, among other matters, that objections "that the city cannot incur a debt, as they now owe more than the constitutional limit," are not sufficient to defeat the wish of the common council, because there existed in the general fund an unappropriated balance which could be employed for the payment contemplated by the contract, and, if no funds were applicable, warrants could be drawn, payable when the tax of the current year was collected. "Relying upon said contract, and said opinion as to its legality," the complainant furnished and installed the system accordingly, which was accepted by the city on December 19, 1890; and the system thus installed "is complete and entire, and incapable of dismemberment or disintegration without destroying the use thereof, and without irreparable injury to the several parts composing the same." When the time for payment matured, the city refused to pay the contract price; and the complainant brought suit in the state court for its recovery, which resulted in a decision by the supreme court of the state (*City of Laporte v. Gamewell Fire-Alarm Tel. Co.*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686), that the contract was void by reason of the indebtedness of the city beyond the constitutional limit, and judgment was rendered against the complainant accordingly. The system so constructed is "of great utility and even of prime necessity" to the city, and, being in the possession of the complainant after completion, was turned over to the city in the faith and belief that the contract was obligatory on the city and payment would be made; and after such decision the city was permitted to retain possession pending negotiations for an adjustment, and "solely for the public use and safety," and "not with intent to waive or part with any interest or right therein." The indebtedness of the city has since become reduced to such extent that it may lawfully become obligated "to buy said plant and system," and many fair proposals were made to the defendant to that end, but were all rejected; and finally, about February 28, 1898, the complainant became convinced that it was necessary, "in justice to itself, to acquire possession of and to operate said plant, through and by its own officers, agents, and employes," and thereupon, "with such objects in view, * * * demanded possession of said plant from said city." The city refused compliance, and has since wrongfully withheld the plant from complainant, and continued the use thereof; and, although such use is reasonably worth \$600 per annum, the city has refused to pay reasonable compensation therefor, after deducting its proper expense and outlay. The complainant "tenders and holds itself ready and willing to perform and discharge all public duties" incident to said system, and avers that it is without adequate remedy at law. The prayers for relief are, in substance: (1) That the defendant be enjoined pendente lite from use of the system in any manner unless fair compensation is paid, jurisdiction over the plant to be retained by the court to enforce such payment; (2) that an accounting be had for past use; (3) that the defendant be adjudged as holding the system and all easements and franchises as trustee for the use and benefit of the complainant, subject only to considerations of public safety and convenience; (4) that, in default of satisfactory arrangement between the parties, the defendant be required to make over to the complainant's possession the system, with all easements and franchises, as an entirety; (5) that the defendant be thereafter perpetually enjoined from interference with the management, operation, or disposition of the plant.

James B. Curtis, for appellant.

James S. Harlan, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

The appellant, who was the complainant below, contracted to furnish a fire-alarm system or plant, to be owned and operated by the city of Laporte, at a purchase price to be paid by the city in the following year after completion and acceptance; and this in the face of the fact, then known to all parties, that the existing indebtedness of the municipality was beyond the amount limited by the constitution of the state, and that it was thereby prohibited from incurring further indebtedness. The plant, having been installed in conformity with the contract, was accepted, and went into the possession and use of the city, but payment was refused; and thereupon the appellant sued in a state court to recover the purchase price, resulting in a final adjudication dismissing the action on the ground that the contract violated the constitutional provision referred to, and was invalid. *City of Laporte v. Gamewell Fire-Alarm Tel. Co.*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686. On such state of facts, equitable relief is sought through the present bill, which is predicated on the conclusiveness of that adjudication to bar recovery upon the contract; and it is conceded in the argument for support of the bill, as clearly held in the kindred case of *Litchfield v. Ballou*, 114 U. S. 190, 193, 5 Sup. Ct. 820, 29 L. Ed. 132, that the invalidity is equally effectual against any implied promise to pay for the reasonable value of the property so furnished. The question is not presented of right on the part of the appellant to recover and remove any severable material or appliances furnished by it under the contract, and so appropriated by the city, for the reason that relief of that character is inadmissible, if not impossible, under the allegations of the bill, even if otherwise the subject of equitable remedy. It is expressly alleged that the plant, which includes portions contributed by the city, constitutes an entirety, and is "incapable of dismemberment or disintegration without destroying the use thereof, and without irreparable injury to the several parts composing the same," and, in effect, that the only available remedies in favor of the appellant are (1) an accounting in reference to the past use, to ascertain just compensation therefor; (2) an arrangement between the parties for future compensation in an annual rental for the use; or, in default of such arrangement, (3) the plant to be turned over as an entirety, "complete and ready for operation," to the appellant, as owner, for management and use, together with a perpetual franchise for that purpose, to be implied from the contract.

The bill rests on the theory that the contract is so far severable that laying aside the void promise of the city to pay for the plant, as purchaser, there remains the permission which was granted by the city for its construction, together with the fact of the actual operation of the plant by the contractor for a brief period before it was delivered over, and that out of these circumstances equity may imply a grant

by the city of a franchise to the contractor to operate and manage the system as the beneficial owner, and will enforce both ownership and franchise in his favor whenever the contract of purchase becomes inoperative. How the intended public nature of the system, described as one "of great utility and even of prime necessity to the city," can thus be preserved, is neither disclosed nor intimated. In other words, the appellant invokes equitable relief, not only to set aside the contract, which was deliberately made between the parties, but to substitute a new contract, and establish relations with the municipality not contemplated in the original transaction. The contract provided for a plant to be owned and operated by the city, for municipal purposes, clearly within its power; and the invalidity arose out of the creation of a debt to accomplish the purpose, and not in the purpose for which it was made. To save the contractor who furnished work and materials under this contract from sacrifice of his contribution in whole or in part, a decree is demanded to create and enforce a contract between the parties departing radically from that which was intended and entered into; placing the plant and its control in private hands, together with a perpetual franchise to so maintain and operate the system. The terms of the contract as made afford no semblance of support for the contention that the grant of a franchise to that end may be inferred, and, aside from the consideration of the inviolable nature of municipal powers in that regard, the doctrine is well established that no measure of relief which would so change the contract purposes and relations can be granted by a court of equity, even in the absence of all remedy at law. *Magniac v. Thomson*, 15 How 281, 299, 14 L. Ed. 696; *Hedges v. Dixon Co.*, 150 U. S. 182, 192, 14 Sup. Ct. 71, 37 L. Ed. 1044. As stated in *Magniac v. Thomson*:

"Whenever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim, '*Æquitas sequitur legem*,' is strictly applicable."

The case presented by the bill is within the rule held in *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132, where the conditions were analogous in many respects. Bonds were there issued by the municipality, beyond the constitutional limit, for the construction of waterworks, and were finally held invalid for that reason. The bondholders then proceeded in equity to obtain satisfaction of the bonds through a sale of the waterworks plant, but their claim of an equitable lien for that purpose was declared untenable, and the bill was dismissed. So in the case at bar the decree properly dismisses the bill for want of equity, without prejudice to proceedings at law, and it is accordingly affirmed.

STUBER v. LOUISVILLE & N. R. CO.

(Circuit Court, W. D. Tennessee. May 15, 1900.)

RAILROADS—NEGLIGENCE—INJURY TO EMPLOYEE—FELLOW SERVANTS.

Plaintiff, who was a skilled machinist, and employed by defendant to keep its pumps, tanks, wells, etc., in good working order, while riding on one of defendant's engines to reach a point where his duties called him, was injured by the engineer's negligently running the engine into a freight train. *Held*, that plaintiff and the engineer were not fellow servants in such sense as to prevent recovery by plaintiff for the damages sustained.

At Law.

Action for personal injuries by collision of an engine with a freight train. The plaintiff was riding in the cab of the engine, and, being thrown violently upon his head, was seriously and permanently injured. The negligence of the engineer was not contested, but admitted, by the defendant company, which discharged him because of this occurrence. The plaintiff, in his testimony, described himself as the "supervisor of the water supply," but on cross-examination and otherwise it turned out that he was not quite entitled to that rank in the service. By a new arrangement his wages had been cut, along with others, to make another the "supervisor," possibly of the whole system, while he continued to do the same work as before on the Memphis branch of the system, though his precise status was not brought out very clearly by the proof, and perhaps it is not very important. What does clearly appear is that the plaintiff was a skilled machinist in the branch of mechanics pertaining to water pumps and their appliances. For a long time he had been in the faithful service of the company, until he had been put in charge of all the water stations between Bowling Green and Memphis. It was his duty to keep the pumps, tanks, wells, etc., in good working order. By his own labor, or with the assistance of others when necessary, he made all repairs, changes, and betterments whenever and wherever needed. Constantly traveling in this service of inspection and repairs, he carried "a pass," and orders admitting him to all trains, often riding on "wild engines," hand cars, or however else was most convenient. He was paid \$80 per month for this service. On this occasion an engine was going, in charge of one Hummel, from Paris down the road, to bring up a train. The plaintiff, having occasion to go down the road below where the engine would stop, but hoping to catch a train at that point, took passage on this engine, being admitted on his orders or "pass," with his kit of tools. On the way, through the grossest carelessness of the engineer, the engine ran almost at full speed into the rear end of a lumber train being shunted in one of the yards at a station. The plaintiff does not remember whether he jumped voluntarily or was thrown off by the concussion, but when found he was unconscious, and has since been, admittedly, in a condition of mental and physical weakness quite hopeless in its character, caused by some injury to the brain or its tissues. The fact of serious injury was apparent, though the plaintiff managed, by great effort, to overcome the nervous agitation of his physical and mental distress, and give a sensible account of the occurrences. The defendant company made no defense except that of fellow service, suggesting, however, contributory negligence in being on an engine contrary to the company's rules forbidding any one to ride on the engines. This suggested defense the court overruled on the ground that the orders or pass the plaintiff had abrogated the rule as to him. There was no proof offered by the company to contradict the plaintiff's statement that his orders or pass required that he should be received on any "train," and the nature of his service made this reasonable. He testified that for many years he was in the habit of riding on engines or anywhere most convenient or necessary to get him along. Another rule of the company defined the word "train" as including an engine running alone as this was, and his orders had always been so construed in the service. The court overruled the defendant's motion to direct a verdict on the ground of fellow service, and, submitting only the question of damages, the jury returned a verdict of \$6,000 for the plaintiff.

Thomasson & Williams, for plaintiff.
Sweeney & Farrabaugh, for defendant.

HAMMOND, J. (after stating the facts as above). In denying the defendant's motion it is possible the court is misconstruing the effect of the case of *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —, the latest exposition of the law of fellow service by the supreme court of the United States. Because that court has overruled the *Ross Case* (112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787) it does not follow that it has established the broad contention of the learned counsel for the defendant company that the exemption from liability for the negligence of fellow servants covers all employes from the president down, except where the company has failed to furnish—First, a reasonably safe place; or, secondly, adequate appliances; or, thirdly, to make diligent inquiry as to the competency of co-servants.

The court does quote cases that enunciate this extreme doctrine, apparently, but it is one of the features of the case that the learned justice delivering the opinion of the court is most careful to confine its effect to the precise facts involved, and declines to educe a rule applicable to all possible circumstances,—such as the rule insisted on by the defendant's counsel here. Each case depends on its own circumstances. And this must be so, for, as Judge McKinney says in *Washburn v. Railroad Co.*, 3 Head, 638, 642:

"If this be correct,—that the board of directors only is to be regarded as the principal or master,—it will inevitably follow that the company cannot be held liable, in a case like the present, unless it can be shown that the injury resulted from the direct action of the company in its corporate capacity. This is absurd. The corporation, of necessity, acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents, so far as it may be necessary to effect the purposes of its creation. It must act in this mode, or not act at all."

In a very wide sense all engaged in the operation of a railroad, from the president to the axle greaser, are fellow servants, to be sure; but this is not what the cases mean by that expression. In this case the company had delegated to some proper official the authority to contract with this plaintiff that he should inspect and properly care for all the appliances for water supply at the water stations from Bowling Green to Memphis, and to contract with him for his safe transportation from one place to another for the performance of that service, for which he was supplied with the necessary passes and orders to receive him on any train; and by means of these orders he was admitted to the engine on which he was injured by collision through the negligence of its driver. He had not the least connection with the movement of that engine, or of any train on which he might be traveling. It was, indeed, not going all the way to the point he wished to reach. He was not charged with any duty even remotely connected with its movements imposing on him any care to guard himself against the negligent management of the engine, jointly or otherwise; nor of that character which would imply, necessarily, that the dangers of the engineer's negligence were assumed by

him. The suggestion that he performed a like service to that of the fireman when shoveling coal or receiving it on the tender is a very strained one. He did not attend the water tank or deliver water to the engine, but only kept the pumps in repair. Not any more than a machinist engaged in repairing car wheels or locomotive machinery was he jointly employed in the business of running the trains or engines on which he took his passage. It was the duty of the company to transport him, and the engineer was its agent in doing that work for him. Mr. Justice Brown, in *Railroad Co. v. Hambly*, 154 U. S. 349, 357, 14 Sup. Ct. 984, 38 L. Ed. 1012, says this:

"If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply. In this view it is not difficult to reconcile the numerous cases which hold that the persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them."

And he pronounces this the most satisfactory test. He cites, by way of illustration of what is meant by the test he is applying, the case of *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755. If the case we have in hand were reversed in its facts somewhat, so that the engineer had been injured by some negligence of the plaintiff, Stuber, in making repairs of a pump, let us say, it is conclusively established by this last-cited case and its approval by Mr. Justice Brown's opinion and reasoning on the subject that the doctrine of their fellow service would be no defense. Why, then, should it be now, when the injury is the other way? for there is mutuality of risk in the doctrine. Again, let us suppose that the plaintiff's contract had been to do the work of keeping the water appliances in repair for a compensatory sum that would contemplate the payment by him of his travel fares; would it then be claimed that he was a fellow servant with the engineer? In effect, he does the work for \$80 per month plus travel fares, since they give him free transportation. Or, suppose he should be traveling in his own conveyance, or otherwise independently, while on duty in the company's service, and were injured by the engineer; would they then be fellow servants? Only in the widest sense that would, by the universality of the application, be a reduction to that absurdity mentioned by Mr. Justice McKinney in the case above quoted.

Overrule the motion.

GALLIVAN v. JONES et al.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 578.

EXECUTORS—PARTIES TO SUIT ON CLAIM AGAINST ESTATE—CALIFORNIA STATUTE.
Code Civ. Proc. Cal. § 1490 et seq., provides that claims against the estate of a decedent must be presented to the executor or administrator and to the judge of the superior court for allowance, and, if rejected, suit may be brought thereon against the executor or administrator. It also provides (section 1510) that, if the executor or administrator is a

creditor, his claim must be presented to the judge, and, if disallowed, suit may be brought thereon against the estate, and summons served upon the judge, who is authorized to appoint counsel on behalf of the estate. *Held*, that the latter section was not applicable where one of two or more executors was a creditor of the estate, but that in such case his claim should be presented for allowance to the other executors, and, if disallowed, suit should be brought against them, and not against the estate *eo nomine*.

In Error to the Circuit Court of the United States for the Northern District of California.

J. B. Clarke, R. Percy Wright, and Black & Leaming, for plaintiff in error.

H. G. Platt and Richard Bayne, for defendants in error.
Crittenden Thornton, *amicus curiæ*.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The plaintiff in error was plaintiff in the court below. The action was commenced by him in that court, upon the ground of diverse citizenship of the parties, to recover \$6,525,—the alleged value of his services as physician and surgeon, rendered to the deceased, Henry C. Nelson, during his lifetime. The original complaint alleged that by the last will of the deceased, which was duly admitted to probate on November 29, 1897, by the superior court of Colusa county, Cal., the plaintiff and the defendants J. Thad Jones, J. W. Goad, and R. E. Smith were appointed executors thereof, to all of whom letters testamentary were duly issued, and all of which executors duly qualified and entered upon the discharge of their duties. The original complaint further alleged that at all times therein mentioned the Honorable H. M. Alberty was, and still is, the judge of the superior court of Colusa county, Cal., and that on or about the 10th day of October, 1898, the plaintiff presented to him his verified claim for the said services, which the said judge refused to allow as presented, but on the 10th day of November, 1898, allowed for the sum of \$575. The prayer of the original complaint was for judgment against the defendants Jones, Goad, and Smith, as executors, for the sum of \$6,525 and costs of suit, to be paid in due course of administration of the estate. A demurrer interposed by the defendants to the original complaint upon the ground that it did not state facts sufficient to constitute a cause of action against the defendants was sustained by the court below, with leave to the plaintiff to amend. Thereupon, and on April 13, 1899, the plaintiff filed an amended complaint, in which the estate of the deceased, Nelson, *eo nomine*, was made defendant, together with the original defendants, and in which the plaintiff repeated, in substance, the averments of the original complaint in respect to the rendition of his professional services to the deceased during his lifetime, their value, the death of the deceased, the probate of his will, the appointment and qualification of the plaintiff and defendant executors, and alleged that, by reason of the fact that the plaintiff is a claimant against the said es-

tate, the plaintiff is not made a defendant as executor thereof, and further alleged that on October 4, 1898, the plaintiff presented his verified claim to the defendant executors at the place designated in the notice to the creditors of the estate as the place at which all claims should be presented; that his said claim has never been allowed by the defendant executors, or any of them; that at all the times mentioned in the amended complaint the Honorable H. M. Albery was, and still is, the judge of the superior court of Colusa county, Cal.; and that on or about the 10th day of October, 1898, the plaintiff presented to him his verified claim for the said services, which claim the said judge refused to allow as presented, but on the 10th day of November 1898, allowed in the sum of \$575, which allowance the plaintiff refused to accept. He prayed judgment against the defendant executors and against the estate, eo nomine, for the sum of \$6,525 and costs of suit. The defendant executors thereafter moved the court to strike from the amended complaint the allegations respecting the presentation to them of the claim of the plaintiff, and their failure to allow the same, and also demurred to that pleading on the ground that it did not state facts sufficient to constitute a cause of action against them. The court below denied the motion to strike out, and overruled the demurrer of the defendant executors, whereupon they filed an answer to the amended complaint, in which they denied that the services rendered by the plaintiff to the deceased, Nelson, were of any greater value than \$575, and setting up, among other things, that, under and by virtue of the provisions of section 1510 of the Code of Civil Procedure of the state of California, the defendant executors had no authority to allow or reject the plaintiff's claim, and therefore did not act upon it; that, under and by virtue of that section of the California Code, the plaintiff's claim could only be presented to the judge of the superior court of the county of Colusa, and upon its rejection suit could be brought thereon only against the estate, eo nomine, and not against the executors of the estate, each of whom, they alleged, was improperly joined with the defendant estate. To the amended complaint the defendant estate also filed a demurrer, upon the following grounds: (1) That it did not state facts sufficient to constitute a cause of action against said estate; (2) that there is a misjoinder of parties defendant therein, to wit, that the defendant executors are, and each of them is, improperly joined with the defendant estate as defendants therein; and (3) that the cause of action stated in the amended complaint against the estate of the deceased, Nelson, is barred by the provisions of section 1498 of the Code of Civil Procedure of the state of California. The court below sustained the last-mentioned demurrer on the ground that the action against the estate, eo nomine, was not commenced within the time prescribed by the statute of the state of California. Thereafter the defendant executors moved the court for judgment upon the pleadings, which motion was granted, and a judgment entered in favor of all of the defendants, dismissing the action at the plaintiff's cost, from which judgment the plaintiff sued out a writ of error, and assigned as the errors relied on for

a reversal the ruling of the court below in sustaining the demurrer of the defendant executors to the original complaint, the sustaining of the demurrer of the estate of the deceased, Nelson, to the amended complaint, the granting of the motion of the defendant executors for judgment upon the pleadings, and the entry of the judgment complained of.

If the court below was right in overruling the demurrer of the defendant executors to the amended complaint, it must have been wrong in granting their motion for judgment on the pleadings. The cause of action counted on is the implied promise of the deceased, Nelson, to pay the plaintiff the value of the services rendered by him. True, he was, by the statute of California, required, as a condition to his right to bring suit against the estate of the promisor, which had passed into the control of the probate court of Colusa county, to present his claim therefor. How and to whom? Section 1490 of the Code of Civil Procedure of California provides:

"Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent requiring all persons having claims against the estate to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice," etc.

Section 1494 provides:

"Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated," etc.

Section 1496 provides:

"When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to a judge of the superior court for his approval, who must in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the 10th day," etc.

Section 1503 provides:

"Whenever any claim is presented to an executor or administrator, or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless recover a greater amount than that offered to be allowed."

Section 1500 declares:

"No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator," with an exception not pertinent to the present case.

Section 1498 provides:

"When a claim is rejected either by the executor or administrator, or a judge of the superior court, the holder must bring suit in the proper court

against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred."

By section 17 of the same Code it is provided that the singular includes the plural.

Section 1510 provides that:

"If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recover no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court."

The provisions of the state statute in respect to the presentation of claims against the estate of a deceased person apply equally to all creditors, be they citizens of the same or some other state, or aliens. If, after such presentation, a controversy arises concerning the claim, an action at law or in equity may arise, of which the proper United States court may take cognizance where the requisite jurisdictional facts are shown to exist, but not until then. In the present instance the plaintiff in error presented his claim to his co-executors as well as to the judge of the probate court. His co-executors did not allow it at all, and the probate judge allowed it in part only. Thereupon a controversy arose in respect to the debt, which the plaintiff in error, being an alien, and his co-executors and the probate judge being citizens of the state of California, had the right to have determined by the court below. *Clark v. Bever*, 139 U. S. 97, 11 Sup. Ct. 468, 35 L. Ed. 88; *Byers v. McAuley*, 149 U. S. 615, 620, 13 Sup. Ct. 906, 37 L. Ed. 867. This is not directly denied on the part of the defendants in error. Their contention is that the plaintiff in error's co-executors were not suable at all; that the estate of the deceased, Nelson, eo nomine, could only be sued; and that it was not made a party to the action until after the time allowed by the state statute for the bringing of a suit on the plaintiff's cause of action had expired. But, as a matter of course, if the plaintiff in error's co-executors were not suable, the diverse citizenship of the parties requisite to give the court jurisdiction of the action would not exist; for it certainly will not be claimed that the estate of the deceased, Nelson, is a citizen of any state. "The estate of a decedent," said Mr. Justice Miller in delivering the opinion of the supreme court in *Hess v. Reynolds*, 113 U. S. 73, 76, 5 Sup. Ct. 378, 28 L. Ed. 928, "is neither a person nor a corporation. It can neither sue nor be sued. It consists of property, or rights to property, the title of which passes, on his death, with right of possession, according to the varying laws of the states, to executors of a will, administrators of estates, heirs or devisees, as the case may be. These parties," continued the court in the case cited, "represent, in their respective characters, the rights which have devolved on them in any controversy, legal or equitable, which may become a matter of judicial contest with other parties

having conflicting interests. In regard to controversies with debtors and creditors, the executor, if there be a will, or the administrator, if one has been appointed, represents the rights and the obligations which had been those of the deceased. The right of the administrator or executor to sue in the ordinary courts of the country to enforce the payment of debts owing the decedent in his lifetime, and unpaid at his death, has always been recognized; and it is believed that no system of administering the estates of decedents has changed this principle. The courts of the United States have always been open to such actions when the requisite citizenship exists, and for this purpose the citizenship of the administrator or executor controls, and not that of the decedent. So, also, until recent times, the administrator or executor was liable to be sued in the ordinary courts, whether state or national, on obligations contracted by the decedent; and such is probably the law of most of the states of the Union at this day. To such a suit the administrator could, at common law, have pleaded that there were no assets in his hands unadministered, or he could have denied the cause of action set up by plaintiff. How far a denial of assets would be a good plea now depends on the statutes of the various states, and the various modes of obtaining equality of distribution among creditors where there is not enough to pay all. Such suits, in the absence of any controlling law, can be brought, and have been brought, in the courts of the United States, where the requisites of jurisdiction between the parties exist. This jurisdiction of the courts of the United States, in controversies between citizens of different states, cannot be ousted or annulled by statutes of the states assuming to confer it exclusively on their own courts. It may be convenient that all debts to be paid out of the assets of a deceased man's estate shall be established in the court to which the law of the domicile has confided the general administration of these assets; and the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require. But neither the principle of convenience, nor the statutes of a state, can deprive them of jurisdiction to hear and determine a controversy between citizens of different states, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a state different from that of the other party, the party properly situated has a right, given by the constitution of the United States, to have tried, originally or by removal, in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents."

In the case of *The Burns*, 9 Wall. 237, 19 L. Ed. 620, it was attempted to sustain certain writs of error by virtue of the statute of Missouri known in that state as the "Boat Law," by which act proceeding was authorized against the res, and the vessel was a good deal treated of by the act as the defendant in the case. In the course of its opinion the supreme court observed:

"It is said that the statute of Missouri allows the steamboat to be sued by name, and allows a defense to be made by the owner in the name of the vessel. But the states cannot in this manner confer on an inanimate object, without sense or reason or legal capacity, the right to prosecute legal proceedings in the federal courts."

For the same reason it would be very difficult to resist the conclusion that the states cannot, should the attempt be made, in a case like the one at bar, where there are executors representing the rights of the estate, and capable of acting in their representative capacity, provide that they cannot be sued, but that an inanimate object,—the estate, *eo nomine*,—without sense or reason or legal capacity, should be; thereby ousting the jurisdiction of the federal court in a case, like the present one, where the plaintiff would otherwise have the constitutional right to have the controverted question of debt or no debt determined by a federal court. However, we do not find it necessary to decide that question; for we do not find that the supreme court of California has ever held that by the terms of the statute of that state, the provisions of which are quoted above, the estate, *eo nomine*, only can be sued by an executor having a claim against it in cases where there are more than one executor of the estate duly qualified and acting, which is the exact case at bar; nor does our construction of the provisions of the California statute lead to any such result. Sections 1490, 1494, 1496, 1503, 1500, and 1498 of the Code of Civil Procedure of California are manifestly general provisions, by which provision is made for the publication by the executor or executors, administrator or administrators, as the case may be, of a notice to the creditors of the decedent, requiring all persons having claims against the estate to exhibit them, with the necessary vouchers, to the executor or executors, administrator or administrators, as the case may be, at a designated place and within a designated time. It is also thereby declared how claims shall be verified, and provision is then made for their allowance or rejection by the executor or executors, administrator or administrators, as the case may be, and by the probate judge. It is then provided by section 1498 that "when a claim is rejected either by the executor or administrator, or a judge of the superior court, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred"; and by section 1500 it is declared that "no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator," with an exception not important to mention. These provisions clearly cover and apply to cases where there is more than one executor or administrator, and one of them is a creditor of the estate; for in all such cases there is a qualified representative of the estate, capable of acting, and who is by the statute required to act, on the claim. But the legislature of the state recognized the fact that there might be cases in which there would be but one executor or administrator, who himself might have a claim against the estate, and, further, that the judge of the probate court might be a creditor of the

estate, in neither of which instances should the claim be passed upon by the claimant himself. So provision was made for each of such cases,—in the case of the judge, by section 1495, which provides, "Any judge of a superior court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof; and if the executor or administrator allows the claim, he must, in writing, designate some judge of the superior court of an adjoining county, who, upon the presentation of the claim to him, is vested with the same power to allow or reject it as he would have if the will had been proved or administration granted in his own county; and the judge presenting such claim, in case of its rejection by the executor or administrator, or by such judge as shall have acted upon it, has the same right to sue in the proper court for its recovery as other persons have when their claims against an estate are rejected;" and in the case of a single executor or administrator, who is also a creditor of the estate, by section 1510 already quoted. These are plainly special provisions to meet the particular cases provided for, and are inapplicable to cases covered by the preceding general provisions. No decision of the supreme court of the state otherwise construing these provisions of the state statute has been called to our attention, nor have we been able to find one. We must therefore construe the provisions for ourselves, which seem to us plain enough. The judgment is reversed, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

MONTANA MIN. CO., Limited, v. ST. LOUIS MIN. & MILL. CO. OF MONTANA.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 567.

1. MINING CLAIMS—CONVEYANCE TO SETTLE DISPUTED BOUNDARY—CONSTRUCTION.

In compliance with a decree for specific performance of a contract made between the owners of two adjoining mining claims in settlement of a suit brought to determine a disputed boundary between them, the owner of one claim conveyed to the owner of the other the strip in dispute, "together with all the mineral therein contained, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein." *Held*, that such conveyance had no other effect than to fix the surface boundary between the two claims in accordance with the original contention of the grantee, and did not deprive the grantor of any extralateral rights under the ground so conveyed; such boundary being a side line of its claim.

2. SAME—ACTION FOR CONVERSION OF ORE—PLEADING.

A complaint which alleges that plaintiff is the owner of a mining claim, and of all the precious metals contained in any vein or lode, through its entire depth, whose apex is within the surface lines of such claim, and that defendant, the owner of a claim which adjoins one of the side lines of plaintiff's, has mined and removed ore from a vein which has its apex in plaintiff's claim, is sufficient, in the absence of a demurrer thereto, to support a judgment in favor of plaintiff for the conversion of such ore, although it does not specifically allege the facts which show that the boundary between the claims of the parties is a side line of plaintiff's claim, beyond which it has extralateral rights.

3. SAME—POSSESSION OF VEIN.

Possession of the surface of a mining claim is possession of a vein or lode having its apex within the surface lines of the claim, although, in extending downward, such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein, beneath the surface of an adjoining claim.

4. SAME—TRESPASS—DAMAGES RECOVERABLE.

Where, in an action for the conversion of ore, an injunction has been issued, in compliance with which the defendant has stored certain ore theretofore mined, it is not entitled to have the value of such ore taken into account in reduction of damages unless it proves such value, and returns or tenders the ore to the plaintiff.

In Error to the Circuit Court of the United States for the District of Montana.

Chas. J. Hughes and Cullen, Day & Cullen, for plaintiff in error.

Arthur Brown, Thomas C. Bach, E. W. Toole, and H. P. Henderson, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error, the St. Louis Mining & Milling Company of Montana, was the plaintiff in an action brought against the plaintiff in error, the Montana Mining Company, Limited, for trespass and conversion of ore which was alleged to have been taken from the plaintiff's mine by the defendant in the action. The plaintiff in the action owned the St. Louis mining claim, and the defendant owned the Nine Hour mining claim, which adjoined it on the east. The principal contention in the case concerns the construction to be given to a conveyance which was executed by the owners of the St. Louis claim to the owners of the Nine Hour claim. The conveyance was made to settle a controversy that had arisen concerning the easterly boundary line of the St. Louis claim. That was the older of the two claims. At the time of applying for a patent the locators thereof included in their survey a portion of the premises which were claimed by the owners of the Nine Hour claim. The latter made an adverse claim, and brought an action thereupon. Before the cause came on for trial the suit was compromised. It was agreed that, as soon as patent was obtained to the St. Louis claim, the owners thereof would convey back to the owners of the Nine Hour claim the strip of land which was in controversy,—a strip 30 feet wide, to be described by metes and bounds,—“together with all mineral therein contained.” The owners of the St. Louis claim, having obtained the patent, refused to make the conveyance. Suit was brought by the owners of the Nine Hour claim for specific performance of the contract. In the complaint in that suit it was alleged that the contract had been made “for the purpose of settling and agreeing upon the boundary line between the said Nine Hour lode-mining claim and the said St. Louis mining claim.” A decree was rendered in the suit in favor of the plaintiff therein, and in pursuance thereof a conveyance was executed by the St. Louis Mining & Milling Company, the defendant in error here, conveying to the Montana Mining Company, Limited, the 30-foot strip, by metes and bounds, “together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals,

ores, gold and silver bearing quartz rock, and earth therein," etc. It was shown upon the trial of the case at bar that in the St. Louis claim there are two veins,—one, the discovery vein, running through the claim from end to end, northerly and southerly, and dipping to the east; and a second vein apexing for a long distance within the claim, and dipping easterly underneath the Nine Hour claim, a portion thereof dipping underneath the premises which were conveyed by the deed above referred to. The question involved in the suit is the ownership of the ores of said second vein, which lie beneath the said conveyed premises, and of which the apex of the vein which carries the same lies entirely within the St. Louis claim.

It is contended by the plaintiff in error that by the deed above referred to there was conveyed to it, from the owners of the St. Louis claim, title to all the ores lying beneath the surface of the strip of land therein described, and lying eastward of a vertical plane extended downward on the division line so created between the two claims. We are unable to assent to this contention. In interpreting the conveyance in question, regard must be had, not only to its terms, but to the subject-matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. Said the court in *Richmond Min. Co. v. Eureka Min. Co.*, 103 U. S. 846, 26 L. Ed. 560, "The language used is to be construed with reference to the peculiar property about which the parties were contracting." The court, in the light of the circumstances of that case, held that a line "continued downward to the center of the earth was not a vertical plane, but must be construed as extending the boundary line downward through the dips of the veins or lodes wherever they might go in their course towards the center of the earth." The controversy between the owners of the St. Louis and the Nine Hour claims was one which involved surface lines only. No dispute had arisen concerning the ores beneath the surface. The owners of the Nine Hour claimed nothing more than that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory. They based their adverse action upon that contention. The compromise was an admission that their claim was just. When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that the strip of land so contracted to be conveyed was a portion of the Nine Hour claim. All these antecedent circumstances leading up to and culminating in the deed are properly considered in determining what was the intent of the parties to the contract. If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights to the ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land

which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself, fixing the boundary upon the very line which they contended was the true line? It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation, and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words “together with all the minerals therein contained” is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, “together with dips, spurs, angles, and also all the metals, ores, etc., therein.” Counsel for the plaintiff in error rely upon two decisions which, it is said, favor the construction which they contend for,—the Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548, and Stinchfield v. Gillis, 107 Cal. 86, 40 Pac. 98. In the first case two owners of several adjoining claims had fixed and agreed upon a line running northerly for a fixed distance, which should be a division between the claims. It was not a line running with the strike of the vein, but across it. Thereafter a controversy arose concerning the right to mine the ores of the vein at a point beneath the surface further north than the line of division extended. The court held that the line so arbitrarily adopted must be projected as far as the lode extended, and must necessarily divide all that the location upon the surface carried. In that case the parties to the agreement had, by the terms thereof, made so clear their intention to divide their claims by a vertical plane, and to confine their mining rights to either side thereof, that there was no room for construction. In the case of Stinchfield v. Gillis it was held that if the locator of a mining claim should convey a portion of his claim by metes and bounds, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, in any vein whose apex was within the surface lines of his deed. Said the court (page 90, 107 Cal., and page 100, 40 Pac.), “All that we hold is that inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff.” We do not see that either case affords light upon the proposition involved in the case at bar. Upon consideration of all the circumstances, we entertain no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each claim the rights that would have attached if the boundary line had been settled without controversy; and the language of the contract and of the deed sustains that conclusion.

It is earnestly contended that the complaint does not state a cause of action, for the reason that it appears therefrom that the vein which

the defendant in error claims the right to pursue under the surface so conveyed to the plaintiff in error is not the discovery vein, and that there is no allegation that the discovery vein runs in any particular direction, or that its strike would intersect the end lines, or that it runs lengthwise of the claim, rather than across, or that it dips in any given direction, and that for want of these allegations the complaint wholly fails to show a right in the defendant in error to pursue beyond its vertical side lines the vein from which the ores in controversy were taken. It is true that the complaint does not mention the direction of the discovery vein or its dip. It contains the allegation, however, that the defendant in error is the owner of, and in the possession of, the St. Louis quartz lode-mining claim, "and of the quartz, rock, and ore and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock, through their entire depth, the tops or apices of which lie within the surface lines of the said fractional portion of said St. Louis lode-mining claim." It describes the mining claim by metes and bounds, and shows that it is about 1,500 feet in length by nearly 600 feet in width. The description closes with these words: "Said lots, Nos. 54 and 55A, extending 1,500 feet in length along said St. Louis vein or lode." It alleges that the strip of land beneath the surface of which the ores in controversy were mined lies east of the east side line of the claim. It alleges that the dip of one of the veins, having a portion of its apex inside of the surface of the St. Louis claim, is to the east, and dips under and beneath the 30-foot strip of the Nine Hour claim, and proceeds to allege that from said vein so apexing within the St. Louis claim, and extending beneath the Nine Hour claim, the ores in controversy have been taken by the plaintiff in error. No motion or demurrer was filed to the complaint, but the plaintiff in error answered upon the merits.

In *Walrath v. Champion Min. Co.*, 19 C. C. A. 328, 72 Fed. 978, this court said:

"The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. * * * When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location."

In *Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 89, 18 Sup. Ct. 908, 43 L. Ed. 86, it was said:

"Our conclusions may be summed up in these propositions: First. The location as made on the surface by the locator determines the extent of rights below the surface. Second. The end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third. Every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth. The only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator

called his side lines are his end lines, and those which he called end lines are in fact side lines."

Upon the expressions of the supreme court just quoted, and upon the assumption that the locator of a mining claim has, unless the contrary be shown, complied with the law in locating his claim, the defendant in error contends that the presumption arises that the discovery vein in this instance runs lengthwise with the claim, and not across the same. This contention it is unnecessary here to consider. We find in the complaint the distinct allegation that the defendant in error owns all the precious metals contained in any vein or lode of mineral-bearing rock, through their entire depth, whose apex is within the surface of the St. Louis quartz lode-mining claim, and the further averment that the ores in controversy were mined from a vein which so apexes within the surface of the claim. These averments are sufficient to show that a cause of action existed, and are sufficient to sustain the judgment.

It is contended that the court erred in refusing to instruct the jury, at the request of the plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain the action of trespass. It is urged that the possession of the apex of the vein in the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive, but actual. Said the court in *Mining Co. v. Cheesman*, 116 U. S. 533, 6 Sup. Ct. 483, 29 L. Ed. 713:

"It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular, and extend laterally outside of the vertical lines of such surface location."

In *Pardee v. Murray*, 4 Mont. 234, 2 Pac. 16, it was held that possession of the surface is possession of all veins or lodes whose apices are within such surface lines. Said the court (page 277, 4 Mont., and page 17, 2 Pac.):

"The possession of the respondent was sufficient to maintain this action.
* * * Possession of the surface of a mining-claim location is possession of all veins, lodes, and ledges, the tops or apices of which are inside the surface lines, although such veins, lodes, and ledges, as they go downward, may extend outside such surface lines."

The case of *Hugunin v. McCunniff*, 2 Colo. 367, cited by the plaintiff in error, does not sustain his contention. In that case the defendants had conveyed a mine, and delivered a shaft and level in the mine to the vendor of the plaintiffs, retaining a certain other shaft and level in the same lode, not connected with the first. The defendants afterwards took ore from the level and shaft, which they retained. In trespass for the ore so taken, it was held that the plaintiffs had not the actual or the constructive possession of the place from which the ore was taken, for the reason that, throughout the length of the level retained by them, the defendants had actual possession, ex-

tending to all depths and levels from the surface to the center of the earth.

Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from "disposing of, treating, and reducing any ores heretofore removed or extracted from said premises," for the reason that such ores were held subject to the order of the court, and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ores had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or were left in the possession of, the defendant in error, and to have submitted evidence of their value. But there is another answer to this contention of the plaintiff in error. Although the instruction which was so requested was refused by the court, it does not appear from the bill of exceptions that the court did not, in its charge to the jury, fully and properly instruct upon that branch of the case. The bill of exceptions does not purport to contain all of the charge of the court. It recites but two instructions, and says that the court, "among other things," so instructed the jury. Considering the whole record and all the assignments of error, we find no ground for reversing the judgment, and it is accordingly affirmed.

BIEN & CO. v. HESS.

(Circuit Court of Appeals, Second Circuit. May 23, 1900.)

No. 28.

1. LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR—EVIDENCE.

Evidence that want of repair of leased premises diminished the productiveness of a part of the lessee's manufacturing plant from 20 to 25 per cent. is too indefinite to warrant the jury in making a finding as to what extent the rental value of the premises was decreased by the lessor's failure to keep in repair pursuant to a covenant of the lease, though the rental value of the whole is known.

2. SAME—LOSSES RECOVERABLE.

A tenant cannot recover of the landlord, as damages for breach of a covenant to keep the leased premises in repair, profits which he might have made, or for losses which he might have avoided, but only for the difference between the rental value of the premises as they were and what it would have been if in repair, taking into consideration the purposes for which they were to be used.

3. SAME—MEASURE OF DIMINUTION OF RENTAL VALUE.

Where a tenant of premises used for manufacturing purposes claims damages for diminution in the rental value of leased premises by reason of the lessor's breach of a covenant to keep the premises in repair, the decreased rental value of the premises should be ascertained by deducting from the agreed rental the sum which the lessor was obliged to expend for help and in operating the plant after the usual hours in order to turn

out the quantity of work, which, but for the defective condition, could have been turned out during the usual working hours; hence it is error to exclude evidence tending to show the amount expended to keep the plant running overtime to turn out a normal quantity of work.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon a writ of error to review a judgment of the circuit court, Southern district of New York, entered upon a verdict which was directed in favor of the plaintiff below, who is defendant in error. The action was brought to recover for one quarter's rent of premises No. 140 Sixth avenue, under a lease made by Sayles to defendant (plaintiff in error), at a rent of \$10,000 a year. The facts sufficiently appear in the opinion.

Franklin Bien, for plaintiff in error.

M. G. Holstein, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

LACOMBE, Circuit Judge. There is no dispute as to the lease, assignment, rent, etc.; the only questions arise upon breach of covenant to keep the premises in proper repair.

In directing the verdict the trial judge said:

"I am of the opinion that the lessor under the lease was bound to keep the premises in proper repair, to render them tenantable for the uses and purposes for which, by the lease, it was contemplated they would be occupied. The covenant of the lease in this respect is somewhat vague, and there is some reason, perhaps, for the position taken by the plaintiff in this case, that the terms were not such as to compel the lessor to make the repairs. However, from that view I differ. But I am of the opinion that there is not sufficient competent evidence to enable the jury to ascertain what the damages were. The only damages which the law recognizes in such a case is the extent of the diminution of the value of the leased premises during the time when the repairs were not made, and we are given nothing here by which we may determine how much that was. The lessee claims that, because his landlord has not repaired the premises according to the covenant of his lease, he can recover for all damages to his business, consequential and remote. But he cannot recover such damages. The law does not recognize that rule of damages. It would open the door to too many uncertainties altogether. If the repairs are of a trifling nature, then the lessee has a right to make them, and deduct the cost from the rent; if they are of a serious nature, then he is entitled to recover for the impaired rental value of the premises during the time of the existence of the breach. That is the measure of damages, and no other, and there is no evidence in this case by which we can determine that; so I direct the jury to find a verdict for the plaintiff."

Many of the matters originally in dispute are, upon this review, to be taken as decided in favor of the defendant. Thus, it will be assumed that the lessor was bound to keep the premises in repair and tenantable; that for part of the time he failed to do so as to a substantial portion of the premises; and that the repairs were not of such a trifling character as to warrant the restriction of recovery for damages to the cost of making them.

The measure of damages adopted by the circuit judge, viz. the impaired rental value of the premises during the time of the existence

of the breach, is sanctioned by the authorities quoted by both sides. In *Cook v. Soule*, 56 N. Y. 420, the leaky roof of a stable was held a breach of the covenant to repair. Evidence was given tending to show the value of the use of the premises in the condition they were, and what they would have been worth if in good repair, and also (under exception) further evidence showing that because of the leaks wagons and harness were injured. The general term (1 Thomp. & C. 116) sustained the admission of the evidence excepted to on the ground that the jury might allow as damages either the difference in value of the use of the premises or the injury to the tenant's property, but the court of appeals repudiated such a rule, although they held the evidence admissible on other grounds. "The only rule of damages given to the jury * * * was the difference in value of the use of the premises as they were and as plaintiff agreed to put them. * * * That the rule of damages is correct was determined by this court in *Myers v. Burns*, 35 N. Y. 269." In the case last referred to there was a lease of hotel property. During some portion of the time four rooms, through a defect in the flues of the chimney, were of no use to defendant. The court of appeals approved a charge that defendant was entitled to counterclaim "the fair value of the use of such rooms for the time they were unoccupied." In *Hexter v. Knox*, 63 N. Y. 561, the lessee of the Prescott House, a hotel property, brought an action to recover damages for breach of contract to complete a new building and for failure to make repairs, by reason whereof certain rooms were untenable. It was held that the lessee was entitled to the rental value of the rooms for hotel purposes during the time he was deprived of them by the default of the lessor, and that as to such of the rooms for which plaintiff had furniture he was entitled to damages based upon the value of their use as furnished rooms.

Two questions, therefore, are presented: First, whether there was evidence in the case from which the jury might determine the value of the use of the premises as they were and the value as they would have been had they been kept in proper repair, or, in other words, what was the rental value, for the purposes of the manufacturing business which defendant carried on, of that part of the premises of which, by reason of the lessor's neglect, it temporarily lost the use; and, second, whether evidence was improperly excluded from which, with that already in the case, the jury might have determined such value.

The theory of defendant is shown by the request to go to the jury with which it supplemented the exception to direction of verdict for plaintiff:

"That the defendant in this action has proved that he was deprived from the use and possession of the premises between December, 1896, and May, 1897, at least twenty per cent., and that, the rent being fixed by the terms of the lease, the jury have the right to determine the amount of damages during that time."

There is some evidence in the record as to an interference with the enjoyment of the premises while certain construction work (the placing of new girders and trusses) was going on; but this was

prior to the assignment to Hess, and it is stated in the brief of plaintiff in error that no claim is made for it. The breach of covenant upon which defendant relies was the failure of the landlord to repair or to prevent a break in the cement floor of the cellar under the water-tight compartments behind the boilers. Water flowed in through the break. The effect of the influx of water is best described by the engineer (Loftus):

"The flow of water had the effect of retarding the draft to the point that we could not get the combustion in the combustion chamber to get the amount of steam to run the engines to the proper capacity. * * * The water it gradually comes and raises, and I have seen it raising from one inch to eleven inches, and going down as it raises, during a period of time that I did not take data of. * * * In December, 1896, and the three following months, I had trouble with it. The water appeared there from December, 1896, to May, 1897. In order to absorb this water, I had to be there, and get steam up with a dead fire, to siphon the water out—pump it out—to the best of my ability; and then I couldn't get it all out against the regular time, and the energy of the boilers—what pressure I had raised when I started the engine to give power to the plant—would die right down. During the time of this trouble the same power that was given prior thereto—before that time—couldn't be given. * * * The water entered the ash box, and rose to in the neighborhood of about six inches from the grate bars. * * * I was during the trouble absorbing the water as fast as I could to prevent it reaching the fire."

The witness English, employed in the press room, explains the effect of the reduction of steam pressure as follows:

"I was running a press of a certain make, and whenever the steam run low I had to shut down, and wait until the steam got up again, before I could run it, owing to the construction of the press. * * * There were fourteen presses, * * * all connected by one belting, so if one press stopped all the steam presses stopped. I couldn't tell you whether during the period covered by December, 1896, to May, 1897, those steam presses stopped, but various times they stopped. They stopped nearly every day for certain periods. When these presses stopped or slowed there was an effect on the work that was being done. The press that I was working would not register. The cylinder used to drop by not running at the proper speed, and, of course, I had to stop or spoil the work. Some of the work on my press went through spoiled, and that was occasioned by the fact that the steam run down, and slowed the press."

The testimony of these two witnesses gives a very clear description of the trouble, but it is wholly vague as to the extent of interference with the beneficial use of the premises. Bien, the secretary and general manager of the defendant company, testified that its business was lithographing, and gave a similar account of the break in the floor and the influx of the water. To an inquiry as to how much breakage there was and how much water came in he said that he could only answer on reports made to him in a general way.

"The leakage [said the witness] prevented us getting the full capacity of product from our steam machinery, and necessitated the additional expenditure for the purpose of securing it by working at night, or else by working a greater number of days for the purpose of turning out our work. * * * The working hours of the corporation were from 8 a. m. to 5:30 p. m. * * * We had only two boilers for the operation of our engine. We had at one time 14 steam presses, all of which were affected by it to so great an extent that in order to get a day's product we were compelled to work at night. Q. That is to say, they were affected about half their normal ca-

capacity; is that it? A. No, not that much; it was less than half. It varied. I have known at times they were affected probably half, sometimes stopped half, or may be 20 or 30 per cent., of their normal capacity. It was a variable quantity. * * * Q. The capacity [of the presses] was decreased how much? A. I have said it would vary sometimes,—sometimes half, and sometimes 20 per cent. or 30 per cent. It was irregular. Q. Average it. A. Well, during that time I should judge it affected our capacity 20 per cent. or 25 per cent. * * * [During this period] we suspended business so far as the running of our machinery was concerned for hours at a time, owing to the fact that we could not get proper steam power because of the defect. That was at odd times—not consecutively—between December, 1896, and May 1, 1897. * * * The suspension was all at different times,—different hours during the day. * * * We were compelled by reason of that suspension during the day to do the night work."

This additional evidence was not materially helpful to a solution of the question presented. The estimate of 20 per cent. or 25 per cent. was manifestly a vague guess, and was confined to the capacity of the presses, which occupied one floor and a half of premises consisting of four floors, with an annual rental for the whole of \$10,000. The jury would not have been warranted upon such testimony in finding the difference in value at 20 per cent. or 25 per cent. of the whole rent for the period in question. In the absence of further proof tending to show the rental value of the premises in the condition of disrepair, all effort to fix the "fair value" of the premises as they were would have been mere blind guesswork.

It is contended, however, that the court erred in excluding competent testimony, which, if admitted, would probably have made the operation of assessing damages an easy one. As has been already shown by reference to the authorities *supra*, the tenant is not entitled to recover for profits which he might have made, nor for losses which he might have avoided, but only for difference between the rental value of the premises as they were and as they would have been, taking into consideration the purposes for which the premises were to be used; or, as the trial judge expressed it, the damages are "the extent of the diminution of the value of the leased premises during the time when the repairs were not made." In the authorities above cited there was evidently some direct testimony as to rental value, but, in the federal courts at least, such direct testimony is not essential. The record does not show whether the attention of the trial judge was called to the case, but in *Mining Co. v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031, the supreme court seems to have approved of liberality in the admission of evidence indirectly bearing upon the question of rental value. In that case defendant had undertaken to supply a roasting cylinder and a 20-stamp dry-crushing silver mill, with connected apparatus. They were put up at plaintiff's mine, and proved defective, subjecting plaintiff to great loss and damage by reason of the long period during which the mill could not be operated. The supreme court approved a charge that for the delay in the operations of the mill caused by defective machinery defendant was undoubtedly entitled as damages to the rental value of the mill for the period in question. There was no direct evidence of rental value. Defendant called one expert, to whom he put the question, but his answer was excluded on the ground that his past experience had been

wholly with gold mines. The character of the indirect evidence sufficiently appears in the following excerpt from the opinion of the supreme court:

"Evidence to show that the capacity of the mill was forty tons a day had been offered and received to prove the rental value of the mill, and perhaps very properly, as that might be a necessary preliminary fact leading up to the determination of its value for rental. But after the defendant utterly failed to show, by any admissible evidence, that there was any rental value for a mill of the kind, we think the court did not err in holding that such rental value could be shown by proving the value or the amount of ore delivered and milled."

The trial judge in *Mining Co. v. Fraser* charged that, "in the absence of all evidence as to the rental value, the jury were at liberty to add interest [at the statutory rate, 10 per cent.] on the investment," and that the "wages of the men employed in the mill whose time was lost while the mill was idle" were a proper element of damages, which charge the supreme court approved.

It will be quite apparent from the statement of facts in the case at bar that it is fairly to be inferred that there may be indirect evidence available to prove the rental value of the premises in their condition of disrepair. Indeed, it seems not improbable that without such evidence no expert could give an intelligent estimate of such rental value. Defendant did not vacate the premises, nor any part of them,—not even the locality where the water leaked. It still continued to maintain fires under its boilers to run its presses and to conduct its business, only for certain periods nearly every day subsequent to December, 1896, the running of the presses was suspended while the steam was diverted to the pump, or the rising water interfered with draft until its level was reduced. But despite these drawbacks defendant's work continued, and for each 24 hours the output was the same as it would have been if the establishment had run for regular hours (8 a. m. to 5:30 p. m.) unobstructed by water. This was accomplished by employing men to work at night, feeding the boilers, pumping the water, and running the presses, and the wages paid to those men for working after hours, in order to accomplish the work which, but for the leak, they could have done in working hours, would seem to be the exact measure of defendant's loss. The rental value of the premises in the condition in which they should have been kept may fairly be taken at that named in the lease, and it would seem that their rental value in the condition of disrepair would be the same amount, less the extra sum it would cost to do an equal amount of work in the premises, which, by reason of the lack of repair, were rendered less convenient for a manufacturing business. The plaintiff in error claims that he had such evidence, which was excluded by the court. It appears that after the witness Bien had testified that defendant was not able to have the full use and enjoyment of the premises during business hours between 8 a. m. and 5:30 p. m., and that it was compelled to use other means and other time for the use of the premises, in order to enable it to complete the work which it could have done within business hours if the premises were fit, he was asked this question: "Q. And were you compelled to pay and make greater outlays for wages for people working there at night for work that you were un-

able to do during the business hours by reason of the failure of the construction of the building?" This was objected to and excluded, exception being reserved. This question seems fairly to call for the very testimony which has been suggested, and under *Mining Co. v. Fraser*, *supra*, we think it should have been allowed. It may be doubtful, judging from the other evidence in the case, whether testimony sufficiently specific to be helpful would thereby have been elicited. The statements as to time and extent of interference were of the vaguest character, and it might be difficult to show how much of the wages for night work paid during the period in question was due solely to the interference of the water with work by day. So much of the wages for night work as was due to mere press of business, and would have been required even if the premises were in perfect order, should not be taken into consideration in fixing rental value of the unrepaid premises. It is, however, unnecessary to speculate on this subject. The question fairly called for testimony proper to be received upon the issues before the jury, and we think it was error to sustain the objection. The judgment is reversed, and a new trial ordered.

LOUISVILLE TRUST CO. v. KENTUCKY NAT. BANK.

(Circuit Court, D. Kentucky. June 2, 1900.)

1. NATIONAL BANKS—ACTION TO RECOVER PENALTY FOR USURY—PARTIES.

Whether an assignee for the benefit of creditors under a common-law deed of assignment is the "legal representative" of the assignor, within the meaning of Rev. St. § 5198, and as such entitled to maintain an action in his own name against a national bank to recover usury paid by his assignor, *quære*.

2. SAME—LIMITATIONS—ACCRUAL OF RIGHT TO ACTION.

On a settlement between a national bank and a debtor who owed the bank some \$69,000 on a number of notes, a payment was made which reduced such indebtedness to \$30,000, for which a new note was given. *Held* that, both on general principles, in accordance with the presumed intention of the parties, and under Ky. St. § 2219, cl. 3, which provides that "partial payment on a debt bearing interest shall be first applied to the extinguishment of the interest then due," all past interest, whether usurious or otherwise, must be regarded as having been paid in the settlement, and that limitation commenced to run on that date against an action under Rev. St. § 5198, to recover the penalty for usury previously contracted for.

3. SAME—AMOUNT OF PENALTY—LIMITATIONS.

Where a national bank discounts a note at a usurious rate, the maker, or his legal representative, on payment of the note, is entitled to recover as a penalty, under Rev. St. § 5198, double the amount of the discount so taken, and of all interest subsequently paid on the note or its renewals, although separate payments of interest were made from time to time after its maturity, and all at legal rates; and limitation does not begin to run against an action to recover such penalty until full payment of the note or its renewals.

This was an action by plaintiff, as assignee for the benefit of creditors of the firm of W. H. Thomas & Son, to recover the penalty imposed by the national banking act for usury paid the defendant by plaintiff's assignors.

Gibson, Marshall & Gibson and Helm, Bruce & Helm, for plaintiff.
Humphrey, Burnett & Humphrey, for defendant.

EVANS, District Judge. When this case was before the court upon a previous occasion my learned predecessor, Judge Barr, in disposing of the demurrer to the plaintiff's petition, announced, as reported in 87 Fed. 143, three propositions, in substance as follows, namely: First, that the plaintiff, as assignee under a voluntary deed of assignment for the benefit of the creditors of W. H. Thomas & Son, might, as the "legal representative" of that insolvent partnership firm, sue in its own name to recover, under section 5198 of the Revised Statutes, any usury which had been paid to the defendant by the insolvent firm before the assignment; second, that the plaintiff might, under that section, recover twice the amount of the entire interest paid, and was not limited merely to twice the amount of the excess of interest over the legal rate; and, third, that usurious interest on a note is not paid, so as to set running the statute of limitations against an action to recover it back by giving a renewal note which includes the interest, but that the statute only begins to run from the time the renewal note is paid. To the two last propositions we think there can be no valid objection, but to the first we give our consent, not because it may be entirely sound (for that is possible), but because it has been so decided in this case by my predecessor. It has been my uniform custom not to reverse any decision previously made by him in the progress of a particular case. For doing that there is an appeal to a higher tribunal. I say this because, while I might also have reached the conclusion announced by Judge Barr on the first proposition, I am not inclined to think that I should have done so. I rather believe that a "legal representative," to come within the meaning of that phrase as used in section 5198, must be a representative who is made such by law, as distinguished from the voluntary action of the parties; such, for example, as an executor, an administrator, a trustee in bankruptcy, or the like. They are representatives by the force and operation of positive law, and therefore the "legal" representatives of their constituent. And so, indeed, under the present statute of Kentucky, which, however, was not in force when the assignment was made, an assignee under a statutory assignment may be a legal representative by force of the provision making him such. Being representatives by law (otherwise "legal representatives"), all such fiduciaries as those mentioned might sue in their own names. Here, however, is the case of a plaintiff undertaking to sue in its own name, who is not a representative by any law as such, but is a mere assignee under a voluntary common-law deed of assignment of what is possibly only a mere nonnegotiable and nonassignable chose in action, if, indeed, it amounts to that. The claim sued upon is not described, nor in specific terms embraced, in the deed of assignment, and yet the assignee attempts to bring an action in its own name without joining W. H. Thomas & Son as plaintiffs upon a cause of action which did not accrue to the plaintiff, but to other persons, who, by no express provision in the deed of assignment, transferred it to the plaintiff, and which, under section

474 of the Kentucky Statutes, at least, is not assignable so as to vest the right of action in the assignee. That section, which is the only authority for assigning choses in action in this state, is in the following language:

"Sec. 474. All bonds, bills or notes for money or property shall be assignable so as to vest the right of action in the assignee; but except in case of bills of exchange, not to impair the right to any defense, discount, or offset that the defendant has and might have used against the original obligee, or any intermediate assignor, before notice of the assignment."

W. H. Thomas & Son had the option to claim and demand the penalties given for receiving usurious interest from them, or not to do so, as they pleased. They were *sui juris*, and capable of making the election at all times. A dead person or a bankrupt is not capable, and, if an election is made at all in such cases, it must be made by the "legal representative," and it seems to me that this is what section 5198 means. It is upon considerations like these that I am inclined to think that, if the proposition were open in this case as it comes before me, I should hold that the plaintiff was not, by force of any law, the "representative" of W. H. Thomas & Son; that we must look alone to the deed under which it claims, and not to the law, to ascertain its rights; and that, not being the "legal representative," it could not lawfully sue in its own name for the recovery sought, but must leave that to its assignors, who, of course, however, could have sued for plaintiff's benefit, or both might have joined. We think these views can be powerfully supported, in the absence of any express description or mention in the deed of assignment of the claims sued on, by the doctrine of the Kentucky court of appeals in the case of *Estill v. Rodes*, 1 B. Mon. 321, where it is held that a right to recover usury is not even a chose in action until the debtor has manifested his election to make the claim. There was no such election made by Thomas & Son in the deed of assignment as I think might have been done, nor by any suit or demand, nor, indeed, in any other way. But, passing this question, we come to the matters of material importance to be determined upon this hearing. Was any usurious interest "included" in the note for \$30,000 executed July 8, 1893, and due 60 days thereafter; and, if so, how much? Or, if not, was there any excessive interest paid upon it, or upon any of the other notes or bills mentioned in the agreed findings of fact, after that date, and within two years of the 13th day of November, 1895, when this action was brought? On the 8th day of July, 1893, the indebtedness of W. H. Thomas & Son to the defendant upon various items of mercantile paper exceeded \$69,000, and the only note for an amount which in any way approximated \$30,000 was one for \$24,500, which had been given in February previously in settlement of the balance then unpaid of a note for over \$46,000, at which time it is probable that all previous usury and interest were paid upon it. On July 8, 1893, there appears to have been a general settlement between the defendant and Thomas & Son, with the result that over \$39,000 was paid to the bank,—mostly, if not entirely, in whisky,—leaving a balance then due of \$30,000. For this sum, a note was given, due at 60 days, and was discounted at that time by the bank at a usurious rate. The amount of discount retained

on this note at that time, and which included this usury, was \$373.33. It was deducted from the face of the note, and Thomas & Son credited with the net proceeds. All of the notes, probably 9 or 10 in number, and all of which bore interest, which were embraced in the settlement of July 8, 1893, were at that time marked "Paid and canceled." After the maturity of this \$30,000 note, Thomas & Son paid the interest upon it from its maturity to April 1, 1894, at the lawful rate of 6 per cent. per annum only, and on the 18th day of the same month made the deed of assignment. On April 20, 1894, the note was paid by the plaintiff, with interest from April 1st to the date of payment at 6 per cent. only, amounting to \$95. It will be observed from the findings of fact that in no way is it ascertained, either expressly or otherwise, that there was any usury actually included in the \$30,000 note; and it seems to me that it would be an unjust conclusion to assume, in the absence of direct proof or finding to that effect, that there was any. The burden in a penal action like this is manifestly upon the plaintiff to show that there was usurious interest included in the note, whether it was a renewal of former notes or not. There was no presumption that there was any usury included in it, and, to say the least, the agreed facts may well excite the gravest doubt of it. Such a doubt should preclude a recovery in an action of this character. Certainly, on July 8, 1893, the gross indebtedness of Thomas & Son to the bank may have included usurious interest, but it also included principal to an amount very greatly in excess of \$30,000, and there is no express finding as to whether the payments then made were applied to principal or interest. The findings in no way differentiate the payment or its application. The Kentucky Statutes, by which alone we are to determine what is lawful and what is unlawful interest, in section 2219, cl. 3, expressly provides that "partial payment on a debt bearing interest shall be first applied to the extinguishment of the interest then due." The word "extinguishment," as thus used, must be equivalent to the word "payment."

Beginning in 1890, there had been an active series of transactions between Thomas & Son and the defendant in which many notes had been discounted, and some large notes frequently renewed, a new discounting occurring at each renewal; but apparently in no instance was interest added to principal, though at each discounting there had been a more or less excessive rate retained from the face of the note. There has been much contention as to whether the interest should be considered as having been "paid" at each renewal (these transactions having mostly occurred more than two years before the action was brought, and at each of which, at the time, the bank's books, as well as its account with Thomas & Son, showed that the discount was paid), or whether any part of the interest should be considered as paid until the principal itself was paid; and many authorities have been cited and examined. The agreed findings of fact do not entirely clear up the difficulty, but, as the burden of proof was on the plaintiff, it seems to the court that the questions of law so much discussed by the respective counsel are, in the main, abstract, because the agreed facts of the case do not seem at all to show that there was any interest whatever, either usurious or other-

wise, included in the note for \$30,000 given July 8, 1893. All interest, whether excessive or otherwise, which had been charged by the defendant up to the giving of that note, under the stress of the statutory provisions last referred to, must probably be considered as having been "extinguished" by the payment then made, and, if this be so, the statute of limitations as to this phase of the case began to run as of that date, which was more than two years before this action was brought. But, apart from the provision of the Kentucky statute just quoted, and whatever weight it may be entitled to, it would be difficult either to reach or to sustain any other conclusion than that it was intended, alike by the defendant and by Thomas & Son, that everything, including interest, usury, as such, and a large amount of principal, was settled at that date, except the \$30,000 note then given. Thomas & Son were always in need of money. They borrowed it. They voluntarily paid the excessive interest. They manifested no election to reclaim it at the time of the settlement of July 8, 1893, and no other conclusion could be fair than that it was meant upon that occasion to extinguish every obligation of the defendant and of Thomas & Son respectively, except that of the latter to pay to the bank \$30,000, as provided for in the note of that date. After the payment of \$39,000, then, it would be grossly unjust to hold that there was anything but principal in the \$30,000 note. So that, as there was then no pretense by Thomas & Son of any claim to insist upon usury, and as they make none now, and have never made any, either in the deed of assignment or by demand or otherwise, there does not seem to be any reason why section 5198 of the Revised Statutes should not be strictly construed as against the plaintiff, who has not, under the deed of assignment, any express right to it by special mention or description. Neither the plaintiff nor Thomas & Son paid any usurious interest on this note after its maturity. It is true that, subsequent to that event, some interest was paid by W. H. Thomas & Son as a separate transaction, and it is equally true that in another separate transaction after the maturity of the note the plaintiff paid a small amount of interest, and that in each case it was paid at the lawful rate. It is contended that the interest thus paid in separate transactions cannot be the basis of a recovery for double its amount merely because in the previous transactions usurious interest had been charged; that the payment of the usurious interest was an illegal transaction, and stood apart; and that to punish the defendant for taking lawful interest in a separate transaction was not contemplated by congress in section 5198. But the express decisions of the supreme court have closed the question. The only illegal charge, it is true, in respect to the \$30,000 note made by the defendant, was in the original discount, which embraced usurious interest. Upon that illegal transaction the penalties of the statute must, of course, be visited. In the case of *Brown v. Bank*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801, and more particularly in that of *McBroom v. Investment Co.*, 153 U. S. 318, 14 Sup. Ct. 852, 38 L. Ed. 729, the supreme court holds that double all the interest charged or chargeable on a note under like circumstances should be recovered, whether taken out more than two years before suit was

brought or not. These decisions proceed upon the idea that the person receiving the usury may, at any time before the principal of a particular note is paid, repent, and credit it in settlement upon the debt, or treat it as having been paid upon principal, or else refund it outright; and, indeed, the principal has been carried to the extent of being applied where a note which in fact included usury has been renewed. But in this case the \$30,000 note did not include any usury, and was never renewed. But for the decisions referred to, it might be possible to hold that what was retained as discount on July 8, 1893, was actually paid on that date, and therefore barred, and that what was paid afterwards was lawful. But they forbid such a ruling. The case before us is not one where, the principal debt being sued for, the interest may be abated because of usury. It is an action to recover the penalty of double the interest which "has been paid" upon the ground that some of it was usurious. *Barnet v. Bank*, 98 U. S. 555, 25 L. Ed. 212. We must, therefore, ascertain when the interest was "paid," and whether within two years before the suit was brought. In my opinion, upon the agreed facts, no result can fairly be reached which does not find the further fact to be true that all the interest sued for, whether usury, paid as such or otherwise, except such as was retained or paid in way of discount and interest on the \$30,000 note dated July 8, 1893, and such as was retained or paid on the other small notes discounted after that date, was all "paid" on or before July 8, 1893, within the meaning of section 5198, and that the right to recover it was barred by the statute when this action was begun on December 13, 1895. While the agreed facts may possibly trace usury into the \$69,000 due the defendant on July 8, 1893, I do not think that the plaintiff, by proof or otherwise, has traced any of it into the note for \$30,000 given for the balance then not paid, although resting under the burden of doing so in order to manifest a clear right to the extreme penalty it seeks to enforce. As already stated, there is no presumption that there was any usury included in the note, and the Kentucky statute and the action of the parties seem clearly to negative the idea. I do not think, upon all the agreed facts, that the court would be justified in reaching any conclusion except that, by the voluntary action of the parties, all claim for interest and usury as such which accrued previous to July 8, 1893, was "extinguished" by what then occurred. Certainly, after what then took place, the plaintiff, as mere assignee under the deed offered in evidence, has no claim to it, and particularly as Thomas & Son made none. If this be correct, we are now to deal only with the interest accruing after that date. Under the case of *Brown v. Bank*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801, the plaintiff (if entitled, as legal representative, to recover anything) must be adjudged double the entire interest afterwards accruing on all the notes discounted on and after July 8, 1893, because of the very small amount of usury obtained at the original discounting of each. There were various discounts by Thomas & Son of mercantile paper after July 8, 1893, upon which they paid usury; and where subsequently they paid lawful interest, as did also the plaintiff in a manner very similar to the transactions respecting the \$30,-

000 note. To each of these transactions the same principles must apply as I have announced in respect to the \$30,000 note. Yielding with much doubt to Judge Barr's view, I hold that the plaintiff, as legal representative of W. H. Thomas & Son, is entitled to recover double the sums indicated, but none of the various large amounts claimed for payments made previous to July 8, 1893. A judgment can be prepared accordingly.

HOOPEs v. NORTHERN NAT. BANK.

(Circuit Court of Appeals, Third Circuit. May 23, 1900.)

No. 21.

1. PROMISSORY NOTE—FAILURE OF CONSIDERATION—DEFENSE TO ACTION BY INDORSEE—PLEADING—AFFIDAVIT OF DEFENSE.

An affidavit of defense to an action upon a note, alleging that the same was given in part payment of certain machinery, which, by written contract, therein set forth, was guarantied by the payee to be of first-class material and workmanship, and to perform the work for which it was made, without breaking, and at a speed specified; but that the payee wholly failed to carry out its contract, that the machinery had failed to perform the work called for therein, had broken down, and had never been able to perform the work at the rate guarantied, owing to defects in workmanship; that said note was given in pursuance of an express oral agreement that it was to be paid at maturity if said guaranty of the payee was satisfactorily performed, and that otherwise an offset for damages was to be allowed; that defendant indorsed said note for accommodation only, and that plaintiff is only the holder of said note, the payee being the real owner thereof,—is sufficient to prevent judgment, and to require the submission of the case to the jury, since it alleges a failure of the consideration for which the note was given, which defense is available to an accommodation indorser.

2. SAME.

An affidavit of defense to an action upon a promissory note, alleging a failure of consideration, in that the note was given in payment of certain machinery, which was guarantied to be of first-class workmanship, and to do certain specified work, and that the payee had wholly failed to perform said guaranty, is not defective for not affirmatively alleging that the machinery was "properly handled," since this is to be presumed in the first instance.

Bradford, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John A. McCarthy, for plaintiff in error.

George E. Johnson, for defendant in error.

Before **ACHESON** and **GRAY**, Circuit Judges, and **BRADFORD**, District Judge.

ACHESON, Circuit Judge. In *Thompson v. Clark*, 56 Pa. St. 33, the court said that it is not necessary that an affidavit of defense be drawn with such nicety that no critical skill can suggest an objection. In *Twitchell v. McMurtrie*, 77 Pa. St. 383, the rule was laid down that a reasonable intendment is to be made in favor of affidavits of defense; and in *Moeck v. Littell*, 82 Pa. St. 354, it was declared that the facts

set forth as constituting the defense need be averred with reasonable precision and distinctness only. In these cases, and in many other cases, some of which are hereinafter cited, the supreme court of Pennsylvania has ruled that, if the affidavit sets forth substantially a good defense, it should be supported. Now, it must be conceded that the affidavit of defense which this writ of error brings before us is not well drawn. Nevertheless, read fairly, giving to its averments a reasonable intendment, the affidavit discloses, we think, a substantial defense. The suit is by the Northern National Bank of Toledo, Ohio, against Herman Hoopes upon his irregular indorsement of a promissory note, of which the following is a copy:

"\$3,100.

Philadelphia, April 1, 1899.

"Four months after date I promise to pay to the order of Vulcan Iron-Works Co., thirty-one hundred dollars at Northern National Bank, Toledo, Ohio, without defalcation, for value received.

John McGill White."

This note is indorsed thus: First, "Frank C. Smythe," second, "Herman Hoopes," and thereunder as follows:

"Pay to the order of Northern National Bank, of Toledo, Ohio.

"The Vulcan Iron-Works Co.,

"By Alex. Backus, Pres't and Tr.

"Alexr. Backus."

The affidavit of defense presents at length a written contract and specifications attached thereto, dated May 11, 1898, between the Vulcan Iron-Works Company, the payee of the note in suit, and the Boise Dredging Company, whereby the former company agreed to furnish to the latter company, for a specified price, certain machinery for an elevator bucket dredge. The contract contains the following stipulation on the part of the Vulcan Iron-Works Company, namely:

"We will guaranty ample strength and good construction in every part, and that the material and workmanship shall be first class."

"We will guaranty the machinery we furnish to perform the work specified without breaking down, if properly handled."

And the attached specifications stipulate:

"The buckets * * * will have two running speeds; one at the rate of eleven buckets per minute, and one at the rate of sixteen buckets per minute."

The contract provided for part payment of the price of the machinery in the notes of the Boise Dredging Company.

The defendant's affidavit of defense alleges that in December, 1898, "at request of the Vulcan Iron-Works Company, said company agreed to accept in payment personal notes of John McGill White, treasurer of the aforesaid Boise Dredging Company, indorsed by deponent and Frank C. Smythe, directors of said Boise Dredging Company, upon an express oral agreement that said notes were to be paid at maturity if the aforesaid guaranty of the Vulcan Iron-Works Company was satisfactorily performed; otherwise, an offset for damages was to be allowed, and in no event was payment to be made till full test was made." The affidavit of defense then proceeds thus:

"Deponent avers that he signed said note as accommodation indorser under said agreement, and that the Vulcan Iron-Works Company has wholly failed

to carry out said contract with said Boise Dredging Company; that said dredge and machinery have failed to perform the work called for by said contract, have broken down repeatedly, and have never been able to work at the rate of sixteen buckets per minute, owing to defects in workmanship."

And the affidavit contains this further statement, namely:

"Deponent believes, avers, and expects to be able to prove at trial that plaintiff is only the holder of said note, and that the Vulcan Iron Company are the real owners thereof."

Under this last averment it must be assumed for present purposes that the plaintiff is not the bona fide holder for value of the note in suit, but is suing thereon for the benefit of the payee, the Vulcan Iron-Works Company, and the case is to be treated as if the suit were by that company itself. *Eyre v. Yohe*, 67 Pa. St. 477; *Bank v. Ellis*, 161 Pa. St. 241, 28 Atl. 1082. Now, incontestably, the consideration of every promissory note is open to inquiry for the purpose of a defense between any of the immediate parties to the note. *Clement v. Repard*, 15 Pa. St. 111; *Peale v. Addicks*, 174 Pa. St. 543, 34 Atl. 201. The present case, upon the averments of the affidavit, clearly comes within this rule, for the nominal plaintiff stands upon the rights of the payee, and the defendant is an original accommodation indorser. The affidavit of defense discloses that the note in suit was given for part of the price of the machinery furnished to the Boise Dredging Company by the Vulcan Iron-Works Company under the recited written contract. The affidavit clearly connects the note with that contract. It is also quite plain from the affidavit that the note was not taken in absolute settlement, but was given and accepted under and subject to the provisions of the contract for the machinery. According to the alleged facts, the payee took the note subject to defenses arising from the breach, by the payee, of that contract. The real defense here set up to the note is the failure of the payee to perform its contract. We are of opinion that the breach of the contract is set forth with sufficient particularity and fullness to send the case to a jury. It is averred that "the Vulcan Iron-Works Company has wholly failed to carry out said contract"; that "said dredge and machinery have failed to perform the work called for by said contract"; that they "have broken down repeatedly, and have never been able to work at the rate of sixteen buckets per minute"; and the cause for these failures is specified, namely, "owing to defects in workmanship." The draftsman has not here nicely distinguished between the dredging machinery and the dredge boat, but, giving to the language of the affidavit a reasonable construction, it discloses an out and out breach of the contract by the Vulcan Iron-Works Company; virtually, a total failure of the consideration for which the note in suit was given is averred and shown. Undoubtedly, the defense is available to this defendant, who is an accommodation indorser, and is here to be treated as a surety. *Moeck v. Littell*, 82 Pa. St. 354; *Gunnis v. Weigley*, 114 Pa. St. 191, 6 Atl. 465. The affidavit, we think, is not defective in that it does not affirmatively allege that the machinery was "properly handled." This is to be presumed in the first instance. If improper handling caused the failure, that is to be shown in rebuttal of the defense. *Martinez v. Earnshaw*, 143 Pa. St. 479, 486, 22 Atl. 668. An affidavit of defense

need not be framed with the technical accuracy of formal pleadings. *Kaufman v. Mining Co.*, 105 Pa. St. 537, 542.

Our conclusion that this affidavit of defense is sufficient to carry the case to a jury is well sustained by the decisions. *Bronson v. Silverman*, 77 Pa. St. 94; *Moeck v. Littell*, 82 Pa. St. 354; *Kaufman v. Mining Co.*, 105 Pa. St. 537; *Ludington v. North*, 141 Pa. St. 184, 21 Atl. 517; *Martinez v. Earnshaw*, 143 Pa. St. 479, 22 Atl. 668; *Bacon v. Scott*, 154 Pa. St. 250, 26 Atl. 422; *Lane v. Sand Co.*, 172 Pa. St. 252, 33 Atl. 570.

In *Bronson v. Silverman*, *supra*, which was a suit by the holder of a note against the maker, the defendant's affidavit, after alleging that the plaintiff was not a bona fide holder, averred that the note was given for part of the purchase money of land, and that the payees were to execute and deliver to him a written contract as his title thereto, but had failed to do so. This was held to be sufficient to prevent judgment, the court saying:

"As evidence of his title, the written instrument would be of great value to him. The deprivation of it might work him great injury. Be that as it may, it was an indivisible part of the agreement which entered into the consideration for which the note was given."

In *Kaufman v. Mining Co.*, *supra*, an averment in an affidavit of defense that the plaintiff sold the iron ore for the price of which the suit was brought upon a warranty as to quality which had been broken, was held sufficient to prevent judgment, although damages were claimed according to an alternative measure, and were stated only approximately. Speaking of the damages, the court said:

"We can only determine that question when it comes properly before us. It is now essential to the proper adjudication of the matters involved in this record."

In *Ludington v. North*, *supra*, an averment in an affidavit of defense that the note in suit was given in payment of pianos purchased under a contract by which the defendants were to be the exclusive sales agents of the payees for five years, and that by reason of the revocation of the agency without cause the defendants had been unable to dispose of the pianos, was held sufficient to prevent a summary judgment, although the affidavit set up an erroneous measure of damages. The court said:

"The question to be determined in this motion is, not whether the defendants have adopted a correct measure of damages, but whether they have stated facts from which a right to damages results. * * * These facts show a cause of action, and they are, therefore, good as matter of defense to an action by the vendors on a note for part of the price of the stock thus depreciated by their breach of their agreement."

In *Martinez v. Earnshaw*, *supra*, the plaintiffs had sold to the defendant "dry iron ore" of usual quality, "guaranteed to contain a yield of fifty per cent. of iron in the natural state," and in a suit for damages for a refusal to accept the full quantity of iron ore sold the defendant filed an affidavit of defense averring that a portion delivered did not contain 50 per cent. of iron in the natural state; and that, as soon as he discovered this, he refused to receive

any more ore under the contract. This was held sufficient to prevent judgment, and the court said:

"We know at this time only that a literal breach by the plaintiffs is alleged and claimed, and a literal breach is enough to defeat a compulsory judgment without a hearing."

The judgment of the circuit court is reversed, and a procedendo is awarded.

BRADFORD, District Judge (dissenting). I am constrained to dissent from the judgment of the court. In my opinion it is sustained neither by principle nor authority. The note in suit is for \$3,100, dated April 1, 1899, and payable four months after date. It was given in part payment of the price of certain machinery for an elevator bucket dredge furnished by the Vulcan Iron Works Company to the Boise Dredging Company. The affidavit of defense sets out as an exhibit thereto attached a certain written contract between the two companies above mentioned dated May 11, 1898, whereby the Vulcan Company agreed for the consideration therein named to furnish to the Boise Company the machinery for the dredge. This contract contained the following stipulations:

"We will guarantee ample strength and good construction in every part and that the material and workmanship shall be first class. We will guarantee the machinery we furnish to perform the work specified without breaking down if properly handled."

The specification attached to the contract and forming part thereof contains several hundred items, including, among others, the following:

"The buckets are to be of five cubic feet capacity each. They will have two running speeds. One at the rate of eleven buckets per minute and one at the rate of sixteen buckets per minute."

The affidavit of defense further sets forth that in December, 1898, "At request of The Vulcan Iron Works Company said company agreed to accept in payment personal notes of John McGill White, Treasurer of the aforesaid Boise Dredging Company, endorsed by deponent and Frank C. Smythe, Directors of said Boise Dredging Company, upon an express oral agreement that said notes were to be paid at maturity if the aforesaid guarantee of The Vulcan Iron Works Company was satisfactorily performed otherwise an offset for damages was to be allowed and in no event was payment to be made till full test was made. * * * And that The Vulcan Iron Works Company has wholly failed to carry out said contract with said Boise Dredging Company, that said dredge and machinery have failed to perform the work called for by said contract, have broken down repeatedly and have never been able to work at the rate of sixteen buckets per minute, owing to defects in workmanship."

It appears from the contract attached to and made part of the affidavit of defense that the total consideration to be received by the Vulcan Company was to vary from \$9,750 to \$10,250, according to dates of shipment. The learned judge below held that the affidavit was fatally defective in several particulars and, among others, in that "no information is given as to whether the defendant claims an 'offset for damages,' and if so for what amount either exact or approximate." In this specific holding the learned judge was, in

my judgment, clearly right. Without discussing the other grounds of alleged insufficiency in the affidavit, I shall confine my remarks to the point last stated. It will be observed that this is not a case in which an affidavit of defense sets up several independent or distinct matters of defense any one of which if sufficient would prevent a summary judgment. Here, on the contrary, the several matters alleged by way of defense constitute a chain and each material link must be sufficient in order that the affidavit of defense may be sustained. Therefore, on the assumption that the Northern National Bank, defendant in error, and Hoopes, plaintiff in error, stand in the shoes of the Vulcan Company and the Boise Company, respectively, with respect to the transaction in question, the case is narrowed to the point whether such facts are presented in the affidavit of defense as if proved would have defeated a recovery by the Vulcan Company against the Boise Company in a suit directly between those companies. The court says:

"Now it must be conceded that the affidavit of defense which this writ of error brings before us is not well drawn. Nevertheless, read fairly—giving to its averments a reasonable intendment—the affidavit discloses we think, a substantial defense. * * * According to the alleged facts the payee took the note subject to defenses arising from the breach, by the payee, of that contract. The real defense here set up to the note is the failure of the payee to perform its contract. We are of opinion that the breach of the contract is set forth with sufficient particularity and fullness to send the case to a jury. * * * Virtually a total failure of the consideration for which the note in suit was given is averred and shown."

The averments in the affidavit on which the court relies to sustain its conclusion are the following:

"That The Vulcan Iron Works Company has wholly failed to carry out said contract, with said Boise Dredging Company, that said dredge and machinery have failed to perform the work called for by said contract, have broken down repeatedly and have never been able to work at the rate of sixteen buckets per minute owing to defects in workmanship."

Now, assuming, as is necessary at this stage of the case, that all the above averments are true, they do not clearly and distinctly, or even by reasonable inference, set forth a total failure of consideration for the note in suit or a claim as "an offset for damages" equal to or greater than the amount of the note, nor do they specify either exactly or by approximation, or allege any excuse whatever for not so specifying, the amount of any "offset for damages" by way of partial defense to the note. The allegation that the Vulcan Company "has wholly failed to carry out said contract with said Boise Dredging Company" is vague, indefinite and ambiguous. It may mean one or more of several different things. If it could be treated as asserting a breach of the warranties relating to "ample strength and good construction," to the character of "the material and workmanship," and to the performance by the machinery of "the work specified without breaking down if properly handled," it would obviously be insufficient. It does not appear that the contract was at any time rescinded nor that the machinery was returned to the Vulcan Company. The mere allegation of the breach of such warranties cannot of itself support the affidavit of defense, for in such a case the breach of warranty is not a

condition, but can be taken advantage of only in an action on the warranty for damages or by way of set off in an action for the purchase money; and he who has suffered by such breach is bound to prove the breach and the amount of damages resulting to him therefrom and can recover or defend, as the case may be, only to the extent of such damages. As above stated, the specification annexed to the contract includes several hundred items of machinery. One who may properly be said to have wholly broken his warranty may nevertheless be entitled to recover the price of the warranted property subject to a set off by way of damages arising from such breach. If one sells a horse with warranty of good eyesight, and it turns out that it is blind in one eye, there is a total breach of warranty, yet if the vendee keeps the horse he cannot in an action for the price rely, by way of defense, on the mere breach of warranty, but has a defense only to the extent to which he has sustained damage through such breach. Or if an iron chain be sold for \$100 with a warranty that it is sound and strong, the warranty extends to the whole chain; but if it turns out that some of the links are defective and weak, yet can be replaced or repaired for a trifling sum, he is entitled to recover the purchase price less the damage sustained by him through such faulty links, unless other elements of legal damage are shown to have been incurred sufficient in amount wholly to defeat the suit. Indeed, the contract in question recognizes this rule of law when it states that "said notes were to be paid at maturity if the aforesaid guarantee of The Vulcan Iron Works Company was satisfactorily performed, otherwise an offset for damages was to be allowed," etc. If, however, the averment in the affidavit of defense that "The Vulcan Iron Works Company has wholly failed to carry out said contract with said Boise Dredging Company" is not to be confined to the alleged breach of warranty, it is still vague, indefinite and ambiguous. The learned judge below well said:

"If this averment had ended with the general assertion that the Vulcan Company has failed to carry out its contract, it would, under all the authorities, have been clearly defective as lacking specification and definiteness."

It may mean a total failure to carry out the contract with respect to each and every of the several hundred items included in the specification either through omission to deliver any portion of the machinery or through failure of each and every item delivered to conform to the warranty, or it may mean a total failure with respect to the delivery of some of the items included in the specification or their non conformity with the warranty. There is no denial in the affidavit of defense that in consequence of the contract machinery was delivered by the Vulcan Company to the Boise Company. On the contrary it is plainly to be inferred from the affidavit that the machinery was so delivered. It states:

"Said dredge and machinery have failed to perform the work called for by said contract, have broken down repeatedly and have never been able to work at the rate of sixteen buckets per minute, owing to defects in workmanship."

A steamship built and delivered with warranty that she should be constructed of good materials, be of first class workmanship and

make seventeen knots an hour, may through some defect in her propeller or imperfection in connecting rods or the misplacement of a few bolts, fail to make the required speed and repeatedly break down. An affidavit of defense in an action for the purchase money that the builder had wholly failed to carry out his contract, that the vessel had failed to do the work for which she was ordered, and that she had repeatedly broken down, would be perfectly consistent with such a condition of things, but without alleging any repudiation of the vessel or specifying the defects and averring either exactly or approximately the amount of damages sustained by the vendee, and offering no excuse for the omission of such averment, would obviously be insufficient. And, as before stated, there is no allegation of any rescission of the contract or return of the machinery. While the affidavit discloses a breach of the contract and warranty, it does not allege either exactly or approximately the amount of damages sustained thereby or state whether such damages were or were not in excess of the note in suit, nor does it suggest any excuse for omission to mention the amount of the damages. They may be in excess of the amount of the note or they may be equal only to a small portion of that amount. The affidavit does not, in my judgment, disclose "virtually a total failure of the consideration for which the note in suit was given", as held by the court. In *American Electric Const. Co. v. Consumers' Gas Co.* (C. C.) 47 Fed. 43, it appeared that the plaintiff's statement of claim set forth a written agreement between the plaintiff and defendant for the sale and erection by the former of an electric-light plant. The plaintiff sued for the balance, amounting to \$7,749.25, due on the contract. An affidavit of defense was filed which, among other things, alleged as follows:

"That the said American Electric Construction Company limited, did not and has not complied with its contract, and that the said Consumers' Gas Company has already been put to great delay and expense and damages to the amount of \$10,000."

Judge Reed delivering the opinion of the court said, among other things:

"An affidavit of defense has been filed by the defendant, and the plaintiff has moved for judgment for want of a sufficient affidavit of defense. It is not necessary to cite authority for the rule that the affidavit of defense should state specifically and at length the nature and character of the defense relied on, and should set forth such facts as will warrant the legal inference of a full and legal defense to the plaintiff's cause of action, nor of the equally well settled rule that upon the hearing of a motion for judgment all the material averments of the affidavit must be taken as true."

And with respect to the portion of the affidavit above quoted, he said:

"This is clearly insufficient, stating conclusions, and not facts. The defendant should have specified the various matters in which it was claimed that plaintiff had failed to comply with its contract."

Judgment was rendered in favor of the plaintiff, notwithstanding the affidavit of defense. This case was taken on a writ of error to this court (1 C. C. A. 663, 50 Fed. 778), where the judgment of the

court below was affirmed, Judge Acheson delivering the opinion. Among other things he said:

"An affidavit of defense is insufficient to prevent judgment, unless it sets forth all the facts necessary to constitute a substantial defense. Mere general averments amounting to legal conclusions will not do. The specific facts must be stated, so that the court may draw proper conclusions. Nothing should be left to conjecture, for that which is not stated must be taken not to exist. These principles have been repeatedly declared and enforced. * * * Finally, the general allegations, without further specification, that the plaintiff 'has not complied with its contract,' and that the defendant 'has already been put to great delay and expense and damages to the amount of \$10,000' are altogether too vague, indefinite, and uncertain, as the authorities cited at the opening of this opinion demonstrate. The court below was entirely right in holding that the affidavit of defense was insufficient, and in entering judgment for the plaintiff."

In *Reed v. Raymond* (C. C.) 37 Fed. 186, an affidavit of defense was filed in an action of scire facias upon a mortgage for the balance of the purchase money of certain lands. In a well considered opinion Judge Acheson said, among other things:

"It is well settled that an affidavit of defense is insufficient unless it sets forth all the facts necessary to constitute a substantial defense. *Bryar v. Harrison*, 37 Pa. St. 233; *Marsh v. Marshall*, 53 Pa. St. 396. General averments amounting to legal conclusions will not do; the facts must be stated in order that the court may draw the proper conclusion. * * * Nothing should be left to inference, for what is not stated in the affidavit must be taken not to exist. *Brick v. Coster*, 4 Watts & S. 494; *Peck v. Jones*, 70 Pa. St. 83; *Asay v. Lieber*, 92 Pa. St. 377. An affidavit of defense to a portion of a claim must state the amount admitted to be due. *Griel v. Buckius*, 114 Pa. St. 187, 6 Atl. 153. In an affidavit of defense setting up a breach of warranty of the quality of goods sold, the mere averment of a warranty, without more, is bad. * * * Furthermore, the affidavit of defense does not allege that the defendant has sustained any damages whatever by reason of the non-supply of natural gas. Giving the utmost allowable effect to the averments of the defendant's affidavit, it shows only a partial failure of consideration susceptible of compensation in damages, if any loss was sustained. *Yard v. Patton*, 13 Pa. St. 278-282. But the defendant does not allege that he has suffered any actual damage. * * * In the opinion of the court, the affidavit of defense is incomplete, vague and evasive in its statement of facts, and under the authorities altogether insufficient to prevent judgment."

One may look in vain through the affidavit of defense in question for any averment of actual damage sustained. There is no such statement. The only damages to which the defendant is entitled so far as the averments in the affidavit are concerned are purely nominal, arising by law from the fact of the breach of the contract. If all the facts alleged in the affidavit of defense were submitted to a jury, without supplementary evidence, no court would permit the jury to find that the Boise Company or defendant had sustained more than purely nominal damages. I find it impossible to reconcile the reasoning of the court in the several cases above cited with the decision of the court in this case. Reference will now be made to a few recent decisions of the Supreme Court of Pennsylvania bearing on the point under discussion. Most of them are later than the latest decision referred to in the opinion of this court bearing on that point, and as such should furnish a guide to this court in the matter of construction of Pennsylvania statutes and rules regulating practice.

Thomas v. O'Donnell, 183 Pa. St. 145, 38 Atl. 597, was an action brought to recover a balance alleged to be due on a building contract. The defendant in his affidavit set up several distinct and independent matters by way of defense. One of them was departure in specific particulars from the specification and defects in the work. The amount of the damage resulting from such departure and defect was not stated. While the court sustained the affidavit on other grounds, it recognized the proposition of law embodied in the syllabus as follows:

"In an action to recover a balance alleged to be due on a building contract, an affidavit of defense is insufficient which specifies certain departures from the specifications and defects in the work, but fails to state the amount of the resultant damage."

Vollmer v. Magowan, 180 Pa. St. 110, 36 Atl. 571, was an action on promissory notes for over \$30,000 given for furniture and carpets sold to the defendant. The affidavit of defense averred, among other things, that the goods were all to be of first class quality and manufacture, but in fact were defective in various particulars specified, unknown to the defendant when he gave the notes, and also that the plaintiff had failed "to deliver some of the articles of a very valuable character, which still remain undelivered, to the extent of about at least \$1,000." The affidavit did not otherwise describe the goods not delivered or state their value nor did it state the amount of damage sustained by the defendant by reason of the defective character of the goods delivered. It was, however, averred that "by reason of the aforesaid herein recited defects in the said goods, wares and merchandise, and the failure of said plaintiff to fully comply with his said agreement, he, deponent, is greatly damnified and injured." The court said:

"The affidavit of defense in this case is too vague and indefinite to carry the case to a jury, and hence there was no error in making the rule for judgment absolute."

Bridge Co. v. Bonta, 180 Pa. St. 448, 36 Atl. 867, was an action to recover a balance alleged to be due on a contract for building a plate glass mill. The affidavit of defense averred, among other things, that by reason of the plaintiff's delay in completing the work the defendant was prevented from carrying out a contract with a corporation in which he held stock and that thereby his stock had depreciated in value. The court thus dealt with this point:

"The third item was a cross-demand amounting to about three times as much as the plaintiff's claim, and was for an alleged fall in the value of the defendant's shares of stock in the plate glass mill. The allegation is that the defendant held two thousand three hundred and thirty six shares; and that these shares were depreciated at the rate of 'about \$5 per share' by reason of the failure to complete the mill on the day named in the contract; and that the defendant has therefore suffered in damages because of the depreciation in the value of his stocks about twelve thousand dollars. The real contest in the court below and here is over the sufficiency of this item. It will be noticed that the value of these shares before and after the day when the mill was to be completed is not stated in the affidavit. The time when the depreciation took place, in what manner the extent of the depreciation is ascertained, how long the depreciation continued, and what was the value of the stocks when this action was brought, are circumstances that the affidavit

furnished no light upon. No facts from which depreciation, or its extent, can be inferred are given. Whether the stock ever had a market or selling value, whether any of it has been sold, and at what prices, and how the defendant is able to fix the depreciation at 'about \$5 per share' we are not told. So far as we can learn from the affidavit, this is but the unsupported guess of the defendant at what might have taken place if he had put his shares upon the market. This is not enough. Without assenting to this mode of measuring his damages for a delay in the completion of the plate glass mill, we are satisfied that the defendant has not made such a statement of facts as could support this item, if it was clear that he would otherwise be entitled to rest upon it. The affidavit is insufficient in relation to both the first and third items. The second item was well stated, and the defendant has the benefit of it in the judgment appealed from. The assignments of error are overruled and the judgment is affirmed."

Light Co. v. McCorkell, 161 Pa. St. 227, 28 Atl. 1083, was an action to recover for designated quantities of electricity at a fixed price per lamp-hour alleged to have been furnished to the defendant. The affidavit of defense, although not stating the amount of electricity used by the defendant, was under the peculiar circumstances of the case held sufficient. But the opinion of the court is clearly in line with the doctrine of the cases already cited. The court said:

"While it is true the defendant does not state what the correct measurement of the electricity consumed was, or would have been, he proceeds to state a reason why it is impossible for him to make such a statement. He says the meter for the measurement of lamp-hours is the property of the plaintiff and under their sole control, that it was removed from the premises by the plaintiff, and he had no opportunity to test by a new and correct meter. He avers that because of this reason he cannot tell in what sum he is indebted to the plaintiff for electricity actually consumed and concludes by saying he is perfectly willing to pay what is justly due upon a proper test of the current by a proper instrument. It seems to us that this affidavit discloses a reasonable excuse for not expressing the amount he does owe. The meter being removed from the premises the defendant would have no opportunity of examining it with a view of determining the correctness of the quantity registered, or of comparing it with the quantity which he claims it ought to have registered."

The law does not require the performance of impossibilities in order to prevent the sacrifice of a man's rights. This was the ground on which the court proceeded. It held that the defendant was excused from doing that which it was impossible for him to do, but which had it been practicable the defendant must have done, namely, set forth in his affidavit the amount of electricity he had used.

After careful examination of all the authorities cited by the court they are, in my judgment, without exception, clearly distinguishable from and inapplicable to this case, so far as the point under discussion is concerned. I now refer to them in some detail. In *Thompson v. Clark*, 56 Pa. St. 33, the defendant averred in his affidavit that the draft in suit, of which he was the acceptor, did not belong to the plaintiff but to one Gray who had done certain work for the Thompson Oil Company, and that the "defendant has overpaid said Gray for the work done for said Thompson Oil Company, and that nothing is now due him from defendant." *Twitcheil v. McMurtrie*, 77 Pa. St. 383, was an action of scire facias on a mortgage. The defendant in her affidavit, among other things, averred that at the time of the execution of the mortgage in suit,

"She and her husband were confined in prison, and said mortgage was given as security for any expenses that might arise from their approaching trial, and under the express agreement with the said O'Byrne, that he would never in any manner assign or part with said mortgage. * * * And the said O'Byrne immediately after the said assignment to him, took possession of the said property, and has retained the same until just prior to this suit; has rented the premises, collected the rents, made the repairs, paid the taxes, and generally acted as a mortgagee in possession, and that she has never received any return therefrom in any way, nor any account thereof, although she has often demanded the same from him. That she has never received from the said O'Byrne any statement or account of the expenses of her and her husband's trial, or either of them, notwithstanding she has urged the rendering of such account or statement by him."

The affidavit further averred that O'Byrne, though not appointed, acted as administrator of her mother's estate, selling the personal property and "collecting the credits in his own name" and that

"Upon a citation, the account of said administration was filed April 26th, 1872, and has been referred to an auditor, before whom she believes and expects to be able to prove that a large portion of the assets of said estate are unaccounted for, amounting to more than the principal sum of said mortgage."

Moeck v. Littell, 82 Pa. St. 354, was an action against the endorser of a promissory note. The defendant in his affidavit averred, among other things, that he purchased from one Rowley the lease of a certain tavern and certain personal property therein for the sum of \$1,700, paying \$500 in cash and giving Rowley two notes, one for \$500, on which suit had been brought and judgment rendered, and the other for \$700, being the note in suit; that the personal property on the leased premises was "almost worthless," and that in a very short time the tavern stand became "entirely untenable, and had to be entirely abandoned." The affidavit concluded as follows:

"The defendant avers that the consideration for the note in suit has not only entirely failed, but more than failed, but affiant further avers, expects to be able to prove and show in the trial of this case, that James Littell, the plaintiff above named, is not the owner and holder for value and before maturity of the note in suit, but the same was handed over to him by John Rowley, the payee, for the purpose of debarring the maker and endorsers thereof from a defense to the same."

Eyre v. Yohe, 67 Pa. St. 477, was an action on a negotiable note for \$2,703.75, by an endorsee against the maker. The defendant in his affidavit averred that the note was the property of one Gordon, the payee, and not of the plaintiff; that the note included "usurious and unlawful discount and interest" to the amount of \$815; and alleged as follows:

"Deponent therefore claims a deduction of \$815 on the note now sued upon, being the amount of usurious and unlawful discount over and above six dollars to the hundred allowed on said note."

The affidavit was sustained as setting forth a defense pro tanto. Clement v. Reppard, 15 Pa. St. 111, does not relate to an affidavit of defense and has no bearing on the point under discussion. Nor does Peale v. Addicks, 174 Pa. St. 543, 34 Atl. 201, bear directly or indirectly on the point. In Bank v. Ellis, 161 Pa. St. 24, 28 Atl.

1082, it was held that the plaintiff's statement was insufficient without reference to the affidavit of defense. The court said:

"It follows that the plaintiff's statement in this case is fatally defective; and without reference to any of the averments of the affidavit of defense, it is not in a position to demand judgment. But waiving all that, the defendant in his affidavit avers in substance that no consideration was paid either by the maker of the note in suit, or by the plaintiff bank; that the latter 'paid nothing either for or on account of said note to anyone,' but is a mere transferee without value and holds the same merely for collection for account of De Saville, the maker, who is indebted to deponent 'in large sums of money much in excess of the amount of said note.' For present purposes we must assume that these averments of facts are true."

Gunnis v. Weigley, 114 Pa. St. 191, 6 Atl. 465, while supporting the proposition for which it is cited by the court, does not seem to have any definite bearing on the point under discussion. Bronson v. Silverman, 77 Pa. St. 94, was an action on a promissory note for part of the purchase money of lands. The defendant in his affidavit, among other things, averred as follows:

"That the said note was given by affiant for the purchase money, in part, of a certain tract of land, for which Hugh Maher and the Chicago Petroleum and Mining Co. were to make, execute and deliver a written contract to affiant, as his title thereto, which paper has never been delivered to affiant, as agreed upon, and he has no written evidence of his contract or the purchase of said land, nor title thereto."

The court said:

"Wherever the land lies, the agreement was to furnish written evidence of title. This is the specific contract averred and a breach of it is affirmed. * * * As evidence of his title, the written instrument would be of great value to him. The deprivation of it might work him great injury. Be that as it may, it was an indivisible part of the agreement which entered into the consideration for which the note was given."

In my judgment, this case is not in point. The delivery of written evidence of the title was the consummation and an indivisible part of the agreement for which the note was given. It would plainly have been impossible for the defendant to have stated either exactly or approximately the amount of damage resulting to him from the failure to deliver the title papers, and the affidavit was properly sustained. Bacon v. Scott, 154 Pa. St. 250, 26 Atl. 422, was an action on promissory notes given in part payment of the price of certain moldings, blinds and doors sold under an express warranty. The defendant averred in his affidavit that the goods furnished were "unsuitable for the purposes ordered and not as represented in size and kind, and deponent was compelled to sell the same at the following losses." The losses were specifically stated in amount. The defendant further averred in reference to the prices obtained by him, as follows:

"And that these prices were the best that could be obtained for the same, and were all they were worth. That deponent suffered a further loss, by reason of the same, of an amount greater than the entire amount of notes in suit."

The court said:

"The specific loss on each of the articles thus sold is then set forth and it is followed by the averment that the prices for which they were sold were the best prices that could be obtained, and that they were all they were

worth. The affidavits thus aver an express warranty, its breach, and the damages resulting therefrom."

Ludington v. North, 141 Pa. St. 184, 21 Atl. 517, was an action on a promissory note for \$345 given by the defendants in part payment of the price of certain pianos. The defendants averred in their affidavit, among other things, that they became the purchasers of the pianos under an agreement that the defendants should be the exclusive sales-agents of the payee for the balance of a term of five years; that subsequently in violation of the agreement the payee took away the agency for the pianos from the defendants without just cause or reason and before the expiration of the balance of said term and entered into a contract of agency with another dealer. The affidavit then states:

"That in consequence of the taking away of said agency from defendants, twelve of the pianos purchased by them remain upon their hands unsold, although they have made diligent efforts to sell the same; that defendants, by reason of the breach of said contract, have lost the price of said pianos which remain unsold, which would amount to \$2,000, and in addition thereto defendants have lost their time and expense of advertising, all of which has been rendered useless by reason of the taking away of said agency from them."

Here there was a statement of a definite pecuniary loss in excess of the amount of the note in suit. Kaufman v. Iron Co., 105 Pa. St. 537, supports the proposition of law which has repeatedly been recognized that "a claim of set-off in an affidavit of defense need not be of a certain liquidated amount, where the facts out of which the alleged set-off arises, as stated in the affidavit, are such that an approximate amount only could be stated." It is merely an application of the maxim that the law does not require the performance of that which is impossible. The action was on the common counts for the recovery of \$1,338.75 as the price of iron ore sold and delivered at \$3.50 per ton. The defendants in their affidavit averred, among other things, that the defendants purchased from the plaintiffs through the agents of the latter 300 tons of iron ore on the express agreement that all of it should be well roasted and in all respects equal in quality to 50 tons of iron ore theretofore purchased from the plaintiffs, and that the ore when furnished was poor in quality, unlike the previous 50 tons and utterly unfit for the manufacture of foundry iron. The affidavit further averred as follows:

"The said iron ore was not and is not worth more than one dollar and seventy five cents per ton. Through the violation of the said contract by the plaintiffs and the shipment of an inferior quality of ore as aforesaid, the defendants incurred damages in an amount exceeding the plaintiffs' claim for the price of the said ore. Defendants were at the time of the said contract manufacturing foundry iron and had the entire product of their furnace sold for upwards of a month in advance to foundry men and for foundry purposes. * * * The number of tons of iron, spoiled by the inferior quality of the said ore was about three hundred, and the difference between the value of the iron which defendants could and would have made from ore of the quality stipulated for, and the iron actually made of the said ore, was three dollars per ton."

The defendants in a supplementary affidavit of defense averred, among other things, as follows:

"The said iron ore was not and is not worth more than one dollar and seventy five cents per ton, and the defendants claim to set off against the

plaintiff's claim the difference between the actual value of the said ore, viz: one dollar and seventy five cents per ton, and the value it would have possessed if it had conformed to the warranty, viz: three dollars and fifty cents per ton, making altogether upon the three hundred tons the sum of four hundred and fifty dollars."

The court said:

"The affidavits filed in this case set forth, we think, a valid defense against the plaintiffs' claim at least pro tanto; the facts stated in each are different, and on that account should be carefully examined; but they do not contain alternative allegations upon the subject-matter of the defense. * * * The damages resulting from the breach are, it is true, assessed according to an alternate measure, and the defendant claims to recoup or recover by way of set-off, according to one, or other, or both of these, as the law may entitle him. What may be the proper measure of damages, we will not now consider; the rule entered was for judgment on the plaintiffs' claim, not for any part of it. It is sufficient for the purpose of this case, as now presented, if a valid defense is asserted for part."

The inapplicability of *Kaufman v. Iron Co.* to the present case is too apparent to require argument. *Lane v. Sand Co.*, 172 Pa. St. 252, 33 Atl. 570, was an action to recover a balance of \$2,134.26 alleged to be due on a written contract for furnishing and erecting machinery and a mill plant. The plaintiffs' statement of claim set forth the contract which contained, among other things, the following:

"The said machinery, etc., including and intending to include all things necessary and needful for setting up and furnishing a complete apparatus for crushing, washing, conveying and drying sand to the full capacity herein guaranteed by said first parties. * * * The said first parties further agree to guarantee said grinding and washing machinery when put up to have a capacity of eight tons per hour, and the dryer to have a capacity of four tons per hour."

The affidavit specified among other damages sustained by the defendant items of damage aggregating some \$1,700. The opinion of the court sufficiently shows the nature of the defense set up in the defendant's affidavits, as follows:

"Without referring at length to the affidavits of defense, it is sufficient to say that they expressly deny that plaintiffs substantially performed their contract, and aver that 'the mill, plant or machinery' they agreed to put up under the contract 'was not erected or constructed in accordance with the terms of said contract, but in such an unworkmanlike and defective manner as to cause the defendant great loss and damage,' etc. That the same was 'so defectively constructed in workmanship and of such defective material as to render the said plant almost wholly useless for the purpose for which it was intended.' After specifying wherein the plaintiffs failed to comply with their contract, etc., it is further averred, 'that without taking into consideration the injury defendants sustained by reason of the defective work done by the mill, owing to faulty material and construction, and failure of the plaintiffs to perform their contract, the defendants sustained damages to more than the amount alleged to be due on the original contract,' etc."

The case just referred to does not in any manner, in my judgment, sustain the decision of this court. On the contrary, it is an authority against it; the court recognizing as material and essential the averment "that the defendant sustained damages to more than the amount alleged to be due on the original contract." The only remaining case cited by the court is *Martinez v. Earnshaw*, 143 Pa. St. 479, 22 Atl. 668. The action was for an alleged breach by the defendant

of a written contract for the purchase by the defendant from the plaintiffs of a certain quantity of dry iron ore warranted in the contract to contain a certain percentage of iron in the natural state. The defendant in his affidavit averred that upon the arrival of the ore it was tested and ascertained not to accord with the samples or the guaranty in the contract. The affidavit further averred as follows:

"The defendant did not discover these facts until after the iron had been delivered at the furnaces and it had become impracticable to reject and return the ore, nor could he, in the usual course of business of this kind, have discovered the fact sooner. Immediately on ascertaining the fact that the ore shipped did not correspond to the quality guaranteed, the defendant repudiated the contract that had been made and refused to receive any more ore under it."

It was properly contended on the part of the defendant "that the defendant is not in court on the effect of a delivery and acceptance, but on the obligation to accept a thing that differs from the thing bought." The court sustained the affidavit of defense, saying among other things:

"We know at this time only that a literal breach by the plaintiffs is alleged and claimed, and a literal breach is enough to defeat a compulsory judgment without a hearing."

This language was undoubtedly correct as applied to the facts of that case, but has no proper application here. There the defendant promptly "repudiated the contract." Here nothing of the kind occurred. There was no rescission of the contract nor return of the machinery. That, in the absence of rescission or repudiation, the allegation of a mere breach of warranty as to the quality of goods sold and delivered, without averring damages, is sufficient in an affidavit of defense, was not held in that case. To put such a construction upon the words quoted would bring that case into irreconcilable conflict not only with later cases decided by the Supreme Court of Pennsylvania, to which I have referred, but also with the federal decisions to which allusion has been made, and particularly the statement by Judge Acheson in *Reed v. Raymond* (C. C.) 37 Fed. 186, that "in an affidavit of defense setting up a breach of warranty of the quality of goods sold, the mere averment of a warranty, without more, is bad." I have now, without exception, referred to all the cases cited by the court. Not one of them, in my opinion, supports or tends to support the judgment in this case against the objection to the affidavit as being fatally defective in not alleging either exactly or approximately the damages, if any, sustained by the Boise Company or any excuse for omitting such an averment. The manifest intent of the statutes and rules in Pennsylvania relating to affidavits of defense is that the defendant, while not held to the niceties of special pleading at common law, must nevertheless by his affidavit, as far as practicable plainly and fully inform the plaintiff of the nature and extent of the defense on which he relies. If it goes either to the entire amount or to only a portion of the amount claimed by the plaintiff it must be so shown by the affidavit. In averring a counter-claim or claim for damages by way of set-off, the defendant must, when practicable, state the exact amount, as held in *Griel v. Buckius*, 114 Pa.

St. 187, 6 Atl. 153. If it be impracticable to state the exact amount, as in the case of an unliquidated claim, the defendant must, if possible, state approximately the amount of his set-off, as recognized in *Kaufman v. Iron Co.*, 105 Pa. St. 537. If the circumstances of the case are such as to render it impossible for the defendant to state either exactly or approximately the extent of his damages, he is excused from so doing, as held in *Light Co. v. McCorkell*, 161 Pa. St. 227, 28 Atl. 1083, and *Twitchell v. McMurtrie*, 77 Pa. St. 383. But here the defendant has averred no excuse whatever for omitting to state approximately, if not exactly, the amount of damage sustained as he might have done by specifying the defects, and stating that he verily believed that thereby the Boise Company sustained damage to an amount not less than so many dollars. He fails to give to the plaintiff information it has a right to receive. He is wholly silent on the subject. Nor does the affidavit disclose any circumstances from which it might fairly be inferred that he was unable to state by way of approximation, at least, the amount of damage sustained. The clear result of all the cases heretofore cited, state and federal, is that in view of these facts, the affidavit is fatally defective, and requires that the judgment of the court below should be affirmed. It may be that the defendant employed a careless or incompetent attorney. But persons who entrust their legal affairs to such attorneys must abide the consequences of their improvidence. To sustain such a defective affidavit as that filed in this case, in my judgment, involves a clear departure from the law as recognized not only by the Supreme Court of Pennsylvania but by this court, and virtually puts a premium on the making of insufficient or evasive affidavits calculated, if not designed, to hinder and delay the due administration of justice.

In re ALEXANDER et al.

(District Court, N. D. Georgia, May 30, 1900.)

BANKRUPTCY—PROOF AND ALLOWANCE OF CLAIMS—PREFERRED CREDITORS.

Where a creditor, holding an open account against his debtor, receives from him payments on account in the ordinary and usual course of business, and within four months thereafter the debtor becomes bankrupt, the creditor will not be required to surrender the amount so received as a condition upon being allowed to prove the balance of his debt as a claim against the bankrupt's estate, in the absence of evidence to show that the debtor was insolvent at the time the payments were made, or that the creditor knew, or had reason to believe, that a preference was intended.

In Bankruptcy. On exceptions to decision of referee in bankruptcy disallowing the claims of certain creditors.

Smith, Hammond & Smith, for creditors.
Starr & Erwin, for trustee in bankruptcy.

NEWMAN, District Judge. The question certified by the referee to the court in this case is as follows: Whether or not a claim which had been duly proven and allowed should be reconsidered and disallowed on objection thereto by the trustee, upon proof showing pay-

ments made by the bankrupts to said provant within four months prior to the filing of the original petition in bankruptcy; no evidence being adduced showing insolvency of said bankrupts at the time any of said payments were made. The claims as to which this question arose were those of wholesale mercantile establishments dealing with the bankrupts, and holding indebtedness for merchandise sold. The involuntary petition in bankruptcy was filed January 30, 1900. As to one claim it is shown that the last payment made to the creditor was \$90, on October 14, 1899; the indebtedness then amounting to considerably over \$1,000. On another the last payment was on November 10, 1899, \$178.78, the indebtedness at that time being over \$900. On another the last payment was on December 28, 1899, \$171.54, being one-half of the indebtedness then existing. There were some prior payments within four months, but these dates are given as the last dates of payments, and will be sufficient to illustrate the conclusion reached by the court in this matter.

It is conceded on the argument that these creditors had no knowledge at the time these payments were made of the insolvency of the debtor. Indeed, the referee certifies that there is no evidence before him to show insolvency at the time the payments were made. An examination of the amount of the indebtedness, the amount of the payments, and the dates of the same shows that they must have been made in the ordinary course of business, and discloses nothing whatever showing any intention to prefer on the part of the debtor, or any knowledge whatever of a preference being received on the part of either of the creditors. In order to justify the court, therefore, in confirming the action of the referee in this case, it is necessary to hold that all payments made by the debtor, who subsequently becomes a bankrupt, to creditors within four months, must be repaid by the creditor receiving the same to the trustee, before such creditor can be allowed to prove his debt.

Section 57g of the bankrupt act provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." Section 60b is as follows:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

It will be perceived that there may be a distinction between the character of preference which will act as a bar to the proof of claims of creditors unless all preference is surrendered, and a preference such as would authorize the trustee to recover the same back from the person receiving it. Under section 57g, knowledge by the creditor that he is receiving a preference is not necessary to prevent the proof of the claim, although under section 60b it is necessary to give the trustee a cause of action for the recovery of the same. Some of the courts, in dealing with the provisions of this act in this respect, have fully recognized this distinction. In the case of *Electric Co. v. Worden*, 3 Am. Bankr. Rep. 634, 39 C. C. A. 582, 99 Fed. 400, decided by

the circuit court of appeals for the Seventh circuit, Circuit Judge Jenkins delivering the opinion of the court, the first headnote is as follows:

"Where a creditor who has innocently received a payment upon his debt within four months of his debtor's bankruptcy comes into the court of bankruptcy seeking to share with other creditors in the estate of the bankrupt, he must surrender the preference which he has received; in other words, he has his election to abide by what he has received or to surrender that, and share with the other creditors."

To the same effect are *In re Conhaim* (D. C.) 97 Fed. 923; *Strobel & Wilkin Co. v. Knost*, 3 Am. Bankr. Rep. 631 (D. C.) 99 Fed. 409.

To the contrary, holding that there is no preference under section 57g unless the creditor had notice of the insolvent condition of the person subsequently becoming a bankrupt, is the case of *In re Piper*, 2 Nat. Bankr. N. 7, decided by Judge Wellborn of California. The language of the court is as follows:

"The use of 'preference' in section 57g the court holds to include and mean a preference in the full sense of that term; that is, all the elements of a preference must attach to the use of the word in that connection, viz. the intent of the creditor as well as that of the debtor. That a preference, as applied to the creditor, includes the element of intent or reasonable cause to believe that the debtor is insolvent is further evidenced by section 60c, which provides: 'If a creditor has been preferred, and afterwards, in good faith, gives the debtor further credit without security, * * * it may be set off against the amount which would otherwise be recoverable from him.'"

Deciding that, even under 60b, payments within four months will not constitute a preference, unless the creditor has knowledge of the intention to prefer, is *Blakey v. Bank*, 1 Nat. Bankr. News, 411 (D. C.) 95 Fed. 267, decided by Judge Baker of Indiana. In the case of *Electric Co. v. Worden*, *supra*, it is said: "The bankrupt here intended to prefer the appellant in the sense that while insolvent it sought to give an advantage over other creditors." While the case is not discussed in that view, it seems that the court assumed that at the time the payment was received by the creditor the debtor was insolvent. If the record of the case at bar showed insolvency of the debtor at the time the payments in question were made, it would be necessary to decide the question of what constitutes a preference under section 57g; but, in the absence of evidence showing insolvency, it will be necessary to presume the same for a period of four months prior to the institution of the bankruptcy proceedings, if the question of solvency or insolvency is to control in the determination of the rights of these creditors to prove their claims without repaying the amounts received.

The contention of counsel for the trustee in this case is that the intent of the bankruptcy act is that the settlement of a bankrupt estate shall relate back to a period of four months prior to the commencement of the bankruptcy proceedings, and that equality shall be brought about as of that period. He contends that everything received within four months must be turned back into the hands of the trustee, and equally divided between the creditors. His argument is that all who wish to share in the distribution of the bank-

rupt's estate in bankruptcy must stand upon an equality as of a period four months before the institution of the proceedings in bankruptcy, and that it is immaterial whether the bankrupt was solvent or insolvent at the time the payment within four months was made, because the purpose of the act is to cause an equal distribution as suggested.

I do not think the position thus taken is sound in reason or under the provisions of the bankrupt act. The definition of "preference" given in the act (section 60a) is as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Assuming that the payment of money is embraced in the expression, "transferred any of his property," it is still necessary, in order to constitute a preference, that the person making the payment should have been insolvent at the time the payment was made. Certainly payments made by one entirely solvent at the time the payments are made are not obnoxious to any provisions whatever of this act, and where, as in this case, the payments appear to have been made in the ordinary course of the business, without any knowledge whatever of the insolvency of the debtor on the part of the creditor, the fact that the debtor is subsequently declared a bankrupt seems insufficient to render these payments objectionable, even under section 57g, with regard to the proof of claims. As has been stated, the fact that the debtor was adjudicated a bankrupt on January 30, 1900, would render it necessary, in order to avoid these payments, to presume insolvency in December, November, and October preceding. There certainly can be no such presumption in fact. Casualties of many kinds may render a perfectly solvent business firm insolvent in a day. And I am not aware of any provision of the bankruptcy act which requires, or even authorizes, any such presumption. Four months is fixed as the period within which preferences are avoided, but not as a period within which insolvency is necessarily presumed. Where, therefore, as in this case, the evidence fails to disclose insolvency at the time payments were made, or any knowledge or reason to believe on the part of the creditor that a preference was being received, or was intended, but the facts seem to indicate, on the contrary, that the payments were made in good faith, and in the regular and ordinary course of business, there is no reason whatever to apply the provisions of section 57g of the bankruptcy act to the proof of the balance of the creditor's claim. Consequently I must hold that the action of the referee in this matter was not justified, and an order will be made directing him to revoke the order disallowing the proof of the debts mentioned in the record.

In re KINNEY, Collector of Internal Revenue.

(District Court, D. Rhode Island. May 26, 1900.)

INTERNAL REVENUE—OLEOMARGARINE LAW—POWERS OF COLLECTOR.

The provisions of Rev. St. § 3173, authorizing a collector of internal revenue to summon before him for examination any person charged by the law with the duty of making returns of "objects subject to tax," do not apply to persons required under the oleomargarine law to make returns of "materials and products." Such provisions relate only to objects of taxation upon which the tax is collected by the method of return and assessment, and not to those upon which the tax is required to be paid by a stamp, and a collector has no power under section 3173 to compel a person to appear and testify to the correctness of the returns made under the oleomargarine law.

This was a petition by W. Frank Kinney, collector of internal revenue, to the district judge, asking the issuance of an attachment for contempt.

Charles A. Wilson, U. S. Atty., for petitioner.
Comstock & Gardner, for respondent.

BROWN, District Judge. The collector's petition, addressed to the district judge, represents the refusal of Frank M. Mathewson, president of the Oakdale Manufacturing Company (a corporation engaged in the manufacture of oleomargarine), to obey a summons issued by the collector under section 3173 of the Revised Statutes, and prays that, in accordance with the provisions of section 3175 of the Revised Statutes, "an attachment may issue against the said Frank M. Mathewson, directed to the United States marshal of said district, commanding him to arrest said Frank M. Mathewson, and bring him before you, to show cause why he should not be adjudged in contempt, and punished according to law." This summons, as well as a previous summons upon a printed form, contains this clause: "Failure to comply with this summons will render you liable to attachment as for contempt and punishment by the court, as provided by section 3175, Revised Statutes of the United States." A first reading of this section would certainly seem to justify the view which the collector has taken of this statute. And yet it is clear, under the reasoning in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489, 14 Sup. Ct. 1137, 38 L. Ed. 1061, that if section 3175 does in fact authorize a judge or commissioner to arrest and punish for a contempt of the order of a collector of internal revenue it is unconstitutional and void. In *Brimson's Case* it was said:

"Of course, the question of punishing the defendants for contempt could not arise before the commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law in the circuit court is determined adversely to the defendants, and they refuse to obey, not the order of the commission, but the final order of the court."

Section 3175 can be sustained only upon a construction that would make the procedure thereunder similar to that sustained as constitutional in *Brimson's Case*. I have serious doubts whether it is not a straining of the terms of section 3175 to make it read otherwise

than as a plain direction to the judge or commissioner to "arrest as for a contempt" of the collector, and to punish as for a contempt of the collector a witness who refuses to testify and produce documents before him. The interstate commerce act provided for no summary arrest before hearing on the question of right, and the determination of the right of the commission to the evidence and of the duty of the witness to answer was given to the circuit court, and not to a single judge or commissioner. Upon the present application, however, I do not deem it necessary to decide the questions of constitutionality which have been raised by the counsel for Mr. Mathewson upon the hearing of the order to show cause why a writ of attachment should not issue; for assuming that the collector may now apply for an order to the witness to testify and produce books and documents before the collector, and that for disobedience to this order the witness might be dealt with as for contempt, I am of the opinion that such an order should not be granted, for the reason that section 3173 does not confer upon the collector a right to the testimony of this witness. Mr. Mathewson was summoned to testify "in a certain case arising under the internal revenue laws depending before me [the collector], to wit, the correctness of the monthly returns or reports required by law to be made and made by the Oakdale Manufacturing Company, manufacturers of oleomargarine," etc., "to wit, the returns made by said company between the following dates, January 1, 1896, to and including December 31, 1899; said returns, in my [the collector's] opinion, being false and fraudulent, and containing undervaluations and understatements."

In re Kearns (D. C.) 64 Fed. 481, is a decision directly adverse to the collector's contention. Though that decision related to a wholesale dealer in oleomargarine, and not to a manufacturer, this distinction is immaterial; for the reasoning of the court is equally applicable to the case of a dealer and of a manufacturer. In that case it was held that the act of August 2, 1886, called the "Oleomargarine Law," was not a supplement to or amendment to other revenue legislation, but was a distinct and independent act, creating a complete and comprehensive system in itself, and fixing punishments for violation of its provisions. The title of the act, "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," affords some support to this view. The learned judge dwells chiefly upon the fact that the act itself expressly enumerates in section 3 certain general provisions of the internal revenue laws, to wit, sections 3232-3241, inclusive, as well as section 3243, as applicable to the special taxes imposed by section 3, and to the persons upon whom they are imposed, and omits all reference to other general provisions of the internal revenue laws. The inquiry is then made: "If congress deemed it necessary to specify such sections of the revenue system to extend them to oleomargarine, how can its omission to extend section 3173 be considered other than a deliberate declaration that it was not extended? To say otherwise is at variance with the recognized rule of construction, '*Expressio unius est exclusio alterius*.'" A careful examination of section 3173, and a comparison of the re-

turns therein referred to with the returns referred to in the oleomargarine law, to wit, returns of "materials and products," discloses important differences, and supports the view that section 3173 is not in terms broad enough to extend the inquisitorial powers of the collector to the reports required by regulations made by the commissioner, in accordance with section 5 of the oleomargarine law. Powers such as are conferred by sections 3173 and 3175 are not to be extended by analogy, and must be strictly limited within the express terms of the statutes. Section 3173 provides, among other things, that:

"Whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is false or fraudulent or contains any undervaluation or understatement, it shall be lawful for the collector to summon such person or any other person, having possession, custody or care of books of account containing entries relating to the business of such person, or any other person he may deem proper, to appear before him and produce such books, at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects liable to tax or the returns thereof."

The character of the returns to which this section of the statute refers is shown by the first proviso, to the effect that if any person shall fail to exhibit a list or return required by law, but "shall consent to disclose the particulars of any and all the property, goods, wares, and merchandise, articles and objects liable to pay any duty or tax, or any business or occupation liable to pay any special tax as aforesaid, then, and in that case, it shall be the duty of the deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath or affirmation by the person," etc., "may be received as the list of such person." This list is to serve as a basis for an assessment of the tax. It should be observed that section 3173 does not apply generally to all objects of internal revenue taxation. The statutes of the United States disclose at least two distinct methods of taxation,—one requires a return containing a list of objects liable to tax, upon which return an assessment is made, and the other method requires that the tax be paid by a stamp affixed to the taxable article. This latter method is deemed adequate for the collection of numerous taxes, without the requirement of any return or assessment. This distinction is recognized in the war revenue act (30 Stat. 450), wherein, after providing for certain returns, the statute says: "The commissioner of internal revenue shall assess and collect the taxes found to be due as other taxes not paid by stamps are assessed and collected." Section 3173, in my opinion, relates to the former mode of taxation by return and assessment, and not to the latter method of collecting a tax by a stamp. So cautious was congress not to impose upon the person liable to taxation any duty beyond that of disclosure of his liability to taxation that it relieved him, if he so elected, of the preparation of the list or return, and made his disclosure of the objects liable to a tax, and his verification of a list, prepared by a deputy collector upon his disclosure, equivalent to a performance of the requirement to make a return.

The collector's powers, under section 3173, are confined to inquiries "respecting any objects liable to tax or the returns thereof," and the duty of the witness to testify is respecting any "objects liable to tax" or the returns thereof. The legal purpose of the inquiry is solely to enable the collector to assess and collect a tax. The powers of the collector are conditional upon the failure, neglect, or refusal of some person to deliver a return of "objects subject to tax," or upon the delivery of a return of "objects subject to tax" which was false, fraudulent, or contained understatements or undervaluations. In *re Archer*, 9 Ben. 455, Fed. Cas. No. 506; *Wells v. Shook*, 8 Blatchf. 254, Fed. Cas. No. 17,406. There is no language in this section that would warrant a collector in summoning a witness, or requiring the production of books, for the enforcement of a statute, or a regulation of a department, which required reports or returns other than those of objects subject to tax. For example, section 3358 relates to certain inventories and monthly abstracts required to be made by manufacturers of tobacco or snuff. The purpose of these requirements is to aid in the collection of internal revenues, and yet a failure to comply therewith subjects the manufacturer to no proceeding by the collector under section 3173.

Section 3173 is part of a chapter entitled, "Of Assessments and Collections." The term, "objects subject to tax," is used in various sections of the act. In *U. S. v. Mann*, 95 U. S. 580, 24 L. Ed. 531, it was held that "paid bank checks, unless it is alleged and proved that they were not duly and sufficiently stamped at the time they were made, signed, and issued, are not articles or objects subject to taxation," and that a person might lawfully refuse to suffer a collector to examine them, though section 3177 provided that a collector might enter upon premises to examine articles subject to tax. A return, therefore, of objects which have paid a tax, whether required by law or by regulation, is not a return of objects subject to tax, and is not within section 3173.

It is furthermore apparent that returns or reports are required by law or regulations for other purposes than to enable the collector to assess a tax upon the person who is required to make the return. They may be useful to aid in the detection of evasions of law by other persons than the one liable to taxation. They may furnish a test of the correctness of the list of objects subject to tax, or of the quality of the object of taxation. For example, returns of materials used in the manufacture of oleomargarine are required by regulation; but these are not returns of objects subject to tax, and are clearly not such returns as are referred to in section 3173. A district judge would have no power, under section 3175, to order a person to make such returns, or punish his failure to do so as a contempt, despite the fact that returns of materials might assist in determining the amount of the product. Nor are returns of "products" returns of objects liable to tax. *U. S. v. Mann*, 95 U. S. 580, 24 L. Ed. 531, is exactly to the point that an article or product upon which the tax has been paid with a stamp is no longer an object subject to tax. By the terms of the oleomargarine law, only that part of the product which is sold or removed for use is subject to a tax stamp.

The only part of the product which would be an object subject to tax would be that part which had been sold or removed in violation of law, without proper stamps.

The difficulties that arise in trying to apply the procedure under sections 3173 and 3175 to the oleomargarine law are a strong reason for following the view taken by the learned judge in the case of *In re Kearns*, *supra*. If we hold that the oleomargarine law was intended as a complete act in itself, that the taxes on the commodity were to be collected through tax-stamp requirements similar to those whereby the tax on tobacco and snuff is collected, and not through the distinct method of return and assessment contemplated by section 3173 and subsequent sections of the same chapter, we escape the difficulties which arise if we attempt to apply the procedure of return and assessment to returns which are not objects subject to tax, but of "materials and products."

Furthermore, the oleomargarine law contains no positive requirement that any returns shall be made. This, in itself, strongly supports the view that the method of return and assessment was not contemplated by the act. By section 5 it is left discretionary with the commissioner of internal revenue, contingent upon the approval of the secretary of the treasury, to make by regulation requirements of returns of materials and products. If no such regulations are made, the law is still sufficient. The inference is strong that for the collection of the tax of two cents per pound the stamp provisions and heavy penalties and forfeitures were considered adequate. While there are precedents for tax-collection proceedings of an extremely inquisitorial character, I do not attach much weight to the argument that without the powers conferred by sections 3173 and 3175 the collector is powerless to enforce the oleomargarine law. The general laws of the land are enforced by judicial proceedings and penal sanctions, without recourse to inquisitorial proceedings by special tribunals, and it is reasonable to infer that in enacting the oleomargarine law congress preferred to follow in the ordinary path, without extending the extraordinary powers conferred by sections 3173 and 3175 to new objects of legislation.

Furthermore, it seems improbable that, after enumerating in the oleomargarine law certain sections of the Revised Statutes, and omitting any reference to section 3173, it should be left to the commissioner of internal revenue to decide whether section 3173 should or should not be employed as a means of collecting the tax upon oleomargarine. The regulations established by the commissioner with the approval of the secretary of the treasury require a detailed statement of the quantity of oleomargarine sold or consigned, with the name, place of business, residence, county, and state of the consignee or purchaser. The returns to which the summons relates are "the monthly returns or reports." These are required to contain accounts of the quantities and kinds of materials used, of the quantity of oleomargarine produced, a special account of tax-paid oleomargarine returned to the factory, as well as a detailed statement of the oleomargarine sold or removed or destroyed, with the name and place of business of the vendee or consignee. It would be a most

unjustifiable extension of the provisions of section 3173, and an unwarranted enlargement of its words, "returns of objects subject to taxation," to make the section include such returns as those referred to in the summons.

Upon the whole, I am of the opinion that the petition of the collector must be denied, not alone for the reason that it prays that the witness be attached to show cause why he should not be adjudged to be in contempt and punished according to law, and does not pray for an order directing him to answer to inquiries of the collector (thus failing to make a case to support which *Brimson's Case*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047, is applicable as an authority), but because, in my opinion, neither the oleomargarine law, nor any regulation established thereunder, imposes upon the Oakdale Manufacturing Company the duty of making such "returns of objects subject to tax" as are referred to in section 3173 of the Revised Statutes of the United States, and because the collector has no power, under section 3173, to compel the witness to testify to the correctness of such monthly returns or reports as are required by the regulations. The petition is denied.

JACKSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 570.

1. ASSAULT WITH DEADLY WEAPON—EVIDENCE—ATTENDANT CIRCUMSTANCES.

On the trial of a defendant for an assault with a dangerous weapon, charged to have been committed during an affray between defendant and a number of associates on one side, and a number of persons on the other, during which one person on each side was killed, the prosecution is entitled to prove the attendant facts and circumstances which show the nature of the assault; and the defendant cannot complain that the character and acts of the associates with whom he was acting were such as tended to prejudice his case before the jury.

2. CRIMINAL LAW—APPEAL—REVIEW.

To authorize an appellate court to reverse a judgment of conviction in a criminal case, it is not sufficient to show that error may have occurred, but it must be affirmatively shown by the record that there was a prejudicial departure from established principles in the rulings of the trial court.

3. GRAND JURY—GROUNDS FOR CHALLENGE OF JUROR—STATUTES.

The impaneling of a grand jury in Alaska is governed by the statutes of Oregon, extended by act of congress to that territory; and under such statutes, which provide that no challenge shall be allowed to an individual juror except for some one of the grounds of disqualification enumerated, it was not error to refuse to discharge a grand juror from the panel on a challenge for actual bias made by an accused, whose case would come before such jury, but the rights of the accused were sufficiently protected by a direction to such juror not to take part in or vote upon that particular case.

4. INDICTMENT—CAPTION—INACCURATE DESIGNATION OF COURT.

The entitling of an indictment returned in the district court for the district of Alaska, "In the District Court of the United States for the District of Alaska," although inaccurate, is merely a clerical or technical error, which does not vitiate such indictment, either upon general principles, or under the statute of Oregon in force in the territory.

5. SAME—FORMAL REQUISITES—CONCLUSION.

The conclusion of an indictment returned in the district court for the district of Alaska, "against the peace and dignity of the United States," is proper; the only laws in force in the territory, and which an accused can be charged with violating, being those provided by the congress of the United States.

6. SAME—INACCURATE DESIGNATION OF GRAND JURORS.

The designation of the grand jurors in an indictment found in the district court for the district of Alaska as "the grand jurors of the United States of America, selected, impaneled, sworn, and charged within and for the district of Alaska," is not a substantial error which vitiates the indictment; and under the Code of Oregon (Hill's Ann. Laws, § 1280), also, such defect must be disregarded, as not tending to the prejudice of the substantial rights of the defendant upon the merits.

7. CRIMINAL LAW—EVIDENCE—ADMISSIONS.

Admissions made by a person under arrest, charged with crime, to a committee of citizens met to investigate the charge, at a time when there was no public excitement or danger of violence to him, and which were not induced by threats or promises, were voluntary, and are admissible in evidence against him.

8. ASSAULT WITH DANGEROUS WEAPON—SUFFICIENCY OF INDICTMENT.

Under Hill's Ann. Laws, § 1744 (Cr. Code Or. § 536), making it an offense "if any person, being armed with a dangerous weapon, shall assault another with such weapon," and the provision of section 1279 that an indictment is sufficient if the act charged is clearly set forth in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended, an indictment charging an assault with a dangerous weapon, substantially in the language of the statute, and which specifies that such weapon was a revolver charged with gunpowder and leaden bullets, is sufficient; and it need not aver that at the time of the assault the defendant was within striking distance of the person assaulted, or within the distance that the revolver would carry.

9. SAME—SUFFICIENCY OF EVIDENCE.

To warrant a conviction for an assault with a dangerous weapon, charged to have been a loaded revolver, it is not essential that the fact that the revolver was loaded should be proved by direct evidence, but it may be inferred by the jury from other facts and circumstances shown in evidence.

10. CRIMINAL LAW—EVIDENCE.

The admission of testimony by a witness as to the apparent freshness of the cartridges in a revolver taken from the defendant on his arrest, some hours after the alleged commission of an assault with such revolver, is not error, although the witness is not shown to be an expert.

11. SAME—OBJECTION TO VERDICT.

An objection that the jury received evidence during their deliberations, if the fact is known to defendant or his counsel, should be made before the verdict is received; and it is not error for the court to overrule such objection when not made until the verdict has been received and read, and then only on the unverified statement of counsel. Nor is the court required, merely upon such statement, to interrogate the jury as to the facts.

12. SAME—TRIAL—REMARKS OF COUNSEL.

A remark by counsel for the prosecution, in argument to the jury, "Why didn't the defendant put a sworn witness on the stand?" is not necessarily to be considered as a comment on the failure of the defendant to take the stand, where it appeared from the testimony that there were many witnesses of the act charged in the indictment; and it is not such a plain error as to require a reversal on appeal, in the absence of an assignment of error thereon, especially where the jury were promptly admonished by the court that they should not be influenced thereby.

13. SAME—SENTENCE—CRUEL AND UNUSUAL PUNISHMENT.

A sentence to imprisonment in a penitentiary, on conviction for violation of a criminal statute, for a term not exceeding that prescribed by the statute, cannot be regarded as a cruel or unusual punishment, within the provision of article 8 of the constitution of the United States; and its imposition furnishes no ground for reversal of the judgment.

14. SAME—EXCESSIVE SENTENCE—CORRECTION BY APPELLATE COURT.

Where a statute under which a defendant is convicted in a court of the United States prescribes "imprisonment in the penitentiary" as a punishment for its violation, it is error to add the words "at hard labor" to a sentence thereunder, although hard labor may be required of the prisoner under the disciplinary regulations of the prison where the sentence is directed to be executed; but such error does not render the sentence void, or require the reversal of the judgment and the granting of a new trial, but it is voidable only, and may be corrected by amendment, and such correction may be made by the circuit court of appeals, where the case is before it for review on a writ of error.

In Error to the District Court of the United States for the District of Alaska.

W. T. Hume, for plaintiff in error.

Robert A. Friedrich and Frank L. Coombs, U. S. Dist. Attys.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The plaintiff in error was indicted, tried, and convicted in the district court of the district of Alaska for the crime of an assault with a dangerous weapon, and sentenced to 10 years at hard labor in the penitentiary at McNeil's Island, in the state of Washington. The entire proceedings, from the impaneling of the grand jury to the passing of the sentence by the court, are claimed to be either absolutely null and void or erroneous. The jurisdiction of the court is attacked, and the punishment prescribed claimed to be cruel and inhuman. The case is interesting and important. Prior to the discussion of any points raised by the assignments of error, a brief statement of some of the facts will be made, in order that some of the points will be better understood. From the argument of counsel it appears that in the spring of 1898 one Jeff Smith, who was commonly known, and is designated in the testimony, as "Soapy Smith," a man of alleged desperate character, located in Skaguay, Alaska, and there conducted a saloon and gambling house, and had gathered around him a half-dozen or more men of like character, as his associates, who are referred to in the testimony as belonging to "Smith's gang," and by his general conduct had made himself obnoxious to the law-abiding citizens of the town. Smith and some of his associates (not including Jackson) were, among other things, accused of having enticed a miner into Smith's saloon, and of robbing him of a large amount of money. This, added to other events which had occurred, created great excitement in the community. Almost a reign of terror existed. Matters finally reached a climax, which resulted in the commission of the offense charged against Jackson. On July 8, 1898, about half past 9 o'clock p. m., the citizens of the town assembled at Sylvester's wharf, and detailed four men, namely, J. M. Tanner, J. M. Murphy, Frank Reed, and J. H. Landis, to guard the

approaches to the wharf. The record shows that soon thereafter Smith and his associates, including the plaintiff in error, Jackson, arrived at the approach to the wharf, where they came to a halt, and then started forward,—Smith being in the lead, with a Winchester rifle in his hand, cursing and swearing, using violent and obscene language,—and ordered the assembled citizens to get off the wharf, and, with oaths, threatened to drive every one off. Smith continued right along through the center of the wharf (which was about 16 feet wide) for about 60 feet, going by Tanner and Murphy, and when he got opposite Reed he wheeled around and struck at Reed with his gun. Shooting immediately occurred between Reed and Smith, resulting in the immediate death of Smith, and mortally wounding Reed, who subsequently died. At the time of this shooting the plaintiff in error, an associate of Smith, drew his revolver and pointed it at Tanner, which is the assault for which Jackson was tried and convicted, further particulars of which will be hereafter given. When Smith was killed, Jackson withdrew his revolver, and he and the other associates of Smith hastily retired from the wharf. The citizens then met for the purpose, as is contended by the plaintiff in error, of organizing a vigilance committee to hang the associates of Smith, and, as claimed by the defendants in error, for the purpose of checking the acts of the outlaws, and, if possible, to arrest and bring them to trial. The court seems to have confined the acts of Soapy Smith and his associates within proper limits, in the admissibility of evidence in regard to the offense committed by Jackson. It was impossible to exclude the main facts as to what occurred at the time of the assault. It was proper that the circumstances leading up to the assault should be admitted. There ought not to be any question but what the defendant, if he had claimed to have drawn his revolver as a matter of defense or protection, or that it was drawn purely in jest or under circumstances tending to show it was not serious, should have been allowed to do so. The government, equally with the defendant, should be allowed the same rights and the same privileges. Either party had the undoubted right to introduce evidence tending to show the nature, character, and extent of the assault. If the facts were such as to show that the defendant was associated with men of low, depraved, vicious, or criminal tastes or habits, and was acting with them in such a manner as tended to prejudice his case before the jury, that was his misfortune, and not any fault or error on the part of the court. The presentation of such facts cannot be said to have been done for the purpose of "railroading" the defendant to prison, and convicting him, on "general principles," for the wrongful and illegal acts of others. He must, however, be held responsible for his own conduct. It was, of course, the special duty of the court, which it seems to have faithfully observed throughout the whole trial, to see that the defendant, however low and degraded he or his associates might have been, was not to be prejudiced by the admission of any improper evidence. Every person, whether of low or high degree, is entitled to a fair and impartial trial, which is the most inestimable privilege and right that belongs to any individual accused of crime. The rights of the defendant in this respect were sedulously guarded

by the court, and, if the defendant was prejudiced before the jury, it was owing to the facts and circumstances which immediately led to the assault, and the manner in which it was made. Such a prejudice it is impossible to avoid. If the offense was of an aggravated character, resulting from the acts and conduct of the accused, he has no one to blame but himself. At the outset it is deemed proper to state, as is clearly shown by the record, that, in some of the points made by the plaintiff in error, we are called upon to assume that error might have occurred, without any attempt to show, as a matter of fact, that any did occur. Error will not be assumed by this court unless there was a prejudicial departure from the established rules in the formation of the jury, in the admission of evidence, or other rulings of the court. If error occurred during the trial, it must affirmatively be shown by the record, instead of by appealing to the imagination, and claiming that error might have occurred. In *Jones v. Territory*, 4 Okl. 45, 52, 43 Pac. 1075, the court said, "There is no excuse for claiming the valuable time and attention of this court in the investigation of objections which have nothing in the record for a basis." With these general observations, we proceed to notice the 18 errors assigned, under appropriate heads.

1. It is claimed that the court erred in overruling the challenge to one Frank Burns as a grand juror, on the ground of actual bias. The facts are that, before the grand jurors were sworn, George W. Wilder, Van B. Triplett, W. E. Foster, John Bowers, and Turner Jackson, the associates of Smith, challenged Frank Burns, who was summoned as one of the persons to act as a grand juror, and objected to said Burns being sworn for the following reasons, viz.:

"That said Wilder, Triplett, Foster, Bowers, and Jackson are in custody, having been held to answer to said grand jury upon charges of felony, which charges it will become the duty of said grand jury to investigate. That said Burns was one of a committee who investigated testimony against these defendants and caused their arrest, and said Burns had signed a written report, which had been published in the *Daily Alaskan*, in which report said Burns had expressed his opinion as to the guilt of the defendants, and that the evidence in the possession of said committee was sufficient to convict."

Whereupon the court overruled said challenge, and declined to excuse said Burns from service on said grand jury, but instructed Burns that he should not participate in the investigation of the charges against said defendants, nor vote upon the indictments.

We are of opinion that this action of the court was not erroneous. The procedure relative to summoning and impaneling grand jurors is often expressly provided for by statute. In such cases the courts substantially conform to such procedure. In *Reynolds v. U. S.*, 98 U. S. 145, 153, 25 L. Ed. 244, the court held that section 808 of the Revised Statutes, providing for impaneling grand juries, applies only to the circuit and district courts of the United States, and that the laws of the territory govern and control the impaneling of a grand jury. See, also, *Publishing Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079.

In the organic act providing a civil government for Alaska it is enacted:

"That the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable

and not in conflict with the provisions of this act or the laws of the United States." 23 Stat. 25, § 7.

The statute of Oregon provides as follows:

"Before accepting a person drawn as a grand juror, the court must be satisfied that such person is duly qualified to act as a juror, but when drawn and found qualified he must be accepted, unless the court, on the application of the juror and before he is sworn, shall excuse him from such service for any of the reasons prescribed by chapter 12 of the Code of Civil Procedure."

Chapter 12 provides for the general qualifications and exemptions of jurors. Hill's Ann. Laws Or. § 1233 (34):

"Sec. 1234 (35). No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, unless when made by the court for want of qualifications as prescribed in section 1233 (34)."

No question is raised as to the general qualifications of Burns to act as a grand juror. It must be remembered that there is a marked distinction between a grand juror, who merely makes an accusation of the commission of a crime, and a petit juror, who tries the question of the guilt or innocence of the defendant who is so accused. It is well understood that, in finding indictments, grand jurors may act, and are generally instructed to act, upon their own knowledge, or upon the knowledge of one or more of their number. Grand juries are usually impaneled for an entire term, to inquire into all offenses committed within the body of the district or county. It is, therefore, manifest that if objections to individual jurors were to be allowed, before they were sworn on the panel, which went to disqualify them in some particular case, it would be impracticable or difficult to select an unexceptionable grand jury. It has accordingly been held in most jurisdictions, and sustained by the great weight of authority, that, where there is no express provision of the statute to the contrary, it is no objection to the validity of an indictment that one or more of the grand jurors, who were otherwise qualified, had formed or expressed an opinion of the guilt of the accused, and, instead of being discharged from the panel, was instructed not to participate in the particular cases in which he might be biased. *U. S. v. Williams*, 1 Dill. 485, Fed. Cas. No. 16,716; *U. S. v. Belvin* (C. C.) 46 Fed. 381, 384; *U. S. v. Clune* (D. C.) 62 Fed. 798, 800; *Tucker's Case*, 8 Mass. 286; *Com. v. Woodward*, 157 Mass. 516, 518, 32 N. E. 939; *State v. Hamlin*, 47 Conn. 95, 105; *State v. Chairs*, 9 Baxt. 196; *Musick v. People*, 40 Ill. 268, 272; *Brown v. Com.*, 76 Pa. St. 319, 336; *Lee v. State*, 69 Ga. 705; 10 Enc. Pl. & Prac. 358. And it has frequently been held, in the absence of any statute to the contrary, that an interest or bias in the case, not of a pecuniary nature, cannot be urged as an objection. *State v. Easter*, 30 Ohio St. 542; *Koch v. State*, 32 Ohio St. 353, 356; *Com. v. Brown*, 147 Mass. 585, 590, 18 N. E. 587, 1 L. R. A. 620; *State v. Brainerd*, 56 Vt. 532, 537; *State v. Rickey*, 10 N. J. Law, 83; *State v. Maddox*, 1 Lea, 671; *State v. Sharp*, 110 N. C. 604, 14 S. E. 504. In *Com. v. Woodward*, supra, it was contended that the indictment should be set aside because one of the grand jurors by whom it was found, being otherwise competent and qualified to serve, had, be-

fore the meeting of the grand jury, made a personal investigation into the guilt of the accused, and had secreted himself in a room, with an officer, for the purpose of listening to declarations and admissions made by the accused concerning the crime, and had heard such declarations and admissions, and had listened to statements of officers to the effect that the accused was guilty, and had thereupon formed an opinion, and believed him to be guilty before and at the time of the investigation of the case by the grand jury. The court said:

"We are of opinion that these facts constitute no legal objection to the validity of the indictment. This opinion is in accordance with what appears to us to be the clear weight of judicial decision elsewhere, though in some instances views to the contrary have been held."

In the present case the court acted in favor of the defendant, and instructed Burns not to participate in the investigation of the charges against him, or vote on the indictment. That the court had the right to do this, in the interest of justice, under the circumstances, is too plain to require further discussion.

2. It is claimed by the plaintiff in error that the indictment is entitled in a court having no legal existence, and that the court erred in overruling a demurrer thereto on the ground that "the facts stated in said indictment do not constitute a crime." The indictment is entitled, "In the District Court of *the United States* for the District of Alaska." We are not disposed to hold that the use of the words in italics was erroneous. The indictment would have been good if the words had been omitted, but they are used in the caption of every paper filed in the case, and in the minutes of the court kept by the clerk. In most cases the words used are, "In the United States District Court," etc. We are clearly of opinion that the use of the words "of the United States," at most, could only be considered a clerical or technical error. In no sense can it be held that the use of the words is such an error as would vitiate the indictment, or make all or any of the proceedings had thereunder null and void. The district court for the district of Alaska is not, strictly speaking, a court of the United States, and does not come within the purview of the acts of congress which speak of "courts of the United States" only. *Clinton v. Englebrecht*, 13 Wall. 434, 447, 20 L. Ed. 659; *Reynolds v. U. S.*, 98 U. S. 145, 154, 25 L. Ed. 244; *McAllister v. U. S.*, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693; *Thiede v. Utah*, 159 U. S. 510, 514, 515, 16 Sup. Ct. 62, 40 L. Ed. 247; *U. S. v. McMillan*, 165 U. S. 504, 510, 17 Sup. Ct. 395, 41 L. Ed. 805. But in a certain sense the district court for the district of Alaska is a United States court, and is often so designated. It was created by an act of congress. It is not a state court. The organic act provides that the territory of Alaska "shall constitute a civil and judicial district," and "that there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction not inconsistent with this act, as may be established by law." 23 Stat. 24, § 3. In *McAllister v. U. S.*, 141 U. S.

174, 179, 11 Sup. Ct. 951, 35 L. Ed. 694, cited by the plaintiff in error, the court held that a person appointed by the president to be judge of the district court of the district of Alaska is not a judge of a court of the United States, within the meaning of the exception in section 1768, Rev. St. U. S., relating to the tenure of office of certain civil officers. But the court, after citing various provisions of the organic act of Alaska, said:

"It is clear that the district court for Alaska was invested with the powers of a district court and a circuit court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon, so far as they were applicable, and were not inconsistent with the act and the constitution and laws of the United States."

See, also, *In re Cooper*, 143 U. S. 472, 494, 12 Sup. Ct. 453, 36 L. Ed. 232; *The Coquitlam v. U. S.*, 163 U. S. 346, 350, 16 Sup. Ct. 1117, 41 L. Ed. 184.

In the *Coquitlam Case*, cited by plaintiff in error, the court held that the circuit court of appeals for the Ninth circuit could not review the final judgment or decrees of the Alaska court by virtue of its appellate jurisdiction over the district and circuit courts of the United States mentioned in the act of March 3, 1891, but further held, in view of the fact that there was only one court in Alaska, it was in every substantial sense "the supreme court of that territory," from which the appeal would lie; and in the course of the discussion upon this point the court said, "The title of a territorial court is not so material as its character." The Oregon Code (section 1279) provides as follows: The indictment "is sufficient if it can be understood therefrom (1) that it is entitled in a court having authority to receive it, though the name of the court be not accurately stated."

In the light of the facts, and of the principles announced in the decisions of the supreme court, and of the provisions of the Oregon Code, it is manifest that the plaintiff in error could not have been misled or deceived by the words used in the caption of the indictment. In *People v. Biggins*, 65 Cal. 564, 566, 4 Pac. 572, the court, referring to objections urged to the title of an indictment, said:

"We think the omission of the name of the county in the title is a technical error or defect which did not affect the substantial rights of the defendant. It must, therefore, be disregarded by the court."

It is argued that the indictment is insufficient because it concludes, "against the peace and dignity of the United States." How should it conclude? It would not have been proper to say, "against the peace and dignity of the state of Oregon," nor "against the peace," etc., of the territory of Alaska, because the territory was not granted the power to make laws. It might have been sufficient to have concluded with the words, "contrary to the statute in such case made and provided." But in view of the provision of the organic act of Alaska, which adopts the laws of Oregon, the contention of counsel is wholly untenable. The United States having acquired the territory of Alaska, and provided the laws under which it was to be governed, it is evident that no other government could impose upon its citizens any other law. In *Shively v. Bowlby*, 152 U. S. 148, 14 Sup. Ct. 566, 38 L. Ed. 349, the court said:

"By the constitution, as is now well settled, the United States having right-fully acquired the territories, and, being the only government which can im-pose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition."

See, also, *Endleman v. U. S.*, 30 C. C. A. 186, 86 Fed. 456, 459, and authorities there cited.

A violation of any of the laws adopted by congress for the govern-ment of the territory of Alaska would not only be "contrary to the form of the statutes in such case made and provided," but would also be against "the peace and dignity of the United States."

The next objection of counsel is that the indictment does not state the proper party plaintiff. The language is, "The grand jurors of the United States of America, selected, impeached, sworn, and charged within and for the district of Alaska, accuse Turner Jackson," etc. The views we have already expressed sufficiently answer this objection. It is, however, proper to add, as applicable to all the questions dis-cussed in relation to the sufficiency of the indictment, that the Code of Oregon expressly provides that "no indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits." *Hill's Ann. Laws Or.* § 1280. The last specific objec-tion to the indictment, "that no crime is charged therein," is raised in other points, and will be elsewhere discussed.

3. It is assigned as error that "the court erred in overruling the objection of defendant to the questions asked of the witnesses F. F. Clark and Frank Burns with reference to statements made by the defendant after the time of the alleged assault, in the nature of ad-missions of guilt, for the reason that no proper foundation was laid, and the admissions were made through fear and under duress." The record shows that Tanner arrested Jackson about half past 10 o'clock p. m. the day after the commission of the offense; that he found him in the Astoria Hotel, lying on a cot, with his head cov-ered up with a blanket; that, upon striking a match and removing the blanket, he recognized Jackson, and told him he was the man he had been looking for; that Jackson replied:

"You are mistaken. Q. At that time, did you tell this man why you ar-ested him? A. I told him at the jail. Q. What else did you do with him? A. He was in there two or three days, and then I took him down to the Burkheart Hotel, before a committee of citizens. Q. Did he make any state-ments there as to what had occurred at the wharf,—whether he was there or whether he wasn't? * * * State, Captain Tanner, whether, previous to his making different statements, if he did make any concerning his pres-ence there on that occasion, there was any threats made to him that un-less he did confess he would be hung, or any other violence would happen him, or if there was any inducements held out, or whether the statement was voluntary or involuntary? A. His statement was voluntary. Q. Any inducement held out to him? A. There was not. * * * Q. By the Court: Did you, as an individual, or did any member of this committee that you re-fer to, or did any other person, to your knowledge, directly or indirectly give this man to understand that he would receive any kind of immunity from punishment if he would make a statement? A. I never did. I did not myself, and I never heard of any one else. Q. Did you or any member of

this committee, or any one else, prior to the statement of the defendant, directly or indirectly threaten him to the effect that, if he did not make a statement concerning the affair, that it would go harder with him, or that he would be more liable to be punished? A. No, sir."

The court thereupon overruled the objections made by counsel, and the examination continued:

"Q. I will ask you what, if any, statement he made on that occasion concerning his pulling a gun on you, if any? A. After the committee examined him in regard to the killing, I asked him (I said), 'Didn't you pull a gun on me at the wharf?' and he said: 'I pulled a gun on somebody. I do not know if you are the man.' I said, 'Don't you know I am the man?' He said, 'It was somebody that stood on the corner of the wharf.' Q. Did you refer to the time and place where the killing took place? A. I did."

He further testified that there had been a gathering of the citizens two or three days before, but at the time of defendant's making said statement the town was perfectly quiet.

The witness Clark testified that the first time he saw Jackson was in the committee room three or four days after the difficulty on the wharf.

"Q. I will ask you first if he made any statement at that time with reference to his connection with this affair at the wharf. A. Yes; he did. Q. Previous to his making that statement, did you, or any person present, hold out any inducement that it would be better for him to confess or make a statement, or any threats that it would be worse for him if he did not, or other threats or inducement to get him to make a statement? A. No, sir; we did not. Q. Nothing of that kind occurred? A. No, sir. Q. You can go on and state what, if anything, he said concerning his being present at the time Reed and Smith were killed, and what he did."

Before answering this question he testified that on the day after Reed was shot a large number of citizens, some of them armed, assembled, and considerable excitement existed, and some threats were made, after the parties had been arrested, to hang some of the men in custody, but that at the time of the meeting of the committee with Jackson the town was "in a perfect state of peace and quietude."

"Q. Did your committee advise him at that time * * * that anything he might say might be used against him? A. No, sir. Q. Did your committee advise this man that anything he might say there might be a benefit to him in any way? A. I do not remember anything of the kind. Q. Did you offer him any protection, or tell him that the mob would not be allowed to hang him? A. No; that was all over. He knew it himself,—that he wasn't in any danger; that the excitement was all over."

He then proceeded to answer the question.

"Q. Go on and state what he said. A. He said he was on the dock, and pulled a gun on a man there. Q. Did he say he knew who the man was? A. No; he said he did not. I think Tanner said, 'I am the man you pulled the gun on.' 'Well,' said Jackson, 'I do not know whether you are or not. I do not recognize you. I pulled a gun on some man.' Q. It was supposed this occurred at the time Smith and Reed were killed? A. Yes, sir."

The witness Burns testified substantially to the same effect as the witness Clark.

It is unnecessary to discuss the question, or to refer to the authorities cited by counsel to the effect that confessions, admissions, or statements made by a defendant charged with crime, which are induced by fear, threats, hope, or promise of reward, are not ad-

missible in evidence. It is enough to say that the facts above recited clearly show that the confession was voluntary. Jackson did not make the statements testified to because of any threat, inducement, or promise on behalf of the committee, or through fear of personal danger. The confession was therefore clearly admissible. *Cornell v. State* (Wis.) 80 N. W. 745, 748; *State v. Vaughan* (Mo. Sup.) 53 S. W. 420; *Com. v. Cressinger* (Pa. Sup.) 44 Atl. 433. In *Com. v. Cressinger*, *supra*, the court held that a confession obtained by a trick was admissible. The court said:

"The fact that it was obtained by a trick is no objection to its competency, unless the circumstances are such as to suggest an inference that, through fear or hope, a false confession may be made. There were no such circumstances in the present case, nor anything which required the judge to dwell particularly upon them in his charge. A knife was produced, and the prisoner led to believe that it was his. Under this supposition, he told where he had hid his, and then told the story of the murder. The object of evidence is to get at the truth, and a trick which has no tendency to produce a confession, except one in accordance with the truth, is always admissible. Society and the criminal are at war, and capture by surprise or ambush or masked battery is as permissible in one case as in the other."

In 6 Am. & Eng. Enc. Law (2d Ed.) 536, it is said:

"The fact that a confession was made by the accused while under arrest or in confinement, and to the sheriff, constable, jailer, or other officer having him in custody at the time, will not render it involuntary, so as to exclude it from evidence, unless there is also proof that it was induced by hope or fear. In such case it is not necessary the confession should be preceded by an admonition placing the prisoner on his guard."

Numerous authorities are cited in support of this text.

4. In the seventh assignment of error it is claimed that:

"The court erred in refusing to grant defendant's motion for a peremptory instruction to the jury to return a verdict of not guilty in this cause, on the ground and for the reason that the government had wholly failed to make a case against the defendant, in this: That they had totally failed to show by any testimony whatsoever that the defendant on the occasion was armed, or had in his possession a dangerous weapon; that there was no testimony whatsoever to show that any pistol he may have had, or was charged with having, in his possession was loaded, or that he was within a striking distance of the prosecuting witness, or had any revolver, pistol, or any other weapon charged in the indictment, or attempted to be proved upon the trial, that was dangerous. On the other hand, it affirmatively appeared from the testimony of the government in this cause that the defendant was not in striking distance of the prosecuting witness, and there is no testimony whatever to show that he was armed with a dangerous weapon, or that, if so armed, that he was in a position to inflict any injury upon the prosecuting witness."

Under this assignment we will notice the point, previously urged, that the indictment does not state facts sufficient to constitute a crime, as well as the points suggested as to the insufficiency of the evidence. The indictment was drawn under the provisions of section 536 of the Oregon Code, which reads as follows:

"If any person, being armed with a dangerous weapon, shall assault another with such weapon, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than ten years, or by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than one hundred nor more than one thousand dollars." *Hill's Ann. Laws Or.* § 1744.

The charging part of the indictment reads as follows:

"The said Turner Jackson, at or near Skaguay, within the said district of Alaska, and within the jurisdiction of this court, on the 8th day of July in the year of our Lord 1898, being then and there armed with a dangerous weapon, to wit, a revolver charged with gunpowder and leaden bullets, and with which a mortal wound could be inflicted, did unlawfully and feloniously assault one Josias M. Tanner with said revolver, by pointing the same towards and at him, the said Josias M. Tanner, and threatening him, the said Josias M. Tanner, therewith, with the intent then and there and thereby to assault with said dangerous weapon the said Josias M. Tanner by so doing as aforesaid."

The words relating to the intent with which the weapon was drawn need not have been used, and may be treated as surplusage, although as used they are not objectionable. The law is well settled that congress or the legislature of a state or territory may enact laws for the violation of which, irrespective of the criminal intent, punishment and penalty are attached. It is the act itself, the doing of which constitutes the crime. The charging part of the indictment substantially charged the crime in the language of the statute, and this is generally held to be sufficient. But the provisions of Hill's Ann. Laws Or. § 1279, in addition to the provisions heretofore cited, declare that the indictment is sufficient if it can be understood therefrom:

"(6) That the act or omission charged as the crime is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. (7) That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case."

This, taken in connection with the statute defining the crime, makes it perfectly clear that the indictment in the present case states facts sufficient to constitute the crime charged. It is too clear for argument that the facts are stated in such a manner as to enable a person of common understanding to know what was intended, and with such a degree of certainty as to enable the court to pronounce judgment. The essential element of the crime charged was the assault made by Jackson upon Tanner with a dangerous weapon. The court charged the jury that:

"The drawing of a dangerous weapon upon the person is not necessarily criminal, because it may be done in mere jest; but, if it is done in a menacing and threatening manner, the assault is complete, notwithstanding the fact that no words were used, and notwithstanding that the defendant did not intend to shoot and kill the person at the time he presents the revolver, and it is a violation of the statute to threateningly present a deadly weapon at another within the range that the gun might carry, if it be a gun. A dangerous weapon, under the meaning of this law, is one likely to produce death or great bodily harm; and I instruct you, as a matter of law, a gun in the hands of a person capable of using it, and at a distance within which it will carry, loaded with gunpowder and leaden bullets, is a dangerous weapon."

It is admitted by counsel for the plaintiff in error that this portion of the charge is correct.

This brings us to the question whether the evidence was sufficient to authorize the court to submit the case to the jury. The evi-

dence in the record, independent of the admissions of Jackson, is clear, direct, positive, and undisputed that Jackson, at the time of the shooting between Reed and Smith, did draw and point a revolver at Tanner in a threatening manner. The witnesses varied in their testimony as to the distance between Tanner and Jackson at the time the revolver was drawn and pointed at Tanner. One witness (Landis) said it was "about five feet"; another (Toney), that, in his best judgment, it was "ten or fifteen feet"; and Tanner testified that it was "possibly twenty or thirty feet." The assertion of counsel that there was no evidence that Tanner was "within shooting distance" of Jackson at the time the revolver was drawn vanishes before the light of the evidence.

The remaining point, that there was no evidence that the revolver was loaded, is equally without merit. It is true that there was no positive or direct evidence that it was loaded. How could there be? It was not discharged. Jackson kept possession of it, and got away as speedily as possible after Smith was shot. Whether it was loaded or not was a question of fact, to be determined by the jury. The testimony was circumstantial. The jury had to infer the fact from all the testimony and the surrounding circumstances. What was the object or purpose of Smith and his associates in going down to the wharf? What was the natural inference to be drawn from the acts and conduct of Jackson at or about the time he drew and pointed his gun on Tanner? The jury heard this testimony, and were authorized to draw the inference therefrom that Jackson's revolver was loaded.

In this connection we will notice the objection made at the trial, and assigned as error, that the court erred in permitting any evidence as to the freshness of the cartridges in the revolver. The facts are that after Tanner had testified that he arrested Jackson within 26 hours after the shooting on the wharf, and took the revolver from him, and that Jackson then stated that it was the revolver that he had on the wharf, and Tanner further testified that it had remained in the same condition as when he received it, he was, against the objection of the plaintiff in error, allowed, in the language of the court, to "describe the appearance of the cartridges, if he noticed them, and the jury would be the judge," and testified, "I can't always tell as to the freshness, but I examined the gun the next morning, and I considered them fresh cartridges." The objections urged by counsel were that the evidence was insufficient to show that Tanner was an expert. This was immaterial, except as it might tend to influence the jury as to the weight to be given to the evidence. Tanner testified that he had been accustomed to handling firearms for 30 or 35 years. When the objection was made to the admissibility of one of the questions upon this point, the district attorney remarked, "The gentleman seems to be very afraid to have the facts shown." This remark was objected to by the plaintiff in error. The court said: "The witness has described the appearance. All the witness can say he has said, and the jury are the judges of the facts." There was no error in the ruling of the court concerning the admission of this evidence, and no substantial

objection to the remark of counsel, which was evidently called forth by the frequency of the objections to the admission of any evidence upon this point. The remark might with propriety have been omitted, but it constitutes no reversible error.

5. Objections are urged, and assignments of error made, against the action of the court in refusing to give certain instructions requested by the plaintiff in error. We do not deem it necessary to specify the grounds of objection. It is enough to say in regard thereto that the charge of the court, in its entirety, was clear, concise, and correct, absolutely fair and impartial, and covered every material point in the case, and was in every respect as favorable to the defendant as the law would warrant.

6. The fifteenth assignment of error reads as follows:

"The court erred in overruling defendant's objection to the receipt of the verdict of the jury on the ground that the said jury, while deliberating, had received and accepted evidence other than what was introduced upon the trial, and that that evidence was material evidence, construed by them in determining the question as to whether or not the said weapon alleged to have been used by the defendant was loaded, and that said evidence determined the action of the jury, and brought about the verdict of the jury, in that the said jury exploded and shot off cartridges, which had been introduced in evidence and not identified, while they were deliberating in their jury room, to which said action of the jury the defendant duly excepted, and objected to the receipt of the verdict obtained upon such evidence illegally construed by said jury, which said objection of the defendant the court overruled, and the defendant then and there duly excepted, and the court received the verdict of said jury."

This assignment is objectionable in many respects. It is based upon an unverified statement of counsel. There was no evidence presented or affidavit made by any one to lay the foundation for bringing the matter properly before the court. It conveys the idea that the objection was made before receipt of the verdict, whereas the record shows that after the jury had retired they "returned a verdict into court, against the defendant, of guilty as charged in the indictment," and that counsel then stated to the court that he was informed that the jury had "discharged one of the cartridges," and asked the court to "inquire of the jury whether or not the pistol was fired off during their deliberation"; and, the court declining to ask any questions, he objected "on the ground that the jury considered evidence not introduced upon the trial of the cause." It is evident from the facts stated in the record that there was nothing properly brought before the court to justify any such inquiry or examination. Moreover, the objection was not made until after the receipt of the verdict, and came too late. If counsel knew that the jury had received evidence out of court, he should have brought the facts before the court in a proper manner, and made his objection before the verdict was received. The plaintiff in error could not, with knowledge of the facts, remain silent, wait and speculate upon the chances of a verdict being in his favor, and then, when it was found to be against him, raise this objection. *Lee v. McLeod*, 15 Nev. 158, 163; *Thomp. & M. Jur.* § 428, and authorities there cited; 8 *Enc. Pl. & Prac.* 186, and authorities there cited.

7. The record shows that:

"The defendant put no evidence before the jury, and counsel proceeded with the argument. (Counsel for the defendant excepted to the remarks of counsel for the prosecution, made on his closing argument, to the effect, 'Why didn't the defendant put a sworn witness on the stand?') By the Court: Gentlemen of the jury, the remarks of counsel with reference to the defendant not putting any witnesses on the stand must not prejudice your mind in any way. (Counsel for the defendant objected to the remarks of the counsel for the prosecution to the effect that the jury should not stultify themselves, and that the defendant was a convicted criminal. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)"

It is argued that such remarks tended unduly to prejudice the defendant, and constituted such an error as requires a reversal of the case. It is a sufficient answer to this objection to state that there is no assignment of error which presents the questions to this court, and that the facts set forth in the record do not constitute such "a plain error not assigned" as would require any notice thereof to be taken under rule 11 of this court. We desire, however, to state that the remark, "Why didn't the defendant put a sworn witness on the stand?" does not necessarily imply, and would not ordinarily be understood to mean, that the attorney was commenting on the fact that the defendant had not taken the witness stand. The ordinary meaning would naturally be that counsel was referring to the fact that there were a large number of people on the wharf, and that it was a significant fact that the defendant had not called any of these witnesses to disprove the testimony of the prosecution, if it were not true; and upon this point the court charged the jury that the remarks of counsel must not prejudice their minds in any way.

8. Finally it is claimed and assigned as error that the court erred in rendering judgment and passing sentence that the defendant "be imprisoned at hard labor in the penitentiary at McNeil's Island, in the state of Washington, for the period of ten (10) years, and to stand committed until this sentence be performed," upon the ground that this judgment and sentence "was cruel, unusual, and excessive." Is this assignment well taken? That the sentence of 10 years was a severe one must be admitted. If not unconstitutional, it cannot form the basis of a writ of error. The fact that the court imposed the maximum punishment furnishes no ground for the reversal of the case. The extent of the sentence was within the discretion of the judge who tried the case, and who was well advised as to the facts. Article 8 of the constitution of the United States provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The sentence imposed in the present case cannot be considered in violation of this provision of the constitution. The general rule is well settled that the sentence and punishment imposed upon a defendant for any violation of the provisions of the statute, which is within the punishment provided for by the statute, cannot be regarded as excessive, cruel, or unusual. *Pervear v. Com.*, 5 Wall. 476, 480, 18 L. Ed. 608; *Jones v. Territory*, 4 Okl. 45, 50, 43 Pac. 1072; *Ligan v. State*, 3 Heisk. 159, 164; *State v. Becker*, 3 S. D. 29, 40, 51 N. W. 1018; *People v. Whitney*, 105 Mich.

622, 627, 63 N. W. 765; 8 Am. & Eng. Enc. Law (2d Ed.) 440, and authorities there cited. It is true that there may be exceptional cases, in relation to the whipping post, pillory, or other extreme, isolated, and exceptional cases, where the courts have interfered, and held the sentence to be in violation of the provisions of the constitution. Cooley, Const. Lim. (6th Ed.) 402. The right to punish a person who commits an offense depends upon the right of society to protect itself. Crimes should be severely punished which are most destructive to public safety and the peace and quiet of a community. The extent of the punishment, upon conviction, ought to be such as is warranted by law, and such as appears to be best calculated to answer the ends of precaution necessary to deter others from the commission of like offenses, in addition to the punishment of the individual offender. When all these things are considered in connection with the particular facts and circumstances surrounding the commission of the offense in the present case, it cannot be said that the punishment of 10 years in prison, though severe in extent, is so out of all proportion to the offense for which the defendant was convicted as to "shock public sentiment and violate the judgment of reasonable people." In *Ligan v. State*, supra, the court, in discussing the provisions of a statute of the state of Tennessee which fixed "imprisonment in the penitentiary for a long period (ten to twenty years)" for a felony, said:

"But this is neither cruel nor unusual, in the sense of the constitution. When we look at the evils intended to be checked and offenses forbidden by this act, and turn to the proof in this case, and see the character of acts shown to have been committed by some one, we feel no hesitancy in saying that whenever parties shall be regularly convicted after a fair and impartial trial, in accordance with the forms of law, of such offenses, we shall feel no hesitancy in enforcing sternly the penalties provided by the statute."

The only legal objection to the sentence is in the insertion of the words "at hard labor," which are not authorized by the statute under which the defendant was convicted. The words "at hard labor" should not have been included in the sentence, but authorities hold that the use of such words, where not authorized by the statute under which the prisoner was convicted, does not render the sentence void; that, at most, it is only voidable, and can be amended by striking out the words "at hard labor"; and that it does not constitute such an error as to justify the court to reverse the case and grant a new trial. In *Ex parte Karstendick*, 93 U. S. 396, 399, 23 L. Ed. 890, it was contended on behalf of the petitioner that where the punishment provided for by the statute is imprisonment, alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment is in excess of the power conferred. The court said:

"We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment, alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution, or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come

before them. If the offense is flagrant, the penitentiary, with its discipline, may be called into requisition; but, if slight, a corresponding punishment may be inflicted within the general range of the law."

In *U. S. v. Pridgeon*, 153 U. S. 48, 61, 14 Sup. Ct. 751, 38 L. Ed. 636, the court, after quoting from other cases, among other things, said:

"It is doubtful whether, upon a writ of error, the prisoner would have been entitled to a modification of his sentence by striking out the 'hard labor' portion thereof. By section 5539, Rev. St., it is provided that 'whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state and territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such state or territory.' Suppose the five years sentence had embodied the provision of this section, which it could lawfully have done; would it have carried with it, in point of fact, 'hard labor,' as a part of the discipline of the Ohio penitentiary? This being so, it is difficult to see upon what principle it can be held that the sentence of imprisonment is vitiated and rendered void for expressly including the element or feature of 'hard labor,' which would have been otherwise implied in the sentence of simple imprisonment. * * * The sound rule is that a sentence is legal so far as it is within the provisions of law, and the jurisdiction of the court over the person and offense, and only void as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence. Many well-considered authorities, in England as well as in this country, hold that, where there is jurisdiction of the person and of the offense, the excess in the sentence of the court beyond the provisions of law is only voidable in proceeding upon a writ of error. *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Sennott's Case*, 146 Mass. 489, 493, 16 N. E. 448; *People v. Kelly*, 97 N. Y. 212; *People v. Liscomb*, 60 N. Y. 559; *People v. Jacobs*, 66 N. Y. 8; *Ex parte Shaw*, 7 Ohio St. 82; *Ex parte Van Hagan*, 25 Ohio St. 426; *In re Graham*, 74 Wis. 450, 43 N. W. 148; *Elsner v. Shrigley*, 80 Iowa, 30, 45 N. W. 393; *Ex parte Max*, 44 Cal. 579."

The cases above referred to were decided upon application for a writ of habeas corpus. In *Gardes v. U. S.*, 30 C. C. A. 596, 87 Fed. 172, 184, the court of appeals for the Fifth circuit, in discussing the question under consideration, said:

"It may be difficult to perceive, and more difficult to accurately express, the distinction which we suggest; but we believe there is a material distinction in the public thought between a sentence to confinement at hard labor, and a sentence to confinement in a designated state penitentiary, where hard labor will be required of the person sentenced, as a part of the discipline of the prison. 'At the present day, imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment'; and, 'by the express provisions of acts of congress, either a sentence "to imprisonment for a period longer than one year," or a sentence "to imprisonment and confinement to hard labor," may be ordered to be executed in a state prison or penitentiary' (*Mackin v. U. S.*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909), and thus in either case stamp the convict with the stigma of subjection to an infamous punishment. Still we think that the embodying in the sentence the words 'at hard labor' gives the stigma an emphasis which the statute does not require in this case. We conclude, from a careful consideration of the subject, that the sentence should not go beyond the language of the statute in describing the character of the confinement, and we modify the sentence in this case by striking out the words 'at hard labor.'"

In *Re Christian* (C. C.) 82 Fed. 199, 204, other authorities are cited and reviewed upon this subject. The court ordered the petitioner

discharged from the custody of the marshal, "but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced, in accordance with the law, upon the verdict of guilty against him." The courts are not entirely uniform as to the particular manner in which the correction in the sentence should be made,—whether by the court that imposed the sentence, or by the appellate court. The difference in this respect, however, seems to depend upon the particular way in which the question is raised,—whether by habeas corpus or by writ of error; but all the authorities agree that the defendant is not entitled to a new trial, and that the error can be corrected by striking out the illegal part of the sentence. In *re Bonner*, 151 U. S. 242, 260, 14 Sup. Ct. 323, 38 L. Ed. 149, and authorities there cited; *Haynes v. U. S.*, 101 Fed. 817, 820. We are of opinion that the action taken by the circuit court of appeals in the Fifth circuit in striking out the words "at hard labor" was correct. Especially should this rule be followed when applied to the facts of the present case, where the prisoner is confined in a prison remote from the place where he was sentenced. To have him taken back for a modification of the sentence would incur great expense, without any benefit whatever to the prisoner.

After a careful examination of all the points made in the record, whether specially noticed or not, we are unable to discover any error that would justify a reversal of the case. It is therefore ordered that the judgment herein be modified by striking out the words "at hard labor," and as thus modified it is in all respects affirmed.

POTTER DRUG & CHEMICAL CORP. v. PASFIELD SOAP CO.

(Circuit Court, E. D. New York. June 2, 1900.)

1. TRADE-MARKS—INFRINGEMENT—ARTIFICIAL WORDS.

A person cannot fashion a word not theretofore existing, and, by using the same as a trade-mark or trade-name, exclude the use by another of an existing word in its meaning suitably adapted to the nature of the article to be sold, where the meaning of such word is quite distinct from the meaning suggested by the artificial word.

2. SAME—"CUTICURA."

The word "Cuticura," used as a trade-mark for a soap, is not infringed by the use of the word "Cuticle," also as a name for a toilet soap.

3. SAME—UNFAIR COMPETITION.

Complainant was the proprietor of the word "Cuticura," as a trade-mark for a toilet soap. Defendant also put up for sale and placed upon the market a toilet soap, under the name "Cuticle Soap." In circulars which defendant inclosed in the wrapper with each cake of soap, it copied some of the reading matter from complainant's circulars similarly inclosed. The style of letters used in printing the name "Cuticle" was also somewhat similar to those in which the name "Cuticura" was printed by complainant. *Held*, that such facts did not establish unfair competition, where defendant's soap itself was of a different color from complainant's, and the wrappers inclosing each cake and the boxes in which a number of cakes were inclosed were so entirely dissimilar in color and general appearance that no purchaser of ordinary observation would be deceived thereby.¹

¹ As to unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper Bros.*, 30 C. C. A. 376.

In Equity. Suit for infringement of a trade-mark.

Livingston Rutherford (J. E. & Wm. Maynadier, of counsel), for complainant.

Noah Tebbetts, for defendant.

THOMAS, District Judge. The complainant shows that it is, and for many years has been, the owner and user of the duly-registered name "Cuticura" as a trade-mark for soap, and that during such time it has used a peculiar style of type, and that the name "Cuticura" was printed on the covers of the boxes; that a capital "C" of peculiar design was used; and that the name of "Cuticura" was also printed on the sides and ends of the boxes, and on the top and sides of the package in which each cake was wrapped. The bill charges that:

"Since the 1st day of August, 1898, the defendant has been unlawfully putting up for sale and selling a soap inferior in quality to that of the complainant, in wrappers and packages on which were printed the name 'Cuticle,' and has imitated the style of type used by your orator in printing its labels and packages aforesaid, and still continues so to do, and that the defendant has thereby deceived and mislead the public, and led them to buy the soap so put up for sale by the defendant as and for the Cuticura Soap made and sold by your orator. * * * That the use of the said name 'Cuticle' on the packages and wrappers of soap by the defendant is an effort on the part of the defendant to imitate and simulate the trade-mark of your orator, and has been adopted by the defendant for that purpose, and that the same is in fact an imitation and simulation, and is calculated to deceive the public, and that the public has been deceived by such imitation and simulation. And, further, that the defendant sells its soap at a less price than your orator's regular, established, and well-known price, for the purpose of more readily inducing the public to buy its soap as the soap of your orator's make."

It will be observed that the charge is that the defendant uses the name of "Cuticle," and that he has imitated the style of type used by the complainant, and that he has thereby deceived and misled the public. The facts show that the defendant does manufacture and sell Cuticle Soap. Both the complainant and the defendant include three cakes of soap in each box. The defendant's box is approximately one-quarter of an inch longer, and slightly wider, than the complainant's box. The complainant's box is colored black, and the defendant's box is of a brick-red color. On the cover of the complainant's box are the words:

"Fragrant and refreshing Cuticura Soap. For cutaneous affections, the toilet, the bath, and nursery. This soap contains, in a modified form, all the medicinal properties of 'Cuticura,' the great skin cure."

The defendant's cover contains the following:

"Soothing, protective, & restorative, fragrant & refreshing Cuticle Soap, for the toilet, nursery, bath, & cutaneous diseases. Recommended for athletes. Cures chafes, sunburn, blisters, prickly heat, redness, sore eyes, old sores, skin irritation, eczema, chapped hands, hemorrhoids."

The ends of the complainant's box show these words, "Quarter Dozen Cuticura Soap," while the ends of the defendant's box show, "Quarter Dozen Cuticle Soap." On the front and opposite sides of the complainant's box are the words, "Cuticura, Cuticura Resolvent, and Cuticura Soap," and the words, "Prepared by Potter Drug & Chemical Corporation, Boston, U. S. A.," while on the same relative sides of the

defendant's box are the words, "Soothing, protective, and restorative, for the toilet, nursery, bath, & cutaneous diseases; all skin irritation. Does not dry & shrivel the skin & hair. Use after shaving." In the matter of type there is some similarity, especially in the peculiar style and position of the letters "C" and "S" wherever the name of the soap is exhibited, but the appearance of the defendant's outer box is so absolutely dissimilar and distinctive that no deception or confusion could reasonably arise.

Passing from the boxes to the wrappers immediately about the soaps, the following conditions are found. On the face of the complainant's package are the words, "Cuticura Soap, medicinal and toilet,"—each word being placed under the word which precedes it; and beneath all, on a single line, are the words, "Price, 25 cents." The same identical arrangement occurs on the defendant's soap, except that above the word "Cuticle" are the words, "Trade-mark registered," and beneath the word "toilet" are the words, "Price, 15 Cents." But the paper surrounding the complainant's soap is black, while the cardboard surrounding the defendant's soap is bright red. The words are printed on the complainant's package in red letters, and on the defendant's package in white letters. There is some similarity in the type, especially in the use of the capital letter "C" in "Cuticura" and "Cuticle." The defendant's soap is inclosed in a paper box, while complainant's soap is wrapped in paper, sealed at the ends. On the two shorter sides of the defendant's package are the words "Cuticle Soap," while on the complainant's package is a monogram composed of the initial letters of the words composing the name "Potter Drug and Chemical Corporation." One end of the complainant's package, also, is covered by a revenue stamp, which is placed in a position different from that on the defendant's package. On the longer sides of the defendant's package also appear the words "Cuticle Soap," while the complainant's package in the same relative position shows these words on one side, "This soap contains, in a modified form, all the medicinal properties of Cuticura, the great skin cure," and on the other side, "Healing, soothing & cleansing, fragrant & refreshing. For all cutaneous affections. The toilet, bath, and nursery. For shaving and shampooing." Beneath the exterior covering of the complainant's package are two circulars of a pink hue, one wrapped immediately about the cake of soap, with the intervention of a paper covering, and the other wrapper encircling the package in the form of a belt. On the upper wrapper is placed an adhesive stamp of a bright orange color, containing the words, "Cuticura, Cuticura Soap, Cuticura Resolvent," showing the names of the manufacturers, etc. Around the defendant's cake of soap is a single white circular, bearing no cuts or illustrations, save that of the face of the soap itself, and bearing conspicuously at its head the words, "Pasfield's Cuticle Soap," while on the complainant's circular, whose heading is "Cuticura Soap," is displayed a figure calculated and intended to attract special attention. There is not the slightest similarity in the appearance of these circulars, although there is obvious copying of some portion of the contents of the circular connected with the Cuticura Soap into the other circular, to which attention will be called.

Coming to the cakes of soap themselves, there is positive dissimilarity. The complainant's cake is different from the defendant's soap in shape and size, different in its color, which is deep green, while the defendant's soap more nearly approaches a blue. On the face of the complainant's soap are the words, "Cuticura Soap, medicinal & toilet," while on the face of the defendant's soap are the words, "Pasfield's Cuticle Soap, for skin and complexion."

It is not obvious how any person of usual eyesight or observation could be misled or confused respecting these articles, by the appearance of the articles, by the wrapping immediately about the same, by the exterior wrapping, or by the exterior surroundings. In other words, what a purchaser would ordinarily and necessarily see in selecting the article could in no instance lead him into error in making his purchase. The contents of the inner circulars, however, show greater similarity, although there is absolute dissimilarity in appearance. It is very obvious that the person composing the defendant's circular copied whole sentences directly from the complainant's circular. For instance, the complainant's circular, under its immediate heading, contains the words, "Medicinal and toilet, an exquisitely perfumed skin beautifier, and toilet, bath, and nursery sanative." Although the complainant's circular shows some other words in conjunction with those quoted, the quoted words are transferred bodily into the defendant's circular, so as to occupy the same relative situation. In the body of the complainant's circular are at least three sentences or paragraphs, the very words of which have been transferred to the defendant's circular. This pilfering of language is obvious, but the circulars themselves are entirely unlike in appearance, size, and usually unlike in matter, although there are similarities other than those to which attention has been called. The reverse side of the defendant's circular is blank, while that of the complainant contains advertisements in several foreign languages. Notwithstanding the unfavorable opinion that must attach to this act of the defendant in using the language of the complainant's circular, yet it cannot be concluded that such act had any effect in misleading persons proposing to purchase complainant's soap.

The remaining question is whether the use of the words "Cuticle Soap" by the defendant infringes complainant's trade-mark, "Cuticura Soap." The words are to a considerable degree unlike to the eye, unlike to the ear, unlike in spelling, unlike in meaning, and unlike in suggestion. The complainant's word, "Cuticura," suggests that the soap is curative in its application to the skin. The defendant's word, by itself, has no such meaning, although the indorsements upon the back illustrate that it is recommended for various diseased conditions of the skin. But such recommendation is quite apt to accompany the advertised sale of any soap used for toilet purposes, and it is quite beyond the power of the complainant to monopolize such advantage. In *Chemical Corp. v. Miller* (C. C.) 75 Fed. 656, the defendant offended by using the words "Curative Soap," with such lettering and arrangement as to produce a deceptive resemblance to the complainant's trade-mark. It appears from the decision of the learned judge in that case that the defendant branded his soap "Curative," with such

lettering and arrangement as to produce a deceptive resemblance to the complainant's trade-mark, and "that the defendant's soap was put upon the market in such wrappers and boxes, and with such imitative devices, as to deceive purchasers, and to lead them to believe that they were buying the plaintiff's soap"; and at least one of the defendants acted with positive bad faith, in intending to deceive the public. The facts present in the case cited are not now present, nor is there any such resemblance between the word "Cuticura" and "Cuticle" as to indicate infringement of the complainant's trade-mark. It is considered that a person cannot fashion a word, not theretofore existing, and thereafter exclude the use of an existing word, in its meaning suitably adapted to the nature of the article to be sold, where, as in the present case, the meaning of such word is quite distinct from the meaning suggested by the artificial word. It follows from the foregoing views that the bill of complaint must be dismissed, with costs.

McMULLEN et al. v. BOWERS et al.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 576.

JURISDICTION OF FEDERAL COURTS—CASES ARISING UNDER PATENT LAWS.

Complainant granted a license to a corporation to construct and use within a specified territory dredging apparatus made in accordance with patents owned by him, the contract providing for the forfeiture to complainant of any of such apparatus used outside the territory named. The corporation became insolvent, and a dredging machine built under such license was sold by a receiver, and was subsequently purchased by defendant, who removed and used it outside the prescribed territory. *Held*, that a suit by complainant for the forfeiture of the dredge and for infringement of his patents, alleged to have resulted from its use outside the territory covered by the license, in which the validity of such patents was not denied, was not one arising under the patent laws of the United States, but one on contract, in which the rights of the parties were governed by the general principles of law and equity, and not by the patent laws, the question of infringement being dependent entirely on the construction of the contract; and that, the parties being citizens of the same state, the federal courts were without jurisdiction.

Appeal from the Circuit Court of the United States for the Northern District of California.

R. Percy Wright, for appellants.

John H. Miller, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an appeal from an order granting a preliminary injunction. The essential facts are: That on December 16, 1889, A. B. Bowers granted to the Bowers Dredging Company, an Illinois corporation, the following written license or assignment to operate under his patents:

"Know all men by these presents, that I, Alphonzo B. Bowers, of Washington, D. C., for and in consideration of the sum of one dollar, and for other

good and sufficient considerations, the receipt of which is hereby acknowledged, do hereby give, grant, and convey to the Bowers Dredging Company, its successors and assigns, the full and exclusive right to use, and to manufacture from drawings and supervision furnished or approved by me, all the Bowers hydraulic dredging apparatus and appliances for which letters patent of the United States have been or may hereafter be granted to me, to the full end of the term for which such letters patent have been or may be granted, for use in the state of Washington, exclusive of Gray's Harbor, and in that portion of Oregon lying north of and including the Columbia river and its tributaries, but nowhere else. But this conveyance is hereby made upon this express condition: That the use of said apparatus, or the sale of said apparatus for use outside of said territory without my written consent therefor, shall subject the machines so used to forfeiture to me wherever they may be found, and subject also to the payment by grantee, its successors or assigns, of the sum of forty dollars (\$40) for each of such patents as may hereafter be issued to me by the United States."

Acting under this agreement, the Bowers Dredging Company built two dredging machines, the Anaconda and the Python, from drawings and under supervision furnished by Bowers, and operated them in the territory mentioned in said agreement up to the year 1897. In that year the Bowers Dredging Company, having become insolvent, was placed in the hands of a receiver, and said receiver, on the 12th day of September, 1898, sold the dredgers Anaconda and Python, together with the rights of the Bowers Dredging Company, to one Smith, at Seattle, who subsequently sold all of said property to the Puget Sound Dredging Company, a corporation created under the laws of Washington. That on the 17th day of March, 1899, the Puget Sound Dredging Company sold the dredger Python to the appellant W. N. Concanon at Seattle; and Mr. Concanon thereupon removed the said dredger from the licensed territory, and carried it to Coos Bay, and there operated the same for a short time, after which he procured from the United States government a contract to do dredging in the harbor of Eureka, state of California, and thereupon he removed the dredger to Eureka, and was performing work therewith at Eureka when this suit was brought. It is alleged in the bill of complaint, among other things, that in all of his acts respecting said dredger Concanon was the employé and agent of the San Francisco Bridge Company; that the other defendants herein were officers, directors, and stockholders of said company, and that they were all interested in acquiring said dredger Python, and bringing it into this territory and operating it. It is further alleged that the bringing of said dredging machine Python into, and the use of it in, the state of California, is contrary to and in violation of the terms of the agreement of December 16, 1889, and is an interference with the rights held and owned by complainants under letters patent for the states of California and Oregon south of the Columbia, and is an infringement upon the claims of said patents and rights thereunder; that by reason of said acts of the defendants, complainants have suffered great and irreparable loss and injury. The prayer of the bill, among other things, is that the defendants, and each of them, "be enjoined and restrained, both provisionally on the filing of this bill of complaint and perpetually on the final hearing, from further using, selling, transferring or disposing of the said dredging machine Python, or any of its parts, appli-

ances, or appurtenances, and from making, using, or selling any dredging machine containing or embracing the invention described, claimed, and patented in and by said letters patent, and from infringing upon said letters patent in any manner whatever; * * * that it be ordered, adjudged, and decreed that the said dredging machine Python, by reason of its having been brought out of and used beyond the limit of the territory covered by the license of December 16, A. D. 1889, without the written consent of * * * Alphonzo B. Bowers, has become forfeited" to him, and that the same be delivered over to Alphonzo B. Bowers by virtue of said forfeiture, to be and become his sole property; and for an accounting. The validity of complainants' patents, as alleged in the bill, is not denied by the defendants. The complainants and defendants are all citizens of the state of California.

The contentions of the respective parties upon the merits of the case are, upon the part of appellants, that the dredger Python passed outside of the monopoly created by the Bowers patents on September 12, 1898, and all restrictions upon its use ceased at that time; that the facts disclosed by the moving papers for a preliminary injunction show no equity entitling the appellees, or either of them, to an injunction; and that the circuit court erred in holding and deciding that the use of the dredger Python by any of the appellants could be an infringement of the Bowers' patents. And upon the part of the appellees that under the law Concanon has no right to use the dredger Python outside of the licensed territory. At this point the court naturally stops to consider the question, which presents itself to the judicial mind, viz. what is there in this case to bring it within the jurisdiction of the United States courts? The laws of the United States declare that the circuit courts shall have jurisdiction "of all suits at law or in equity arising under the patent or copyright laws of the United States." Rev. St. § 629, subd. 9. "This jurisdiction shall be exclusive of the courts of the several states." Id. § 711, subd. 5. Does this suit arise under the patent laws of the United States, or is it a suit upon a contract in relation to a patented dredging machine, which does not involve any construction of the patent laws, or the force and validity of the complainants' patents? The jurisdiction, as presented by these questions, has engaged the attention of courts in a great variety of cases. It has repeatedly been held that the national courts have no right, irrespective of adverse citizenship, to entertain suits for the amount of an agreed license or royalty, or for the specific execution of a contract for the use of a patent, or of other suits where a subsisting contract is shown governing the rights of the parties in the use of an invention; and that such suits not only may, but must, be brought in the state courts. *Wilson v. Sandford*, 10 How. 99, 13 L. Ed. 344; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357; *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295; *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 52, 8 Sup. Ct. 756, 31 L. Ed. 683; *Felix v. Scharnweber*, 125 U. S. 54, 58, 8 Sup. Ct. 759, 31 L. Ed. 687; *Marsh v. Nichols, Shepard & Co.*, 140 U. S. 344, 355, 11 Sup. Ct. 798, 35 L. Ed. 413; *Wade v. Lawder*, 165 U. S. 624, 17 Sup. Ct. 425, 41 L. Ed. 851; *Pratt v. Coke Co.*, 168 U. S. 255, 260, 18 Sup. Ct. 62, 42 L. Ed. 458; *Goodyear v. Day*, 1 Blatchf. 565,

Fed. Cas. No. 5,568; *Blanchard v. Sprague*, 1 Cliff. 288, Fed. Cas. No. 1,516; *Merserole v. Collar Co.*, 6 Blatchf. 356, Fed. Cas. No. 9,488; *Fruit Jar Co. v. Whitney*, 2 Ban. & A. 30, Fed. Cas. No. 3,133; *Trading Co. v. Glaenger* (C. C.) 30 Fed. 387; *Williams v. Sand Co.* (C. C.) 35 Fed. 369; *Washburn & M. Mfg. Co. v. Cincinnati Barbed-Wire Fence Co.* (C. C.) 42 Fed. 675, 678; *Routh v. Boyd* (C. C.) 51 Fed. 821; *Montgomery Palace Stock-Car Co. v. Street Stable-Car Line* (C. C.) 43 Fed. 329; *Shoe Co. v. Bryant* (C. C.) 81 Fed. 521. The object and purpose of the patent law is to create and preserve a monopoly in the patented invention in favor of the patentee. "The rights of the patentee in the patented invention, considered as an article of property, and the obligation into which he enters with others as to his ownership or enjoyment, are matters collateral to the existence and continuance of the monopoly, dependent upon it, indeed, but not affecting it; and capable of assertion or repudiation without impairing the exclusive privilege which it bestows. Until, therefore, a controversy arises involving the existence or preservation of the monopoly, there can be no case under the patent laws." 3 Rob. Pat. § 856, and authorities there cited. There are a few of the earlier cases, which, contrary to the views we have expressed, held that any breach of condition by the licensee, even for the nonpayment of royalties or license fees, forfeited his license, and made him an infringer of the patent. This, at first blush, would seem to be in harmony with the general nature of a license, but in the application of these principles two difficulties arose: "One, that it permits the licensor to inflict the extreme penalty, of his own motion, for every trifling violation of his contract by the licensee; the other, that in suits for infringement, when a license is set up as a defense, and its forfeiture alleged, a multiplicity of issues may arise, not involving the actual merits of the cause, and preventing ultimate justice to the parties. To avoid the first of these difficulties, the doctrine has been modified by the courts so far as to require an express stipulation to that effect in the license, in order for a mere breach of condition to work a forfeiture. To overcome the second, later decisions hold that licenses containing express stipulations for their forfeiture are not ipso facto forfeited upon condition broken, but remain operative and pleadable until rescinded by a court of equity." 2 Rob. Pat. § 822. The doctrines announced in the decisions referred to have never been followed by the supreme court of the United States. The general principles contained in the decisions we have cited are in accord with the views entertained by all the courts at the present day. It is true that several of them can be readily distinguished in their facts from the present case, and that all cases should be decided in the light of the particular facts presented by the case in hand. But, after a careful examination of all the authorities, we are irresistibly led to the conclusion that under the facts of this case the United States courts have no jurisdiction to determine the questions involved therein. This is clearly the settled law, unless it can be said, because it is alleged in the bill, and not denied, that the act of Concanon in taking the Python outside of the licensed territory "is an infringement upon said above-specified claims of said patents" (referring

to claims of different patents held and owned by complainants); in other words, that the acts of Concanon amount, ipso facto, to a forfeiture of defendants' rights, and constitute an infringement to the same extent as they would had he constructed a new machine which did infringe upon the claims of complainants' patents. While it is true that there is no specific denial of the language of the bill that defendants had infringed upon complainants' patents, yet the affidavits used upon the hearing set up a right in Concanon, which, if sustained, would allow him to use the Python. The averment of infringement is to be construed with reference to these facts. The question as to whether there has been any infringement depends upon the construction that should be placed by the courts upon the covenants contained in the contract, and not upon the construction of any act of congress in relation to patents. As was said in *Routh v. Boyd*, supra: "The character of the complaint must be determined from the express and implied stipulations of the contract." The pleader here, as there, "with great prolixity of averment" sets forth that the licensee had failed to perform the contract, and that all his rights had ceased, and become forfeited, and deduces as a conclusion from the premises that the defendants are infringing complainants' patents; but whether they are invading the rights of the complainants "depends on the question whether the conditions of the agreement have been performed or not. * * * The primary and controlling question * * * is whether the agreement has been performed or violated. If it has been performed, the plaintiff has no cause of action. If it has been violated, he has a cause of action for its breach. * * * What is said about the infringement of the patent is incidental, and has no force until the question of the breach of the agreement is first settled in favor of the plaintiff." It cannot, therefore, be said that the controversy in this case is one arising under the patent laws.

In *Wilson v. Sandford*, supra, a suit was brought in the circuit court of the United States to set aside a contract made by complainant, Wilson, with the defendants, by which he granted them permission to use, or vend to others to be used, "one of Woodworth's planing machines, in the cities of New Orleans and Lafayette"; and to obtain an injunction against the further use of the machine upon the ground that it was an infringement of his patent rights, which were fully set forth in the bill. Complainant averred that he was the assignee of the monopoly in the territory mentioned, and that the contract he had made with the defendants had been forfeited by their refusal to comply with its conditions. The matter in controversy between the parties arose under the contract, and it did not appear that the sum in dispute exceeded \$2,000. The defendants demurred to the bill, and at the final hearing the demurrer was sustained, and the bill dismissed. The complainant took an appeal from the decree of dismissal to the supreme court; and the court, after construing the provisions of the seventeenth section of the patent act of July 4, 1836 (5 Stat. 124), dismissed the appeal because the sum in dispute did not exceed \$2,000. An examination of the seventeenth section shows that, if it had been a case "arising under any law of the United States granting or confirming to inventors the exclusive

right to their inventions or discovery," the appeal would lie without any reference whatever to the sum in dispute. The question there presented was identical with the question under discussion, namely, does this suit arise under the patent laws of the United States or under the provisions of a contract? The court, with reference to this question, said:

"Now, the dispute in this case does not arise under any act of congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common-law and equity principles. The object of the bill is to have this contract set aside, and declared to be forfeited; and the prayer is 'that the appellant's reinvestiture of title to the license granted to the appellees by reason of the forfeiture of the contract may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And, if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not in a court of chancery depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of congress concerning patent rights. And whenever a contract is made in relation to them which is not provided for and regulated by congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the rights of appeal."

In *Hartell v. Tilghman*, *supra*, the question of jurisdiction was again presented and discussed. There, as here, the parties to the suit were citizens of the same state; there, as here, a contract had been entered into for the use of a certain patented machine, which, as here, it was alleged had been violated; and there, as here, the defendant was charged as an infringer. The court, after quoting subdivision 9, § 629, Rev. St., and section 55 of the act of July 8, 1870 (16 Stat. 206), and stating that these provisions were substantially the same as the act of 1836, discussed at considerable length the question whether the suit arose under the provisions of the patent laws or under the provisions of the contract, and came to the conclusion that the case was one in relation to a contract, and was not cognizable in a court of the United States by reason of its subject-matter. The opinion quotes with approval the views expressed by Chief Justice Taney in *Wilson v. Sandford*, and cites authorities in support thereof. Among other things, Mr. Justice Miller, who delivered the opinion of the court, said:

"We do not agree that either party can, of his own volition, declare the contract rescinded, and proceed precisely as if nothing had been done under it. If it is to be rescinded, it can be done only by a mutual agreement, or by the decree of a court of justice. If either party disregards it, it can be specifically enforced against him, or damages can be recovered for its violation. But, until so rescinded or set aside, it is a subsisting agreement, which, whatever it is, or may be shown to be, must govern the rights of these parties in the use of complainants' process, and must be the foundation of any relief given by a court of equity."

And in the course of his opinion, touching the question whether the suit arises under the patent laws or under the contract, he gave the following apt illustration:

"If a man owning a tract of land, his title to which is a patent from the United States, should sell or lease that land, and a controversy should arise

between him and his vendee or lessee as to their rights in the premises, it could not be said that any suit brought by the vendor to assert his rights was a suit arising under the land laws of the United States; and this would be beyond question if the defendant, admitting the title of plaintiff to the land, should make no other defense than such as was founded in rights derived from plaintiff by contract. That is the case before us, with the variance that plaintiff's title is to a patent for an invention instead of a patent for land."

A similar illustration might well be given in relation to controversies over mining claims located and patented under the laws of the United States. There was a vigorous dissent on behalf of three justices from the conclusions reached by the court. But the views expressed and conclusions reached by the distinguished justices who wrote the opinions of the court in *Wilson v. Sandford* and *Hartell v. Tilghman* have ever since been maintained. In *Manufacturing Co. v. Hyatt*, *supra*, which came before the court upon a writ of error to the city court of New York, the court held that an action upon an agreement in writing, by which, in consideration of a license from a patentee to make and sell the invention, the licensee acknowledges the validity of the patent, and promises to pay certain royalties so long as the patent shall not have been adjudged invalid, is not a case arising under the patent laws of the United States, and is within the jurisdiction of the state courts, and cannot be reviewed by the supreme court on writ of error.

In *Wade v. Lawder*, *supra*, which came before the court upon a writ of error to the supreme court of Missouri, the court held that, where a suit is brought on a contract of which a patent is a subject-matter, either to enforce such contract or to annul it, the case arises on the contract or out of a contract, and not under the patent laws; and, if brought in a state court, the supreme court is without appellate jurisdiction to review the judgment unless it affirmatively appears that a right under the laws of the United States was properly set up and claimed, which was denied by the state court. And in *Pratt v. Coke Co.*, *supra*, which was an ordinary action of assumpsit upon the common counts for the price of a patented machine, and came before the court upon a writ of error to the supreme court of Illinois, the only federal question which was presented by the record related to the admission by the court of evidence tending to show that the patents issued to the plaintiffs were infringements upon prior patents issued to one Springer. It was contended upon the trial that the state court, in admitting such testimony, assumed jurisdiction of a patent case, in violation of the provisions of section 711, Rev. St. In the course of the opinion the court said:

"The action under consideration is not one arising under the patent right laws of the United States in any proper sense of the term. To constitute such a cause, the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of these laws. *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 7 Sup. Ct. 260, 30 L. Ed. 461. The state court had jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defenses, the defendant claimed the invalidity of a certain patent. To hold that it has no right to introduce evidence upon this subject is to do it a wrong and deny it a

remedy. Section 711 does not deprive the state courts of the power to determine questions arising under the patent laws, but only of assuming jurisdiction of 'cases' arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint, or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals."

In the present case no question is presented as to the validity of any of the appellees' patents. There is no question in the case that involves the construction of any act of congress in relation to the patent laws. All the cases hold, where the question is discussed, that suits growing out of contracts made in relation to patent rights are governed by the general principles of law and equity, and not by the patent laws, and are triable in the state courts, and that the rights of the patentee under the patent laws of the United States must be directly, and not collaterally, brought in issue to give the United States courts jurisdiction. The decree of the circuit court is reversed, and cause remanded, with instructions to dismiss the bill.

SANTA CLARA VAL. MILL & LUMBER CO. v. PRESCOTT.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 577.

1. PATENTS—CONSTRUCTION OF CLAIMS.

A claim is to be construed in accordance with the language in which it is expressed, unaided by the drawings and specification, or it is to be narrowed to the construction shown in the drawings and specification. It cannot be enlarged by reading into it as an element a particular feature of the construction as shown in the drawings, while other features are treated as nonessential.

2. SAME—INFRINGEMENT—BAND-SAW MILL.

The Prescott patent, No. 369,881, for a band-saw mill, if conceded to involve invention which will sustain its validity, is limited by the prior art to the precise construction shown in the drawings and specification, and, as so limited, it is not infringed by a mill constructed in accordance with the Wilkin patent.

Appeal from the Circuit Court of the United States for the Northern District of California.

D. W. Burchard, W. F. Booth, and William W. Dodge, for appellant.
Lewis K. Gillson and John H. Miller, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appeal in this case is taken from an interlocutory decree of the circuit court adjudging that letters patent No. 369,881, granted to De Witt Clinton Prescott, of date September 13, 1887, for band-saw mill, are valid as to claim 1, and that the appellant has infringed the said claim, and ordering that he be

enjoined from further infringing. The improvement for which the letters patent were given refers to a band-saw mill, or a mill of which the essential parts are a frame in which are mounted an upper and a lower band wheel on horizontal shafts, one of which is adjustable towards and from the other, and around which wheels passes a saw blade in the form of an endless belt having teeth on one or both edges, and means for imparting a rotary motion to one of the shafts. The purpose of making one of the shafts adjustable is to permit the saw blade to be readily placed upon and removed from the wheels, and to draw the saw blade taut by a separation of the wheels so that the blade shall be kept under a strain sufficient to prevent slipping, bucking, or vibration. The appellee's mill consists of an upright, cylindrical column in the base of which is mounted the lower band wheel, and upon the upper part of which is surmounted an outer cylinder which has a vertical movement upon the inner cylinder, and is lifted and lowered by a jackscrew. The outer and upper cylinder carries bearings and boxes in which are mounted the ends of the upper band-wheel shaft. Aside from the adjustment obtained by the jackscrew, there is automatic adjustment of the upper band wheel, its shaft and boxes, whereby a proper tension of the saw is secured at all times. The portions of the mill which are involved in the present controversy may be thus described with reference to the drawings: Upon the vertical column, b, is mounted and arranged to slide vertically an encircling head or section, b¹, sustained, raised, and lowered by a jackscrew, b³. The vertically movable section carries brackets, D, E, in which are fulcrummed two levers of the second order, the ends of which are united by a pin or bolt, from which a rod, J, rises to one end of the lever, K, of the first order, fulcrummed in the movable head or section, and having a weight, N, suspended from its other end. Above the brackets, D, E, are tubular guides, one of which is an upward extension of bracket, D, and the other is cast upon the side of the movable section, b¹. In these guides are mounted slides or stems, g² and g³, of forked bearing boxes, G and G¹, in which forked bearing boxes are pivoted boxes, f¹, f¹, in which are mounted the opposite ends of an upper band-wheel shaft, f. Rods or stems, h and i, extend from the lower ends of the slides or guiding stems, g² and g³, of yoked bearing blocks, G, G¹, to the levers, H, I; rod h being pointed where it bears upon the lever, H, and rod i being pin-jointed to lever I. Rod i is made in two parts, threaded right and left, and connected by a sleeve or nut similarly threaded, whereby it may be lengthened or shortened to raise or lower the rear end of the upper band-wheel shaft without materially affecting the front end. The weight, N, acting through the lever, K, draws upward the connected ends of levers H and I, thereby lifting the rods, h, i, the slides, g², g³, the yoked bearing blocks, G, G¹, and the boxes, f¹, f¹, the upper band-wheel shaft, f, and the band wheel F. In the specifications it was stated that the object of the invention was to "provide for adjusting the upper band wheel," and that the inventor was aware "that the lower band wheel in mills of this type has been made adjustable automatically for the purpose of taking up slack."

He pointed out an objection to that mode of adjustment, and thus concluded the description of his invention:

"I do not wish to be understood as limiting my invention to the precise devices which are herein shown and described. The upper band-wheel shaft may be made automatically adjustable by other devices, and, as this is the main characteristic of my invention, I claim it broadly."

It is shown by the record that as a matter of fact but one mill had been patented prior to the appellee's in which the lower wheel was made adjustable. Numerous patents had been taken out, however, in which an automatic adjustment was made of the upper wheel. Of this fact the inventor seems to have been unaware. His first claim, as his application was originally presented, read as follows:

"(1) In a band-saw mill, the upper band-wheel shaft, in combination with the vertically movable bearings in which said shaft is mounted, and automatic adjusting mechanism applied to the bearings of said shaft, substantially as and for the purposes specified."

He received notice from the examiner of the patent office that his claim 1 did not distinguish his device from that shown in patent No. 332,365, to S. Stephens, December 15, 1885, and in No. 170,577, to W. C. Margedant, November 30, 1875, band-saw mills. Both these patents so referred to show an upper band-wheel shaft in combination with vertically movable bearings in which the shaft is mounted, and an automatic adjusting mechanism applied to the bearings. Prescott thereupon amended his first claim to read as follows:

"(1) In a band-saw mill, the upper band-wheel shaft, in combination with independent vertically movable bearings in which the ends of said shaft are separately mounted, and automatic adjusting mechanism applied to each of the bearings of said shaft, substantially as and for the purposes specified."

It will be observed that the manual adjustment of the upper band wheel by means of the jackscrew is not included in the claim, or referred to therein.

The question arises, what is the peculiarity of construction which is intended to be pointed out by the amendment? What is meant by the terms "independent vertically movable bearings?" A meaning which might be suggested is that the bearings move vertically, the one independently of the other. But that such is not the meaning of the patentee is obvious upon the most casual observation of the patent. It is clearly seen that the levers which support the stems upon which the bearings are mounted are pivoted together, and that a common weight operates upon both, and that one of the bearings cannot be raised or lowered without a corresponding and simultaneous movement of the other. The appellee, in his specifications, pointed out this fact:

"It is obvious that any vibration of the lever, K, will cause a vibration of the levers H and I, and consequently a simultaneous adjustment of the two bearing blocks of the upper band-wheel shaft in a vertical direction."

Neither in the claim as amended nor in the specifications is the term "independent," as it is there used, defined. The appellee, in his deposition, which was taken in rebuttal, says, in explanation of

it, that the expression "independent vertically movable bearings" means that the "bearing boxes alone are vertically movable, and that they are detached and independent of the arms, brackets, yokes, or fixed supports of which they hitherto formed a part, and that to said bearings by themselves alone are applied the automatic adjusting mechanism substantially as specified. And, moreover, that the mechanical elements found in claim 1 are independent of all other portions of the movable upper portion of the band-saw mill patented to him and in suit, except as they are supplemental and are combined therewith." Conceding that this is the true meaning of claim 1, and that there should be read into the claim, in explanation thereof, that the bearing boxes alone are vertically movable, and that they are detached and independent from the yokes or fixed supports which in other band-saw mills sustain the bearings, it becomes necessary to inquire how the claim is affected by the condition of the prior art. But first it is to be noted that the language so quoted from the appellee's deposition manifestly does not precisely describe the relation of the movable bearings to the supports on which they rest. It is not literally true that the bearing boxes alone are vertically movable, or that they are detached from the arms which support them. The movable bearings are integral with rods which support them, and the rods rest upon levers which are pinned together, and are operated by a weight which secures the automatic adjustment. Stripped of the hollow sleeves whereby the rods which support the bearings are held in alignment, and in which they vertically move, the appellee's device is identical with that of B. D. Whitney, patented July 13, 1875 (No. 165,463). But among the numerous band-saw mills which preceded the appellee's invention are at least two in which are found all the elements of the appellee's first claim after reading into it his own explanation of the terms "independent vertically movable bearings." On August 14, 1877, letters patent No. 194,225 were issued to William H. Doane and George W. Bugbee for an improvement in band-saw mills in which the axle of the upper wheel is supported upon bearings upon either side thereof, and in which the bearings are independently vertically movable. Upon the one side the bearing is attached to a stem, which vertically moves in a sleeve, and rests upon a spring at the base. The other bearing is connected with a stem which is guided by a sleeve, and rests upon a lever. By means of the lever and the spring automatic adjustment is secured. The German patent No. 28,833, granted to Krumrein and Katz, of date March 8, 1884, exhibits independent vertically movable bearings upon either side of the upper wheel automatically adjusted by means of rods which rest upon a doubled forked weight lever. It meets all of the requirements of the appellee's claim as the claim reads and as it is interpreted by the appellee. There is a difference, however, in the fact that in the German patent the points of support of the movable bearings are not in vertical lines passing through the same, but are removed to one side thereof,—a difference which will be alluded to hereafter. Belonging to the prior art are found also numerous

devices for automatically adjusting belt pulleys which operate in the same manner and are used for the same purpose as the devices for automatically adjusting the upper band-saw wheel, which is, in a sense, a belt pulley, the band saw being the belt. Such a device for tightening a belt pulley was patented to J. J. Squire on May 4, 1875 (letters patent No. 162,867). His belt-pulley shaft is mounted upon bearings at either end. The bearings are placed upon stems which move vertically in fixed sleeves which support them and rest upon levers which are operated by a weight whereby the shaft is moved equally at all parts of its length to force the wheel firmly against the belt, and hold it taut. It is said that the Krumrein and Katz invention does not anticipate the device which is covered by the appellee's claim for the reason that the pressure upon the lever which carries the weight is not in the vertical line of the axes of the shaft wheel, but at one side thereof. In order to maintain a distinction based upon this difference, it is argued that the appellee's claim must be construed in the light of the device which was described in the drawings and specifications, and that by virtue of the concluding sentence of the claim, "substantially as and for the purposes specified," there is imported into the claim as one of its elements that the point of support of each bearing shall be in a vertical line passing therethrough, since such is the form so described and exhibited. It may be said in answer to this that there is nothing in the drawings or specifications to indicate that the inventor considered one of the elements of his claim to be the location of the points of support of the movable bearings in a vertical line beneath the same, and no intimation of such meaning is therein given to the public. On the contrary, it clearly appears that it was not his intention so to limit his claim. He believed himself to be the inventor of the combination which he specifically described in his claim. He said:

"I do not wish to be understood as limiting my invention to the precise devices which are herein shown and described. The upper band-wheel shaft may be made automatically adjustable by other devices, and, as this is the main characteristic of my invention, I claim it broadly."

There can be no doubt that an automatic adjustment such as that described in the German patent of Krumrein and Katz and that described in the Bugbee and Doane patent, if made subsequent to the appellee's invention, instead of prior thereto, would have been infringements of the latter, for they contain all the elements of the appellee's claim as the same is written. One who might have used the German device under those circumstances would not have been permitted to defend against infringement upon the ground that he had placed the point of support of the movable bearings at one side of, instead of in a vertical line beneath, the same. The object of the claim in a patent is to publish to the world the precise nature of the invention which the patentee seeks to protect. He cannot demand that there shall be imported into it an element which is not there distinctly stated or necessarily implied. What was there in the appellee's patent to apprise Wilkin, who invented the mill which was

used by the appellant, that one of the elements of the appellee's claim was the location of the point of support in a vertical line beneath the movable bearings? Upon what theory is the appellee to be permitted to select one from the various features of his device as the same is presented in the drawings and specifications, and to say that that, and not some other, is an element of his combination? Either the claim is to be construed in accordance with the language in which it is expressed, unaided by the drawings and specifications, or it is to be circumscribed by the drawings and specifications. If the latter, then it is to be narrowed to the construction which is so set forth, and not to any one specified portion thereof. We are not at liberty to say that the location of the point of support of the movable bearings is a portion of the claim, and that the form of the levers and the construction of the fixed supports and their relation to one another are not. By examining the prior art, Wilkin could see what Krumrein and Katz had invented, and what the Bugbee and Doane device was. He was authorized to assume that, in view of the prior art, the appellee, if his device was indeed sufficiently novel to admit of protection as an invention, must be limited to the precise form in which his drawings and specifications exhibited it. We think that this is the most that can be claimed for the appellee's patent. It may be that the location of the points of support in a line vertically passing through the center of the bearings is an important feature in both the Prescott and the Wilkin patents, and that it materially contributes to the sensitiveness of the automatic adjustment of both. But, if it be true, there is nothing in the appellee's patent to show that the appellee was aware of that fact, or that he deemed it an element of his combination. Concerning the sources of the sensitiveness of his invention, the only information afforded us is that it results from the separation of the independent movable bearings from the fixed sleeves which support the same, and the consequent reduction of the weight of the parts which are sustained by the weighted lever. No suggestion of any other explanation or contributing cause is found in the evidence of the appellee or in that of his experts. As it was said in *Fastener Co. v. Kraetzer*, 150 U. S. 116, 14 Sup. Ct. 49, 37 L. Ed. 1021:

"If this feature be an advantage, as now claimed, it is strange that no allusion is made to it in the specifications."

In *Railroad Co. v. Mellon*, 104 U. S. 112, 118, 26 L. Ed. 642, the court said:

"In view, therefore, of the statute, the practice of the patent office, and the decisions of this court, we think that the scope of letters patent should be limited to the invention covered by the claim, and that, though the claim may be illustrated, it cannot be enlarged, by the language used in other parts of the specification."

In *White v. Dunbar*, 119 U. S. 47, 52, 7 Sup. Ct. 74, 30 L. Ed. 305, Mr. Justice Bradley said:

"The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

In *Manufacturing Co. v. Greenleaf*, 117 U. S. 554, 558, 6 Sup. Ct. 848, 29 L. Ed. 953, the court said:

"We think this difference between the two locks does not give validity to the Rosner patent, for two reasons: First, because the shape and size of the keyhole is not mentioned in the claim of the Rosner patent as one of the elements of the combination. The scope of letters patent must be limited to the invention covered by the claim, and, while the claim may be illustrated, it cannot be enlarged, by language used in other parts of the specification."

But we think that, in any view of the language of the claim, the prior art was such as necessarily to limit the appellee to the specified form shown in his drawings and specifications. In the Doane and Bugbee patent the point of support of the movable bearings is in a line passing vertically therethrough, and the force of this fact is not affected by the unequal distribution of the strain upon the two ends of the band-wheel shaft. The fact that the device is so constructed that the greater portion of the weight is sustained upon one of the bearings, instead of being placed equally upon both, is unimportant. If it be admitted that the appellee's invention is to be protected in the precise form which is shown by his drawings and specifications, we think that the Wilkin mill, which was used by the appellant, sufficiently diverges therefrom to avoid infringement. The Wilkin mill, instead of being constructed with a single column in which the weight and the lever system are contained, has two distinct columns, widely separated, and carries the lever system and the weight below the columns. There are differences in the order and adjustment of the levers which are unimportant to be considered. Taking it altogether, we think it differs from the appellee's mill more than the latter differs from the devices of Doane and Bugbee and of Krumrein and Katz. The circuit court expressed doubt whether, in view of the prior art, the appellee's patent involved invention, but sustained the patent upon considerations suggested by the decision of the supreme court in the *Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, 161, where it was said that the courts incline to sustain a patent to the man who takes the final step in the invention, which turns failure into success. We think, however, that the rule of that decision should be applied in this case to the specific form which the appellee devised. The field of his invention was necessarily limited thereto by what had preceded him. The decree of the circuit court is reversed, and the cause remanded, with instructions to dismiss the bill.

FARIES MFG. CO. v. BROWN et al.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1900.)

No. 676.

PATENTS—INVENTION—WIRE FOR CHECK-ROW CORN PLANTERS.

The Barlow patent, No. 328,452, for improvements in wire for check-row corn planters, is not so clearly void on its face for lack of invention as to justify its being so adjudged on demurrer to a bill for infringement.

Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

C. E. Pickard and L. L. Bond, for appellant.
Ephriam Banning, for appellees.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. This suit was brought to recover damages for alleged infringement of letters patent No. 328,452, issued on October 20, 1885, for "improvements in wire for check-row corn planters." The claims read as follows:

- (1) An improved knot for check-row wires, formed by coiling the wire composing the knot back upon itself, substantially as described.
- (2) The improved knot for check-row wires, composed of a primary coil and a reversely wound external coil, substantially as described.
- (3) The herein-described improved knot and coupling for check-row wires, composed of the eye or loop, and the primary and reversed coils, the latter being formed by first wrapping the end of the wire around the body, and then back upon the coil so formed, substantially as described.

The circuit court sustained a demurrer to the bill, and dismissed the suit. This court is of opinion that the patent is not so clearly and indubitably void of invention as to justify a ruling to that effect upon demurrer. The decree is therefore reversed, with direction to overrule the demurrer.

RICHARDS v. MICHIGAN CENT. R. CO.

(Circuit Court of Appeals, Seventh Circuit. June 7, 1900.)

No. 666.

PATENTS—VALIDITY—GRAIN TRANSFERRING APPARATUS.

The Richards patent, No. 308,095, for a grain-transferring apparatus, is void on its face.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Edgar Madden, for plaintiff in error.
George S. Payson, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. This action was brought at law to recover damages for infringement of letters patent No. 308,095, issued on November 18, 1884, to Edward S. Richards. The circuit court, following the ruling of the supreme court in *Richards v. Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, sustained a demurrer to the declaration on the ground that the patent is manifestly invalid upon its face, because "the combination is a pure aggregation." That view was reasserted in response to a petition for a rehearing. 159 U. S. 477, 16 Sup. Ct. 53, 40 L. Ed. 225. It is urged that the present declaration contains additional averments, but they do not, and, in the nature of things, could not, affect the proposition that the claims of the patent are for aggregations. The judgment below is affirmed.

HANIFEN v. PRICE et al.

(Circuit Court of Appeals, Second Circuit. May 19, 1900.)

No. 126.

PATENTS—INVENTION—KNITTED FABRIC.

The Bywater patent, No. 374,888, for an improved knitted fabric, having a smooth back, and a face made of mohair, worsted, or other yarn, looped, and being matted and curly, so as to give it the appearance of looped or Astrakhan cloth, is void for lack of patentable invention, in view of the prior art.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The bill in equity in this case was brought in the circuit court for the Southern district of New York to restrain the alleged infringement of the second claim of letters patent No. 374,888, applied for December 22, 1883, and dated December 13, 1887, to Levi Bywater, for an improved knitted fabric. Upon final hearing, no question existing in regard to infringement, the patentability of the improvement was sustained ([C. C.] 96 Fed. 435); the court, regarding the decision in *Hanifen v. Godshalk Co.*, in the Third circuit, which sustained the validity of the patent, as controlling ([C. C.] 78 Fed. 811, 28 C. C. A. 507, 84 Fed. 649, 55 U. S. App. 464). This appeal is from the interlocutory decree of the circuit court.

Edmund Wetmore, for appellants.

W. P. Preble, Jr., for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). Before the date of any of the knitted fabrics which are described in the record, there was a woven fabric used in the manufacture of ladies' wearing apparel, which was made to imitate the curled wool of the Astrakhan skin. This woven fabric had a front and back face composed of different or the same materials, the yarn of the surface being looped upon the back in the loom. Wiry, curly yarn was used for the surface. There were also knitted fabrics, made upon a stockinet machine, composed of face and back yarns of different or like materials, "in which the face yarn was looped at regular intervals,

and on alternate stitches of adjacent rows of the back yarn." The Kent & Leeson patent, dated March 9, 1875, describes such a fabric, having a clean knitted face on one side, and a plush face on the other. The British patent to Ball & Wilkins, sealed April 3, 1857, describes another double knitted fabric for fleece-lined gloves. The invention of the Bywater patent in suit was said in the specification to consist of a "textile fabric having the face yarn thereof looped on the stitches of the back yarn, as hereinafter set forth; the said face, which is formed of mohair, worsted, or other yarn, being beat up so as to present a wavy or curly surface, and the back, which is formed of woolen or other yarn, brushed so as to present a smooth surface; the fabric having the appearance of looped or Astrakhan cloth." The machine upon which the fabric is knitted is a well-known circular knitting machine, and there is nothing new in any part of the mode or process of manufacture, or in the method of the mechanical adjustment, or in the material (that is to say, yarn) of which the fabric is composed. Nothing of this sort is claimed, but it is said that the novelty of the fabric consisted in the fact that, after being finished and "beaten up" (which means whipped with a cane), it is matted and curly, and that this result was due to the new use of a coarse wiry or curly yarn, like mohair or worsted, for the face of the product; or, as the complainant's counsel described the invention, "He [Bywater] used a new thread for the face, and put it under new conditions, so that it became matted and curly"; or, to use again the language of complainant's counsel, "Bywater does not claim any novel mechanism or any novel process, but does claim to be the first to make a new and improved textile fabric by such a wise choice of parts and yarns as to produce a knitted fabric which has the appearance of looped or Astrakhan cloth."

Claim 2 is as follows:

"A knitted fabric composed of face and back yarns of different materials; the face yarn being looped at regular intervals and on alternate stitches of adjacent rows of the back yarn, and being matted and curly, and having a smooth back, whereby the said fabric has the appearance of looped or Astrakhan cloth, as described."

The sole novelty in this invention, as thus described, is that the fabric is "matted and curly"; and, if the second claim had left out those words and the word "Astrakhan," the claim would have set forth nothing except what was common in large varieties of knitted fabrics which had been made on circular knitting machines for a great many years."

At the outset of the case, from the description of the invention, either in the language of the patentee or of the complainant, by his counsel, the question of the patentability of the alleged invention becomes prominent; and attention is therefore turned to the specification, to ascertain how the cause of the new result was described, and particularly if the novelty was attributed to a theretofore not used kind of yarn, or to an unknown method of its manipulation in the machine. All that is said about the thread of which the face is to be formed is that it consists of mohair, worsted, or other yarn, and that

the back is a woolen back, and after the knitted fabric has been completed the face is beat up in the ordinary manner, "whereby the loops are matted or curled, so that the fabric has a rough, curly, or wavy surface." Nothing is said about a new mode of adjustment of the machine. It is insisted, however, that the knitter would know, as a matter of course, if the result was to be Astrakhan, that a curly yarn and long loops were to be used. This is undoubtedly true, and, being true, it suggests an invention of simple character.

Bywater was an English knitter, an employé of Hargreave & Nussey, of Leeds, England, stockinet manufacturers, and perfected his improvement in their factory on December 20, 1881, which was the date of the invention, although he had previously made advances towards it, which, it is conceded, had not reached knitted Astrakhan. No English patent was taken out, and in May, 1883, Bywater came to this country, entered into the employment of the complainant, and applied for a patent in December of that year. James Booth, of Halifax, England, is a partner in the firm of James Booth, who are manufacturers of knitted fabrics. He made an improvement in this class of goods in the early part of 1881, filed on February 22d of that year an English provisional specification for a patent thereon, and the patent was sealed in August, 1881. He placed his goods upon the English market early in 1881 under the name of "kyrle," sold six pieces to Luke Gledhill & Co., who shipped them to Herman Steinbach & Co., of New York, on May 12, 1881, by whom five pieces were sold to various dealers in this country. Samples of these Gledhill goods were preserved, and are an exhibit in this case. Booth's patent was in part for a wheel which was claimed to be new. Suit was brought upon it against an infringer. Hargreave & Nussey joined in the defense. The wheel was found to be old, the suit was abandoned, and thereafter the fabric was made by rival manufacturers. James Booth and Hargreave & Nussey have each continued to make this class of goods to the present time, which are called in England "curl" or "kyrle," or Astrakhan. The fabric of the Booth patent was formed upon a circular knitting machine, and is described in the specification as follows:

"I form the back and body of the fabric of the ordinary looping threads, using for such purpose ordinary wool yarn, capable of being afterwards felted together; and I form the face of the fabric on that part which has usually been considered the back. For the face of the fabric I employ worsted or long-fibered yarn, which will not felt with the back or body, and which is laid in between the needles in any desired order; such face yarn being tied to the looping thread by the tie thread usually employed in the manufacture of fleecy-backed hosiery. The means I employ for laying the face yarn in between the needles are those ordinarily employed for laying in straight threads. The fabric, after removal from the machine, is subjected to the process known as 'fulling' or 'felting,' whereby the back, ground, or knitted portion of the fabric becomes considerably shrunk, and the fibers thereof felted together, whilst the face yarn, being laid in straight, and tied to the body or back at longer or shorter intervals, is caused to project from the back or body of the fabric in the form of loops, thereby producing a very ornamental appearance."

The fabric which is shown in the Gledhill samples has a smooth back, and a looped or somewhat curly face. The face yarn does not

felt, and therefore projects from the back in the form of loops, which are curled, but do not have the matted appearance of the modern Bywater loops. As the Booth loops are made of long-fibered worsted, they will necessarily twist and curl. There is no substantial difference in the material of the two fabrics, as described in the specifications of the two patents. The Bywater looped face is made of "mohair, worsted, or other yarn, and the back is woolen." The Booth back is made of "ordinary wool yarn," and the face is formed of "worsted or long-fibered yarn which will not felt with the back." That ordinary woolen yarn and worsted yarn, which is a yarn of long staple and combed, are, as articles of trade and manufacture, different articles, is well known. The alleged point of difference in the two patents and in the article from which the fabric is made is that knitted Astrakhan must be made of curly, crinkly yarn, and that Booth simply tells the public to take a long-fibered yarn. It is true that the fabric should be made of curly yarn, and it is also true that the Bywater patent does not say so, but leaves the selection of the materials to the acquired knowledge of the workman. It is true that all long-fibered wool does not have an inherent tendency to curl, and that the spinning and combing of the wool are varied to give it that tendency; but it is also true that a large part of long-fibered wool does curl, and, if the spinner seeks yarn of long fiber, he will probably find that his yarn is curly. The knitter, with either the Booth or the Bywater patent before him, has the knowledge of the craft as to the character of the worsted which must be used to produce the effect which the public or which existing fashion prefers, and makes his selection accordingly. The Bywater patent told the manufacturer, in express terms, nothing which the Booth patent had not told him previously, because he had been told that a knitted fabric with a looped surface is made by using unfelted worsted, and Bywater told him, in order to make a fabric having the appearance of looped or Astrakhan cloth, to use mohair, worsted, or other yarn. That the face yarn must not felt with the back was then obvious, and neither patent spoke of the necessity of changing the adjustment of the machine in order to produce longer or shorter loops, because such information was needless. It is doubtless true that a distinction can be traced in the two patents as to the purpose which was in the mind of each patentee; the earlier patentee having in mind to make a knitted fabric which resembled woven Astrakhan, in having a looped face varied according to the fancy of the knitter, and the later patentee having in mind to closely imitate woven Astrakhan. But, in our opinion, that fact gives to the Bywater improvement nothing of a patentable character. It consisted simply in the selection of yarns to produce a particular effect or particular style of goods, and, after Booth had told the public (if, indeed, he told them anything of novelty) how to produce a knitted loop fabric, there was nothing of an inventive character in the selection of yarns to make a looped curly fabric more curly and matted. The validity of the Bywater patent should not rest upon the fact that the Booth patent said nothing about curly wool, but its validity depends upon the question whether, after the Booth improvement had been described,

there was anything of an inventive character left. Bywater, by a wise choice of yarns and continued mechanical improvement, succeeded in presenting to the public an attractive fabric, and had the great merit of being patient in the work of mechanical development, but the inventive idea was absent.

In the case of Hanifen v. Godshalk Co., in the Third circuit, the decision turned, in the circuit court (78 Fed. 811), upon the question whether the Booth patent was an anticipation of the Bywater patent. Upon rehearing, Judge Dallas was led to change his opinion, and, upon the testimony of experts, held that the Bywater patent was anticipated. Upon appeal (28 C. C. A. 507, 84 Fed. 649), a majority of the circuit court of appeals were of opinion that the testimony of the experts was not satisfactory, and that the Booth patent was not an anticipation. Judge Butler dissented, and concluded his dissent by saying, "Granting, however, that there is some difference in the two methods, it is not such, in my judgment, as involves the exercise of invention." In the record before this court, testimony not in the Godshalk Case had been introduced,—whether of vital importance or not, we have not considered, although it undoubtedly presented the defendants' view of the case more positively; but we do not regard the question of the Booth anticipation as the controlling one in the case. Indeed, the importance of the Booth patent consists in its bearing upon the question of patentable invention, and we coincide in the view of Judge Butler that, upon the admitted facts in the case, the work of Bywater was the mechanical work of an intelligent spinner, and was destitute of the element of invention. That great deference should be paid to the opinion of the circuit court of appeals of the Third circuit is true, and we have conformed to that duty, but have not been able to accord with the result which that court reached. The decree of the circuit court is reversed, with costs of this court, and the case is remanded to that court, with instructions to dismiss the bill, with costs.

FARRELL v. CONTINENTAL IRON WORKS.

(District Court, E. D. New York. June 2, 1900.)

NEGLIGENCE—ACTION FOR PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.

Libelant contracted to carry a cargo of coal on his canal boat, and deliver the same to respondent, as consignee, and to tend the guy while the cargo was being discharged by respondent. While holding the guy rope in the performance of such duty, it came untied from the chain to which it was fastened, and in consequence libelant fell and was injured. The rope had been tied in the morning by an employé of respondent, but the knot was examined by libelant, who was competent to judge of its sufficiency, and he testified that it was sufficient and could not have come untied. *Held*, that he assumed the risk of its sufficiency, and could not recover on the ground of the negligence of respondent's servants; the preponderance of evidence showing that none of such servants had disturbed the knot since it was first tied.

In Admiralty. Suit to recover for personal injury on the ground of negligence.

Martin A. Ryan, for libelant.

Lamb & Johnson, for respondent.

THOMAS, District Judge. The libelant, who was the owner and captain of the canal boat Lizzie Farrell, entered into a contract with Coxe Bros. & Co., whereby the libelant agreed to carry on his boat certain coal from Perth Amboy, N. J., and deliver the same to the Continental Iron Works, the respondent, and receive therefor the sum of 20 cents per ton alongside; and the libelant also agreed to tend the guy during the discharge of the boat. For the purpose of tending the guy, the libelant stood on one side of his vessel and held a rope, which from his hands ran to and fastened to the chain connecting the bucket with the fall. Some person, who seems to have been connected with the drawing away of the coal, tied the guy rope to the ring in the chain, in the presence of the libelant, and the latter tended the guy rope thus fastened from about 7 in the morning until 12 noon. After an interval of an hour he resumed his work, and continued until about half past 3 o'clock, at which time the end of the rope fastened through the ring became untied, causing the libelant to lose his balance and fall back upon a load of coal in a canal boat behind him, and receive the injuries which are the subject of the present action.

In whatever legal relation the libelant stood to the respondent, the same degree of care was required of the latter, and the question is whether such care was exercised. The libelant testifies that before starting work in the morning he noticed how the guy rope was fastened; that there were 12 or 14 inches hanging over on the short end, and that, as long as it was fastened as he found it in the morning, it was impossible for it to become untied; that the reason he did not notice it in the afternoon was because he thought it was the same fastening as in the morning. The evidence of the libelant is explicit that he knew what the tie was in the morning, and that it was suffi-

cient. Therefore, by whosoever hand it was made, it must be concluded that the respondent, or somebody acting in its behalf, had exercised the reasonable care required to secure the safety of the libellant, so far as the manner of fastening the guy rope was concerned. The result shows that the tie was not secure, but the libellant had opportunity to see, and did see. He had the knowledge of an expert, which capacitated him to pass upon the sufficiency of the knot, and he did pass judgment upon it. The respondent was not an insurer, nor bound to the highest care in adjusting the knot, and the judgment of the libellant is conclusive evidence that the respondent used the care imposed upon it. If there was risk, the libellant had an opportunity to know what it was, and, whatever it was, he assumed it. But the libellant urges that the fastening of the morning was not the fastening of the afternoon. He states that he thought it was the same. Therefore to his eye there had been no change. It appears that at the noon hour the fall was changed, by the rope of which it consisted being renewed in whole or in part. But, whatever was done, it was not necessary to untie the guy rope. Nor is it apparent what useful purpose would have been effected by untying it. But the several persons connected with the replacing or repairing of the fall stated that the guy rope was not interfered with, so far as they severally knew. But a witness produced by the libellant states that he saw a certain servant of the respondent tie the guy rope on before the beginning of the work in the afternoon after the replacing of the fall, and that two other persons named were then present. That servant and such person, being produced, said that the servant did not tie the guy at such time, but that he did tie it after it gave way in the afternoon, and after the libellant was hurt. The force of the evidence against the libellant is at least as strong, and, it is thought, stronger than that in his favor, in this regard; and the conclusion must be reached that the guy rope was tied only in the morning, and that such tie was satisfactory to the libellant, who is himself expert in such matters. The burden of proof is upon the libellant, inasmuch as the mere untying of the rope after several hours of use would not of itself raise a presumption of negligence. It is true that the libellant states that the tie in the morning could not become loosed, and that therefore the guy rope must have been taken off at the noon hour. That is the libellant's opinion, and should be held of considerable value, but it cannot outweigh the fact which the preponderance of evidence establishes. The libel should be dismissed, with costs.

THE PROTECTION.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1900.)

No. 561.

1. CARRIERS—BREACH OF CONTRACT TO CARRY GOODS—DEFENSES.

Representations made by a shipper as to the size and weight of a machine to be transported, although not correct, are no defense to a suit against the carrier for its failure to carry such machine on a particular vessel, in accordance with the terms of a bill of lading which was issued afterwards, and after the carrier's agents had seen the machine, and had opportunity to obtain full information as to its dimensions and weight.

2. SAME—RESCISSION OF CONTRACT OF CARRIAGE—TRANSFER OF BILL OF LADING.

After a bill of lading made negotiable by statute has been assigned by the shipper for value to another, the contract thereby made cannot be rescinded without the consent of the assignee, and the issuance of a second bill of lading to the shipper, without the surrender of the first or the consent of the assignee, cannot affect his rights under the first contract.

3. SAME—BREACH OF CONTRACT.

It is no defense to a suit for damages for the breach of a contract made by a bill of lading to transport goods by a particular vessel that the carrier afterwards forwarded the goods by another vessel without additional cost or risk to the shipper.

4. SHIPPING—MEASURE OF DAMAGES FOR LOSS OF CARGO.

A steamship company issued a bill of lading by which it contracted to transport a machine by a particular vessel from Seattle to Skagway, Alaska, which bill was indorsed to libelant, who proceeded to Skagway to receive the machine on arrival. The vessel, however, did not bring it, but it was forwarded by the company by another vessel, a month or so later, at which time libelant was not there to receive it, and it was entirely lost to him. *Held*, that as the usual rule that the measure of damages for loss of goods is their market value at the port of destination could not be applied, because of the impossibility of showing the value of the machine at Skagway, libelant was properly allowed as damages its cost at Seattle, together with his expenses in going to receive it and the freight paid.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

Gorham & Gorham, for appellants.

Richard A. Ballinger, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. It appears from the testimony that on the 21st day of January, 1898, one R. H. Ballinger, who was the owner of a steam sled sawing machine and four sled runners at Seattle, Wash., entered into an agreement with W. H. Lord (libelant herein) by the terms of which he sold to Lord a one-half interest in the machine, and agreed to transport the same from Seattle to Skagway, Alaska, "as early as the same may be conveniently done," at his own expense. Authority was also given Lord to sell the one-half interest of Ballinger in said machine upon its arrival at Skagway, in accordance with the terms and conditions in said agreement specified. After

the execution of this agreement, to wit, on the 25th day of January, 1898, Ballinger received from the Columbia Navigation Company an ordinary receipt for \$62.50 for freight and wharfage on said machine, to be forwarded on the steamship Protection. Lord visited the office of the company, and notified it that he was interested in the machine, and that it was important that it should be forwarded at an early day; that he was going to Skagway, and would be there to receive it. He was assured that it would be shipped on board the Protection; "that as soon as the Protection came in it would certainly go." Lord left Seattle on January 27th, and arrived at Skagway, February 7th. It further appears that, pursuant to the previous agreement between the parties, the machine and sled runners were delivered at the ship's tackle on the dock at Seattle, freight and wharfage thereon amounting to \$62.50 having been previously paid; that a bill of lading was issued January 29th to Ballinger, by a duly-authorized agent of said company, reciting that the machine and sled runners had been shipped in apparent good order and condition by R. H. Ballinger on board of the steamer Protection; that it contained an agreement on the part of said company to carry said property on the said vessel to Skagway, and there deliver the same in like good order and condition at the vessel's tackle unto R. H. Ballinger or his assignee; this bill of lading was afterwards duly indorsed by Ballinger, and transmitted by mail to libellant, Lord, who had previously gone to Skagway to receive said property, there expecting to operate the same as a movable sawing machine; that the sawing machine, pursuant to the shipping receipt issued by said company, was by Ballinger delivered to said company at the Centennial Wharf before the arrival of the steamer Protection, and prior to the issuance of said bill of lading, and thereafter, for the convenience of said company, and at the joint expense of it and said Ballinger, it was transferred from the Centennial Wharf to the Yesler Dock, and there delivered alongside the Protection and of the ship's tackle, in the presence of the ship's officers and Richard Chilcoat, the duly-authorized agent of said company; that the steamer Protection made the run from Seattle to Skagway according to expectations, but did not take the machine nor the sled runners, and the only excuse offered for the failure to fulfill the contract is that the machine was too large and heavy to be carried on said vessel; that the company afterwards sent the property to Skagway on a scow, which was towed up with the ship Prussia, which arrived there more than a month later than the date on which the Protection arrived; that in consequence of the delay there was no one on hand at Skagway to receive the property, and it has been wholly lost to the libellant. A second bill of lading for the Prussia was thereafter issued by the company, February 21, 1898, after its failure to send the machine up by the Protection, and this bill of lading was put into the hands of said Ballinger, after the first bill of lading had been indorsed by him and mailed to the libellant at Skagway, without having received the surrender of the first bill of lading. Upon these facts the district court entered a decree in favor of libellant against the steamer Protection for failure to deliver said property according to the terms of said contract of affreightment,

and awarded damages in the sum of \$1,787.50, from which this appeal is taken.

It is claimed by appellants that the steamship company was misled by the shipper concerning the size and dimensions of the sawing machine, and that the misrepresentations in regard thereto, though unintentional, render the contract voidable, at the option of the carrier; and that the carrier having rescinded the original contract, and entered into a new agreement for transporting the machine by the Prussia, the libelant cannot recover upon the first bill of lading for the shipping of the machine on the Protection.

In relation to the alleged misrepresentations there is some conflict in the evidence. There is no pretense that Ballinger intentionally misrepresented the size of the machine. The inquiries made by the company and answers given by Ballinger upon this point were prior in time to the issuance by the company of the bill of lading. Before this contract was entered into the officers and agents of the steamship company had seen the machine, and had the opportunity to obtain the necessary information as to its dimensions, size, and weight. Under these circumstances, the prior conversations and alleged misrepresentations as to the size of the machine become wholly immaterial, and it is unnecessary to examine the evidence, and determine whether or not any mistake or misrepresentation was made by the shipper. The company made no objection upon this ground, but signed the bill of lading with the full knowledge of the character of the machine. In fact, no such objection was made by the company either before or after the Protection sailed. It cannot, therefore, urge this point as a legal defense to the libel brought to recover damages for a breach of the contract.

The law is well settled that a party cannot avoid a contract on the ground of misrepresentation if he has personal knowledge of the facts, and acts upon his own information and observation. *Slaughter's Adm'r v. Gerson*, 13 Wall. 379, 383, 20 L. Ed. 627; *Farnsworth v. Duffner*, 142 U. S. 43, 47, 12 Sup. Ct. 164, 35 L. Ed. 931; *E. Bement & Sons v. La Dow* (C. C.) 66 Fed. 185, 188. The authorities upon this point are too numerous to require further citation.

In relation to the alleged second bill of lading on the Prussia, given by the company to Ballinger, there is a mass of evidence, more or less conflicting in its nature, which, under the views we take of this question, it will be unnecessary to examine in detail. It is not shown that Ballinger assumed any responsibility as to the subsequent bill of lading, or made any statement that he was authorized to accept it in lieu of the other. He was extremely anxious to have it forwarded to Skagway in time to have it accepted by Lord, and repeatedly stated that if Lord would accept it upon the arrival of the Prussia it would be all right, but the company was expressly notified by Ballinger that he no longer had any control over the first bill of lading.

There is no claim that there was any new consideration for the second or new contract. The controlling question on this branch of the case is whether Ballinger had any legal power or authority to consent to any change of the first contract which had been assigned by him,

and forwarded to the libelant at Skagway. The testimony shows that the steamship company tried to rescind the first contract. But it takes two parties to make a bargain. There was no mutuality. Even Ballinger, who, if it could be held he had the authority to consent, did not accept the second bill of lading, except upon conditions that were never complied with. The fact is, as shown by the record and found by the court, that neither Ballinger nor Lord ever waived any rights acquired by them under the first bill of lading. As a matter of law, Ballinger could not rescind it without the consent of Lord. He had indorsed and assigned the bill of lading and forwarded it to Lord in good faith and for value. This passed the legal title to the libelant, and the subsequent issuance by the company of the second bill of lading, without any surrender of the first, and without the consent of the libelant, could not affect the rights acquired and held by him under the first contract.

The statute of Washington expressly declares that all bills of lading are negotiable, and may be transferred by the indorsement of the party receiving it, and that all the title to the machine which the first holder had "when he receives it passes to every subsequent indorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange." Ballinger's Ann. Codes & St. §§ 3598, 3599. The steamship company, therefore, became liable to libelant upon its first contract, and had no legal right to rescind it without his consent, which was never obtained. The fact that the company shipped the machine on a scow towed by the Prussia, without any additional cost or risk, cannot be urged as a defense to the libel for the breach of the original contract.

In *Harrison v. Stewart*, Taney, 485, Fed. Cas. No. 6,145, the court, upon somewhat similar facts, said:

"Neither can the opportunity which offered of shipping the goods by the Andalusia, without any additional cost or risk to the libelants, be used as a bar or in mitigation of damages. The shippers were not bound to seek or accept any other mode of conveyance. It was the duty of the shipowners to transport the goods in the manner specified in the bill of lading, and that contract required that they should be carried to the port of destination in the ship Charles. Nothing could excuse them from the performance of that duty but some unforeseen event, which they had not the power to control; and, if they failed to perform it, it is no excuse to say that the libelants might have accomplished the same object by another ship or another contract. The shippers had a right to the faithful execution of the contract they had made, and to rely upon it, and were under no obligation to look further or accept any other contract as a substitute for it."

The only remaining question relates to the amount of damages. The libelant claims damages (1) for the actual expenses incurred by him; (2) for the loss of anticipated profits from the operation of the machine in Alaska; and (3) the value of said machinery, including freight and wharfage.

The court, following the general rule that where the shipper or consignee has entered into a contract made with reference to embarking in a new business, held that the speculative profits which might be supposed to arise, but which were defeated because of the carrier's delay in delivering the material necessary therefor, cannot be looked

to as an element of damages, being too indefinite and uncertain to constitute a basis of recovery. This ruling was in favor of the appellants.

There is no specific objection to the allowance of \$100 for the actual expenses proven to have been incurred by the libelant. But appellants object to the allowance by the court of the sum of \$1,625 for the value of the machine. The cost and construction of the machine at Seattle are shown by the evidence to have been \$1,625. The court in its opinion said: "There is no evidence as to its value at Skagway, and, in the nature of things, it is impossible for the libelant to prove by witnesses the actual value at Skagway." The contention of appellants is that the value at the point of destination governs the allowance of damages. "The general rule is that in case of a loss of the goods the measure of damages recoverable by the shipper is the market value of the goods at the point of destination, with interest from the time they should have been delivered, less the amount of the freight charges due for their transportation." 5 Am. & Eng. Enc. Law (2d Ed.) 373, and authorities there cited. But this rule is not universal. It is subject to be changed by special circumstances. In the present case we are of opinion that the court's ruling was favorable to appellants because the value at the place of shipment may, ordinarily, be presumed to be less than at the place of destination, and, in the absence of any proof to the contrary, it cannot be said that the court committed any error. We agree with the court below that, under all the circumstances of this case, "it is simple justice for the respondent to compensate the libelant for his expenses, and pay as the value of the property what it cost at Seattle, and repay the freight money and wharfage." The decree of the district court is affirmed, with costs.

DAVIS v. ADAMS.

(Circuit Court of Appeals, Ninth Circuit. May 21, 1900.)

No. 575.

1. ADMIRALTY PRACTICE—EFFECT OF VARIANCE—AMENDMENT OF PLEADING.

In the courts of admiralty of the United States there are no technical rules of variance which will prevent a recovery by a libelant who shows a meritorious case, but under the liberal and equitable practice as to amendment he will be allowed to amend his pleading at any stage of the case to conform to the evidence, even to the extent of changing a libel for a tort to one based on contract, where he has mistaken his legal rights, and the allowance of such amendment will work no hardship to the defendant, and is in accordance with the principles of equity and natural justice.

2. SAME—SUIT BY SEAMAN.

Libelant brought suit in personam to recover damages for alleged forcible detention on board a vessel by defendant, where he was induced to go through false pretenses, and for services rendered while so detained. The evidence showed that he went on board under shipping articles which he had voluntarily signed, and by which he was bound, but that he was wrongfully forced by the master to leave the vessel at a distant

port, in violation of such articles, and was refused any payment for the services rendered; and also that he suffered other wrongs and mistreatment at the hands of the master which gave him a right of action in personam against the defendant. *Held*, that he should have been permitted at the close of the case to amend his libel to state his cause of action as disclosed by the evidence.

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. On March 13, 1899, a libel was filed by the appellant in the district court of the United States for the Northern district of California, in personam, against William J. Adams, appellee herein, as owner of the barkentine *Retriever*, to recover damages not very clearly stated, but which appear to be claimed as wages for services rendered on board the vessel for one month at \$35 per month; also damages at the rate of \$35 per month for 14 months after the appellant had been discharged from the vessel, and while he was unable to obtain other employment; also damages for amount expended for board and lodgings during the latter period at \$20 per month, and for damages by reason of exposure and want of necessary food and clothing in the sum of \$2,000. According to the testimony on the part of the appellant, the facts are these: On May 10, 1895, and while a strike of the sailors' union was in progress in the port of San Francisco, rendering it very difficult for shipowners and masters to secure the services of seamen, the appellant, who never had been to sea, was approached by one John Curtin, who asked him if he wanted a job, and introduced him to Capt. Bogan, master of the *Retriever*. He was induced by said Curtin and Capt. Bogan to sign papers, which were represented to him to be only for the purpose of giving the person before whom the same were signed, purporting to be a United States shipping commissioner, something by which the said alleged shipping commissioner could keep track of him. Capt. Bogan told him, when he demurred to going on board ship for want of experience, that all he would have to do would be to help load lumber, and that he would receive therefor \$25 per month and board. Under these representations, appellant went on board the *Retriever*, then at anchor in the Bay of San Francisco. Five days thereafter, having then secured a full crew, the vessel proceeded upon her voyage to Port Hadlock, on Puget Sound, and during the trip the appellant remained on board, cleaning woodwork, sawing wood, and performing such other work as was required of him. On the voyage he suffered much hardship in consequence of not being supplied with proper clothing, and from the fact that he had no bedding at all, both of which the master had represented to him would be furnished him on board the ship; and generally harsh treatment was accorded the appellant and all the members of the crew save two, Harry Baker and William Baker, witnesses for the appellant, who were the only experienced sailors on board. William Baker testifies that the mate said to him, five or six days after they had left port, referring to the port of destination, that they "were going to run them all ashore there." And at about the same time the master said to Harry Baker, referring to all the inexperienced men, that "he wanted to get rid of them on the Sound"; and again, that "he wanted to get rid of them on the Sound, and ship some sailors on the return voyage." The appellant says that a short time before the vessel's arrival at Port Hadlock the master said in forcible language, "I am going to put a plank ashore, and I want every one of you to leave the moment the anchor drops," whereupon the mate said to the appellant, "That means you, too," to which the appellant replied, "I am not going to leave this vessel until she takes me back where she took me from." And it appears from the testimony of Harry Baker that all of the crew but the two Bakers did leave the vessel at Port Hadlock, and the *Retriever* returned to San Francisco with a crew of experienced seamen. Upon arrival at Port Hadlock the vessel was beached, and the appellant, among others, was compelled to stand in the water, which was very cold, to paint the ship's bottom, which exposure caused him severe

physical suffering. He finally told the first mate, under whom he was working, that he could stand it no longer. The mate snatched the tools out of his hands, raised a brush as if to strike him, and in profane language told him to "get away from here." Upon attempting to work under the second mate, he received similar treatment, and was then again driven away by the first mate. Thereupon he applied to the master for his pay, and the master replied: "You don't suppose you are going to get any pay, do you? You have got your pay. You had your board." This was just at the dinner hour. The appellant went on board, got his dinner, took his clothes, and went ashore. The next day he made his way to Port Townsend with some difficulty, and thereafter (the record does not disclose when) returned to San Francisco. The appellee, in his answer, denies generally the averments of the libel, and contends that the appellant deserted the Retriever at Port Hadlock, after having entered into a contract with the master to ship for the voyage, and, under the terms of said contract, is entitled to no remuneration for the services rendered by him. Capt. Bogan testifies that he first saw the appellant on board the Retriever; that he worked during the trip to Port Hadlock, doing what he was told to do; and that he was not paid for his services. The cashier of the Shipowners' Association of San Francisco testifies that he enrolled the appellant in the register kept in the office of that association at that time; that he does not positively remember, but thinks, from the articles, that the crew signed them in the office. The only other evidence introduced by the appellee is the shipping articles, from which it appears that the crew of the Retriever signed for a voyage not to exceed six months in duration, between San Francisco as the home port and Port Hadlock. The articles contain the usual stipulations, among which are the following: "And it is herein expressly agreed, without reservation of any sort, that in case of the desertion from the vessel of any of the crew, the said persons so deserting shall forfeit to the owners of the said vessel all the wages due them." "It is expressly understood that these shipping articles shall be construed to be a civil contract between the master of the vessel and the members of the crew, and that the essence of the contract is the undertaking of each member of the crew to complete the specified voyage before becoming entitled to any portion of his pay." The appellant, upon cross-examination, admitted that he signed these shipping articles, and agreed to go upon said voyage, his compensation to be \$25 per month. The court below, in its opinion, held that, while the appellant was justified in leaving the ship, the libel should be dismissed, as there was a fatal variance between the case proven and the cause of action set up in the libel. The libel was, by the decree, accordingly peremptorily dismissed. (D. C.) 93 Fed. 977. From this decree an appeal has been taken to this court.

George F. Shelton, for appellant.

Charles E. Naylor, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the court.

A consideration of the evidence in the case fails, we think, to sustain the contention of the appellant, as expressed in his libel, that he was induced by false and fraudulent pretenses to go on board the ship Retriever, and was then forcibly detained there. It appears from the record that the appellant, who had been a university student, signed shipping articles of the usual and regular form for a voyage on said vessel, and that he thereafter voluntarily went aboard the vessel and performed such duties as were assigned to him during the voyage to the port of destination, Port Hadlock, where he left the vessel.

The next question that arises is, was the appellant justified in leaving the ship? That is to say, under the facts of this case, was he, in effect, discharged at Port Hadlock? The circumstances of his leaving the vessel are fully set forth in the foregoing statement. The only testimony on the part of the appellee in relation to this point is that of Capt. Bogan, who says, referring to the appellant, "He left the ship." The appellant's testimony, on the other hand, discloses such treatment, and such a chain of circumstances, that the court below found that he was justified in leaving the ship. This, we think, is correct. The evidence shows that the majority of the crew were inexperienced seamen, whose services were accepted because of the inability of the master to secure men of experience. It further appears that, shortly after his departure from the port of San Francisco, the master of the *Retriever* stated to one of the experienced seamen, in effect, that he intended to discharge the new men at the port of destination, and "ship some sailors on the return voyage." And, shortly before reaching Port Hadlock, the master ordered the appellant and others to "leave the moment the anchor drops." It would appear that this intention of the master was carried into effect, as the shipping articles show that four new seamen were secured for the return voyage, and that the only members of the original crew retained were the two Baker brothers, who were acknowledged to be the only experienced seamen on the ship when it left San Francisco. These circumstances, in connection with the acts of the master and mate when the ship reached Port Hadlock, warranted the appellant in considering himself discharged. Upon making demand of the master at the time for the wages due him, he was not paid anything, nor has he been paid up to this time. The master did not tell him to remain on the ship and fulfill his contract, and that he would then receive the wages agreed upon, but said, according to the appellant's testimony: "You have got your pay. You had your board,"—clearly indicating a desire on the part of the master to consider the transaction closed. This testimony was uncontradicted by the appellee, and is, therefore, conclusive upon the matters to which it relates.

The court below, after concluding that the libellant was justified in leaving the ship, stated that the cause of action set forth in the libel was for a tort in the nature of false imprisonment, and not upon the contract established by the evidence, and that this variance between the case proven and the cause of action set up in the libel is fatal to the appellant. Under the strict rules of procedure of the common law, and the civil law, the doctrine of *secundum allegata et probata* is conclusive, and upholds the arbitrary rule of proceeding as paramount to all other considerations. But the practice of the admiralty courts of the United States permits of more flexibility of procedure. And, in the endeavor to determine the case submitted to it upon equitable principles, the court will sometimes disregard mere technical rules and forms, and look only to the rules of natural justice. In this endeavor, the court uses its reason and discretion as a means of defeating chicanery, rectifying mis-

takes, supplying deficiencies, and even suggesting to the party the means of reconstructing his case, if necessary, without the loss of such real progress as he may have already made. The rule is well stated by Benedict, in his work on the Jurisdiction and Practice of the American Admiralty, in the following comprehensive language:

"It has always been the practice of the American admiralty courts to allow every facility to the parties to place fully before the court their whole case, and to enable the court to administer substantial justice between the parties without circuity of action, or turning round in court, and never to allow a party to overcome his adversary by the man traps and spring guns of covert chicanery, or by the surprises and technicalities of mere pleadings or practice. Therefore, on proper cause shown, omissions and deficiencies in pleadings may be supplied, and errors and mistakes in practice, in matters of substance, as well as of form, may be corrected at any stage of the proceedings, for the furtherance of justice." Ben. Adm. (3d Ed.) § 483.

This practice is confirmed by the United States supreme court in the case of *The Gazelle*, 128 U. S. 474, 487, 9 Sup. Ct. 142, 32 L. Ed. 500, where the court uses the following language:

"In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as at common law; and if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded), the court may award any relief which the law applicable to the case warrants. *Dupont De Nemours v. Vance*, 19 How. 162, 15 L. Ed. 584; *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382; *Dexter v. Munroe*, 2 Spr. 29, Fed. Cas. No. 3,863; *The Cambridge*, 2 Low. 21, Fed. Cas. No. 2,334."

In the case of *Express Co. v. Platten*, 36 C. C. A. 46, 93 Fed. 936, the circuit court of appeals for the Fifth circuit sanctioned an amendment of the declaration after the conclusion of the plaintiff's evidence to make it conform to the proof, holding that the variance was not a fatal one, as there was no intimation that the defendant had been misled in maintaining its defense upon the merits by this variance, or that it was prejudiced thereby in any respect. In the case at bar no assertion is made that the appellee was misled by the character of case made by the appellant. Nor could the appellee well make any claim to being surprised. The substantial controversy in this case is as to whether the appellant is entitled to recover from the appellee. This is clearly indicated in the libel, even though the libel asks for damages sustained for forced detention under false pretenses, while the proofs only show that the appellant is entitled to compensation for services under contract. The court below, in its opinion, states, in effect, that the appellant has a meritorious case upon the facts proven, but denies his right to recover because of the character of his pleading. This is a technical defect merely, and under the authorities above cited the court should not allow mere technicalities to overthrow the principles of equity, and defeat the ends of justice. It is assigned as error that after the court had rendered its opinion the appellant moved the court to be permitted to amend his libel to conform to the findings

of the court. This motion does not appear in the record, but the opinion of the court is peremptory in its conclusion that the libel will "have to be dismissed, as there is a fatal variance between the case proven and the cause of action alleged in the libel"; and the decree, following the language of the opinion, peremptorily dismisses the libel. The libel being in personam, and the facts proven tending to establish a cause of action which might be prosecuted in personam, there does not appear to be any good reason why the libelant should not be permitted to amend his libel to conform to the facts of the case. Upon the subject of amendment, Benedict further says, in section 483:

"Where merits clearly appear on the record, it is the settled practice in admiralty not to dismiss the libel, but to allow the party to assert his rights in a new allegation. * * * Amendments may be made on application to the court at any time, as well after as before decree; and at any time before the final decree new counts or articles may be added, and new and supplemental allegations may be filed; and this may be done after the cause is in the appellate court, if the new allegations be confined to the original subject of controversy."

In *Richmond v. Copper Co.*, 2 Low. 315, 20 Fed. Cas. 738, the court, speaking of the power of courts of admiralty to allow amendments of pleading, said:

"So far have they carried the power to allow amendments that it has been laid down by the highest authority that an action can never fail for want of proper allegations if merits clearly appear on the record. And several cases have been sent back from the supreme court with orders to permit amendments and then proceed to a decree. I am not speaking of amendments to introduce new facts, but those of either form or substance to conform to evidence."

The Adeline, 9 Cranch, 244, 3 L. Ed. 719; *The Caroline*, 7 Cranch, 496, 3 L. Ed. 417; *The Anne*, 7 Cranch, 570, 3 L. Ed. 442; *The Edward*, 1 Wheat. 261, 4 L. Ed. 86; *Newell v. Norton*, 3 Wall. 257, 18 L. Ed. 271.

In *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055, the circuit court, in a suit for the foreclosure of a mortgage upon the property of a railway company, had dismissed an intervening petition claiming compensation for the use and occupation by the company for a number of years of certain lands owned by the petitioner. It appears that the original occupation and use of the premises was by the predecessor of the railway company under a contract with the petitioner, and that the railway company was not the formal assignee of its predecessor under the contract. It appears further that by reason of certain actions in the state court between the petitioner and the railway company the former, under a misapprehension as to its rights, deemed itself prevented from claiming under the contract as against the railway company. The intervention was accordingly prosecuted for rent for use and occupation. The supreme court was, however, of the opinion that in a court of equity the railway company would be considered as having adopted the contract between its predecessor and the petitioner, and had made the contract its own. Under this doctrine the petitioner was entitled

to recover damages for a breach of the contract, but not upon the claim for rent for use and occupation of the premises. In commenting upon this aspect of the case, the court said:

"The most serious obstacle in the way of doing substantial justice in this case arises from the attitude assumed by the petitioner throughout the entire proceedings in the circuit court, that it was entitled to recover the rental value of the premises in question."

After referring to the facts in the case, the court says further:

"In view of these facts, and of the persistency with which it [the petitioner] has pressed its claim for rent, and repudiated its right to recover under the contract, it would have no just cause of complaint if this court refused to permit a change of front, and affirmed the decree of the court below. Did this disposition of the case involve anything less than a total and final denial of any right whatever to compensation for the use of this property, it might be proper to do this. There is much to be said, however, in favor of the equity of petitioner's claim to an equivalent for the benefit the defendants have received from the use of this property, and we do not consider it beyond the power of this court, upon broad principles of justice, to refer this cause back for such further proceedings as are permitted by the rules and practice of courts of equity."

The court then refers to a number of cases authorizing such a practice, and concludes with this statement of the rule applicable to the facts of that case:

"A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and, if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made."

We are of the opinion that under the authority of these cases the appellant should have an opportunity to amend his libel to conform to the facts as established by the evidence, and upon such facts a judgment should be entered by the district court. The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with this opinion.

THE CAVALIER.

(District Court, E. D. New York. June 2, 1900.)

SALVAGE—DISTRIBUTION OF AWARD.

Libelants and respondents were associated in an enterprise to raise a sunken ship, to which libelants contributed the services of two tugs; the work to be done under the superintendence of one of the respondents, and the proceeds to be divided. After the enterprise had been entered upon, and the tugs were proceeding to the locality, one of them, temporarily in charge of the superintendent, discovered a schooner aground, and, under the direction of the superintendent, rendered salvage services in effecting her release. *Held*, that such services were entirely apart from the common undertaking, and the award therefor should be distributed between the owners and crew of the tug and the superintendent in his individual capacity, unaffected by the agreement under which the wrecking operations were being conducted.

In Admiralty. On application for distribution of award for salvage services.

Hyland & Zabriskie, for libelants.

Henry W. Goodrich, for respondents.

THOMAS, District Judge. On November 14, 1899, four persons entered into an agreement to raise the ship *Macedonia*, wrecked off Long Branch, and to divide the net profits of the undertaking. The libelants herein contributed to the enterprise two tugboats, the *Lizzie Henderson* and the *Columbia*; Miller, one of the respondents, contributed his time and skill, and was placed in charge of the enterprise; Ferguson, another respondent, contributed divers and diving apparatus, as well as his personal services; the Mineralized Rubber Company contributed a large amount of valuable bags, suitable for use in raising the vessel; and thereafter, to wit, on November 22, 1899, the respondent Harrison became related to the enterprise, and was entitled to receive one-sixteenth of the net proceeds. On the 1st day of December, 1899, the *Lizzie Henderson* and the *Columbia* came to Staten Island, having on board each of the above respondents, or a representative of such respondents. Both of such tugs were on the business of the enterprise. Upon arriving at Staten Island, the master of the *Henderson* went aboard the *Columbia*, which proceeded to New York. On the following day the *Lizzie Henderson*, while proceeding down the coast, discovered the schooner *Cavalier* ashore on False Shoals, Sandy Hook. Miller, superintendent of the general enterprise, directed the *Henderson* to go to her assistance, which she did, and under his supervision the tug was made fast to the schooner; but, before the latter was pulled off, the *Columbia* arrived, and transferred to the *Henderson* the latter's captain, who thereafter took charge of the salving operations in conjunction and consultation with Miller. The tug *Columbia* stood by, with the representatives of other respondents aboard, but rendered no service. The amount of salvage has been stipulated by all parties concerned at \$1,100, and the question arises as to the manner in which it shall be distributed. The re-

spondents urge that the salvage money belongs to the persons interested in the enterprise of raising the Macedonia, and that distribution should be made according to the rights of the respondents to share in that enterprise. The tugs were a part of the common enterprise, but diverted therefrom by one of the four persons undertaking the salvage of the Macedonia, and the superintendent of that work, at the moment in actual command of the tug. Before the salvage of the schooner was completed, the usual master of the tug returned, and took charge of the work in the manner above stated.

It is concluded that the salvage service was quite apart from the raising of the Macedonia, to which the libelants had contributed their tugs, and that the award should be based upon the value of services rendered the schooner, according to usual rules. It is true that the tug would not have been permitted to go to the rescue of the schooner, had the superintendent forbade, but his permission was a consent on his part to divert the tug from the main undertaking; and, if the other parties did not consent thereto, their remedy would lie in a direction other than that of claiming the salvage award. The superintendent was without authority to use the tug for any other purpose than that connected with the raising of the Macedonia, and what he did must be regarded as having been done in his individual capacity, and whatever he earned was earned by him quite outside of the general enterprise to which he was attached. The same is true of the tug. It is considered that the award should be as follows: \$200 to the crew of the tug, distributable according to their wages; \$450 to the owner of the tug; and \$450 to the superintendent who discovered the schooner, directed the tug to her, and performed the service of getting her off. The other respondents neither directly nor through representatives rendered any services. It is not understood that the court is asked to make a distribution as between them, but, for the purposes of a correct record, it is adjudged that the \$450 earned by Miller shall be paid to him.

EVERETT v. INDEPENDENT SCHOOL DIST. OF ROCK RAPIDS et al.

(Circuit Court, N. D. Iowa, W. D. June 4, 1900.)

1. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—SUIT ON MUNICIPAL BONDS.

Where a municipal corporation has issued bonds in excess of the constitutional limit, a holder of such bonds may maintain a suit in equity to determine the portion of the debt which is valid and enforceable, and to have such amount apportioned between the different bondholders.

2. LIMITATIONS.

Limitation against such suit does not commence to run until the maturity of the bonds.

3. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—PARTIES TO CROSS BILLS.

When a federal court has jurisdiction of a suit on the facts alleged in the bill, both as to the subject-matter and the parties, it may take jurisdiction of all ancillary or cross bills without regard to the citizenship of the adversary parties to the dependent bills.

In Equity. On demurrers to bill and cross bill

E. S. Huston and E. Y. Greenleaf, for complainant.

E. C. Roach and J. M. Parson, for defendants.

SHIRAS, District Judge. In the bill filed in this case it is averred that in December, 1879, the independent school district of Rock Rapids, for the purpose of refunding bonds of the district then about to mature, and to fund outstanding judgments against the district, issued its coupon bonds to the amount of \$27,500, payable on the 15th day of December, 1889, which were sold for the full face value thereof to different parties, the complainant purchasing \$13,500 thereof; that the school district refuses to pay the bonds, although it had received the purchase price thereof, on the ground that in the issuance thereof the district had exceeded the constitutional limit of 5 per cent. upon the taxable property of the district; and that the aid of a court of equity is needed in order to ascertain what part or portion of the entire issue of bonds is not within the inhibition of the limitation upon municipal indebtedness contained in the constitution of the state of Iowa, and to properly apportion the amount recoverable on the bonds among the several owners of the same, and also to apportion the amount to be paid among the several school districts that have been created, since the issuance of the bonds, out of the territory then included in the independent school district of Rock Rapids. The bill was duly filed, and service of the subpoena was had before the expiration of 10 years from the date of the maturity of the bonds. To this bill the independent school district of Rock Rapids, the several school districts created since the issuance of the bonds, and the present holders of the bonds other than those belonging to complainant are made defendants.

The demurrer to the bill is based upon the averments that the remedy at law is adequate, and therefore the court of equity is without jurisdiction, and that the remedy sought is barred by the statute of limitations. The questions thus presented are the same as those involved in the case of *Ætna Life Ins. Co. v. Lyon Co.* (C. C.) 82 Fed. 929, and 95 Fed. 325, wherein it was held that a bill of equity could be

maintained in cases of this character, and that against the remedy in equity the statute of limitations did not begin to run until the maturity of the bonds sued on. I see no reason for changing the views expressed in that case, and I therefore hold that the demurrer to the bill is not well taken, and must be overruled. In the present case the defendant bondholders have joined in a cross bill against the several school districts, setting forth the number and amount of the bonds severally owned by them, and asking that their rights under the same be ascertained and decreed both as against the school districts and as among themselves as bondholders. A demurrer to the cross bill presents the same questions as those arising on the demurrer to the original bill, and, for the reasons just stated, these are not deemed to be well taken.

An additional ground of demurrer is relied on, in that it appears that one of the complainants in the cross bill, William L. Bradley, he being a defendant to the original bill, is a citizen of Iowa, of which state the school districts are corporate citizens, and that therefore the court is without jurisdiction to determine the controversy between these parties, they being citizens of the same state. The jurisdiction in the suit is determined by the case made on the original bill, and where jurisdiction exists upon the facts, both as to subject-matter and diverse citizenship of the parties upon which the original bill is based, the court can then take jurisdiction over all ancillary or cross bills that may be properly filed, without regard to the citizenship of the adversary parties in the dependent bills. *Schenek v. Peay*, Woolw. 175, Fed. Cas. No. 12,450; *Freeman v. Howe*, 24 How. 450, 460, 16 L. Ed. 749; *Carey v. Railway Co.*, 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638. Demurrer to cross bill is therefore also overruled.

RALYA MARKET CO. v. ARMOUR & CO. et al.

(Circuit Court, N. D. Iowa, W. D. June 6, 1900.)

1. COURTS—JURISDICTION OF PARTIES—SUIT AGAINST PARTNERSHIP.

Service upon the agent of a partnership, in an action brought against the partnership as such, under a state statute, does not give the court jurisdiction over the individual partners; nor can the court acquire jurisdiction to render judgment against a partner who is a nonresident of the state, unless by service made upon him therein, or by his voluntary appearance.

2. APPEARANCE—SUIT AGAINST PARTNERSHIP.

An appearance entered for the defendant in an action against a partnership as such, brought under a state statute, cannot be construed as an appearance by the individual partners.

3. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—ACTION AGAINST PARTNERSHIP.

An action against a firm by its partnership name, brought under a state statute, cannot be maintained in a federal court, or removed into such court on the ground of diverse citizenship, for the reason that the citizenship essential to give the court jurisdiction cannot be predicated of a partnership as such; and it is immaterial that the petition for removal shows the citizenship of the partners, where they are not, as individuals, parties to the suit.¹

¹ Diverse citizenship as ground for federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullaghan*, 27 C. C. A. 298.

4. SAME—FEDERAL QUESTION—ISSUE RAISED BY DEFENDANT.

The fact that a defendant in an action in a state court attacks the constitutionality of a state statute under which the action is brought does not render the case one arising under the constitution or laws of the United States, within the removal act.²

At Law. On motion to quash and set aside service of original notice.

Robert Hunter, W. E. Gantt, and Bevington & Kennedy, for plaintiff.

Kean & Sherman and T. J. Mahoney, for defendants.

SHIRAS, District Judge. This action, for the recovery of damages for an alleged breach of contract, was commenced in the district court of Woodbury county, Iowa; the defendant named in the petition, Armour & Co., being alleged to be a corporation created under the laws of the state of Illinois. The original notice was returned by the sheriff as having been served upon "W. A. Moon, as manager or agent for Armour & Company, a corporation." This notice required the defendant to appear and plead on or before the 20th day of March, 1900, and on the 10th of March a petition for removal to this court was duly filed in the district court of Woodbury county, in which it was averred that Armour & Co. was not a corporation, but was a co-partnership, composed of Philip D. Armour, J. Ogden Armour, and J. Ogden Armour, P. A. Valentine, and May E. Armour, executors of the last will of Philip D. Armour, deceased, a former partner in said firm; that these several named persons were, when the suit was commenced, and still are, citizens of the state of Illinois,—the plaintiff company being a corporation created under the laws of the state of Iowa, and the suit involving more than \$2,000, exclusive of interest and costs. It was further averred in the petition for removal that the appearance of the petitioner was special only, and not general, and was not intended to waive any objection to the jurisdiction; but petitioner reserved the right to question the jurisdiction and the validity of the service of the original notice. The state court granted the order of removal, and, the transcript having been filed in this court, a motion was filed by Armour & Co., in which it is recited that the appearance is special only, and for the sole and only purpose of questioning the jurisdiction of the court, and for the purpose of obtaining an order setting aside and quashing the service in the case; and thereupon it is averred that Armour & Co. was not, when this suit was brought, and service of the notice was made, a corporation, but was a co-partnership, reciting the names of the partners as already given, and that the so-called service of the notice was invalid and insufficient to give the court jurisdiction in the premises, there being no property attached or otherwise brought within the jurisdiction of the state court. Thereupon the plaintiff, with leave of court, filed an amendment to the petition, setting forth that the defendant Armour & Co. was a co-partnership composed of the persons whose names have been already given, and

² Jurisdiction in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

prayed judgment on the cause of action originally declared on against Armour & Co. and the individuals constituting the co-partnership. In the form in which the record is now placed before the court, the action is one against the partnership in the firm name, and also against the individuals composing the partnership.

By section 3468 of the Code of Iowa it is enacted that:

"Actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any members thereof; and a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice. A new action may be brought against the members not made parties on the original cause of action."

By section 3532 it is provided that:

"When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

Under these provisions of the Code of Iowa it is clear that, if the case had remained in the state court, a judgment might have been obtained against Armour & Co. as a partnership, upon which an execution could have been levied upon the firm property, if any such could be found within the state of Iowa, provided the service of the notice upon W. A. Moon was a service upon the firm. It is equally clear that a judgment thus rendered against the firm in the partnership name, upon a service made upon an agent of the firm, would not be binding upon the individuals composing the firm. Thus, in *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, it is said that:

"It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

See, also, *Boswell's Lessee v. Otis*, 9 How. 336, 13 L. Ed. 164; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918.

In *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648, it was held that a judgment rendered in a state court in New York against several partners, only one having been served with process and appearing in the case, was not valid as against the partners not served with process; and in *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271, it was ruled that:

"A member of a partnership residing in one state, not served with process and not appearing, is not personally bound by a judgment recovered in another state against all the partners after a dissolution of the firm, although the other members were served, or did appear and cause an appearance to be entered for all, and although the law of the state where the suit was brought authorized such judgment."

Under the rule announced in these opinions, and as the case now stands before the court, there is not jurisdiction in this court over

the individuals composing the firm of Armour & Co., for the reason that no service of notice or summons has been made upon them, and, as they are all nonresidents of Iowa, it does not seem possible to obtain service upon them within this state. It is, however, strongly contended on behalf of plaintiff that a general appearance has been entered in this court in such form as to preclude the defendants from contending that they are not properly within the jurisdiction of the court. This contention is based upon the fact that on May 15, 1900, after the transcript was filed in this court, a præcipe was filed with the clerk in the following terms:

"In United States Circuit Court, Northern District of Iowa.

"The Ralya Market Company, Plaintiff, vs. Armour & Company, Defendants.

"The clerk of said court will please enter our appearance for defendant in above cause.

T. J. Mahoney, Omaha, Neb.

"Kean & Sherman, Sioux City, Iowa."

When this appearance was thus entered, the only defendant in the case was Armour & Co., and in terms the appearance was for this defendant, and no other; and it cannot be construed to be an appearance for the individuals who were not made parties defendant until May 23d, when the amendment to the petition was filed. It is well settled by the decisions of the supreme court that an appearance made in the state court for the purpose of securing a removal to the federal court will not be deemed to have the effect of a general appearance, and will not constitute a waiver of the right to question the jurisdiction of the court over the parties or subject-matter of the suit. *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. So far as the individual partners composing the firm of Armour & Co. are concerned, they were not named as defendants to the suit until after its removal into this court; and as no service has been had upon them, and no appearance has been entered by them, the court cannot exercise jurisdiction over them, and they cannot be deemed to be parties defendant to the suit. This leaves as a defendant Armour & Co., originally declared against as a corporation, but now admitted to be a partnership. Under the provisions of the Code of Iowa, already cited, the state court could rightfully entertain a suit brought against a firm in the partnership name, and, service being had on the firm, could rightfully enforce its judgment against the firm property within the state of Iowa. The jurisdiction thus created by the statutes of the state against a firm in the partnership name cannot be recognized in the federal courts, for the reason that it cannot be averred of a firm that it is a citizen of a state. To establish the jurisdictional fact that the controversy is between citizens of different states, when diverse citizenship is the basis of the jurisdiction, it is necessary that the suit shall be brought in the names of the partners, the citizenship of each being shown. *Carnegie, Phipps & Co. v. Hulbert*, 3 C. C. A. 391, 53 Fed. 10; *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Hotel Co. v. Jones*, 20 Sup. Ct. 690, Adv. S. U. S. 690, 44 L. Ed. —. On the face of the record as the same stood in the state court upon the filing of the petition for removal, it was shown that the defendant Armour & Co. was not a corporation, but was a partnership;

and in that form the case was not a removable one, for the reason that it was not an action of which this court could have taken jurisdiction originally, if brought in the first instance in this court. In other words, if the plaintiff had filed the action originally in this court against Armour & Co., a co-partnership, this court, under the rulings in the cases just cited, could not have entertained jurisdiction over the defendant firm, because citizenship, within the meaning of the federal constitution, cannot be predicated of a partnership. So long as the case stood, therefore, as a suit against the firm of Armour & Co., it was not removable into the federal court, for the reason that the second section of the act of congress of 1888, which creates the general right of removal, gives that right only in cases which, under the provisions of the first section of the act, would be within federal jurisdiction, and, as already pointed out, the suit against the firm in the firm name could not have been brought originally in a federal court. If the partners had applied to the state court to be substituted as defendants in place of the firm, so that the suit would then have been only against the individuals, partners doing business under the firm name, the case might possibly then have been removable, as it would have been then pending against the individuals only, and the citizenship of the defendants could then have been shown to be different from that of the plaintiff. This, however, was not done. The removal was asked in the name of Armour & Co. Thus, in the petition for removal it is averred as follows:

"Your petitioner, Armour & Company, a co-partnership, but described in the petition and original notice in the above-entitled cause as a corporation, appears specially and for the sole and only purpose of this petition; * * * that at the time of the commencement of this action the defendant was, and still is, a co-partnership, nonresident of the state of Iowa, and organized and existing under and by virtue of the laws of the state of Illinois, and a citizen of the state of Illinois."

The removal to this court was therefore asked by Armour & Co., a co-partnership; but, as already stated, it was not possible to show that the firm was a citizen of any state, and hence the proper showing, justifying a removal, could not be made on behalf of the only defendant before the state court, and the only party petitioning for a removal. Under the provisions of the Iowa Code, the state court could take jurisdiction of the suit against the partnership in the firm name, and, proper service being had, could render a judgment good against the firm property in Iowa. Over a suit in this form this court could not take jurisdiction for the reasons already stated, and, as this court could not entertain the suit for want of jurisdiction, it could not deprive the state court of the jurisdiction rightfully existing in that tribunal under the provisions of the state statute. Under these circumstances, this court has never had jurisdiction over this case, and any and all action taken herein must be held of no effect, and the suit must be remanded to the state court.

On Motion for Rehearing.

(June 16, 1900.)

Upon the filing of the opinion in this case, wherein it was held that this court could not take jurisdiction upon a removal of the suit from

the state court, because it was in form an action against a partnership in the firm name, a petition for rehearing was filed by counsel, supported by a written brief, in which it is contended that the court has misconstrued the decisions of the supreme court in *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800, and *Hotel Co. v. Jones*, 20 Sup. Ct. 690, Adv. S. U. S. 690, 44 L. Ed. —, and of the court of appeals for this circuit in *Phipps & Co. v. Hulbert*, 3 C. C. A. 391, 53 Fed. 10, in holding that under no possible circumstances, where jurisdiction depends on diversity of citizenship, can a partnership, as such, sue or be sued in the federal court. The contention now made is that if the record shows the citizenship of the several partners, and that is diverse from that of the other party, then the jurisdiction will exist over the suit in the firm name; and in support of this contention it is pointed out that, in the cases above cited, the order was that the same be remanded to the trial court in order that the parties might, by amendment, show that jurisdiction in fact existed. It will be noticed in these cases, which were brought originally in the federal court, that the plaintiffs were partnerships, and therefore, when these cases were remanded to the trial court, it was open to the plaintiffs to amend by setting forth the names and citizenship of the partners; thus converting the suit into one brought in the name of the several partners, doing business under the given firm name. As was said in the original opinion filed in the present case, if the persons forming the firm of Armour & Co. had appeared in the state court, and, by leave of that court, had been substituted as defendants in place of the firm, then the record would have shown a controversy pending between citizens of different states, and the case would have been removable under the statute. This was not done, however, and the case remains in the form in which it was commenced, to wit, an action against the firm of Armour & Co.

Care has been used, in all the proceedings taken, to avoid anything which might be construed into entering an appearance for the individuals composing the firm, and this court is asked to take jurisdiction, by removal on the ground of diverse citizenship, over a case pending against a firm in the partnership name. To authorize a federal court to entertain jurisdiction over a suit on the ground of diverse citizenship, it must appear that the controversy is one between citizens of different states; or, in other words, the jurisdiction depends on the question whether the party plaintiff and the party defendant are citizens of a state, within the meaning of the constitution, and are also citizens of different states. The party defendant in this case is the firm of Armour & Co. If judgment should be entered in favor of the plaintiff on the cause of action sued on, it could be entered only against the firm, and would be enforceable by process against the firm property, and nothing else. As the record now stands, a judgment cannot be entered against the individuals alleged to constitute the firm of Armour & Co. It is therefore clear that the party defendant is the firm, and the firm only. Under the provisions of the state statute, the action may be brought and maintained against the firm in the firm name, and judgment may be enforced against the firm property; but the state statute does not create jurisdiction over

the individual partners, unless by service of notice they have been brought within the jurisdiction of the court. If this court, assuming the existence of jurisdiction, should render judgment in favor of plaintiff, it could only be entered against the firm in the firm name, because the individual partners have not become parties to the suit. There can be no escape from the conclusion, therefore, that this action is one pending against Armour & Co. as a partnership. Every paper filed and every motion made by the defendant is in the firm name, and that only; and it is true, as matter of form and matter of fact, that the defendant is a partnership, sued in the firm name. As this case now stands, this court has no jurisdiction whatever over the individual partners composing the firm of Armour & Co., and the only jurisdiction it could exercise would be over the firm and in the firm name.

This being the indisputable fact, then the question arises whether it can be predicated of the firm of Armour & Co, the defendant herein, that it is a "citizen of the state of Illinois." This question is answered by the supreme court in the already cited case of *Hotel Co. v. Jones*, 20 Sup. Ct. 690, Adv. S. U. S. 690, 44 L. Ed. —, wherein it is said:

"The rule that for purposes of jurisdiction, and within the meaning of the clause of the constitution extending the judicial powers of the United States to controversies between citizens of different states, a corporation was to be deemed a citizen of the state creating it, has been so long recognized and applied that it is not now to be questioned. No such rule, however, has been applied to partnership associations, although such associations may have some of the characteristics of a corporation. * * * That a limited partnership association created under the Pennsylvania statute may be described as a 'quasi corporation,' having some of the characteristics of a corporation or a new artificial person, is not a sufficient reason for regarding it as a corporation, within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations."

In *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800, it was said:

"The allegation of the amended petition is that the United States Express Company is a joint-stock company organized under a law of the state of New York, and is a citizen of that state. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is that the company is not a corporation, but a joint-stock company,—that is, a mere partnership; and, although it may be authorized by the laws of the state of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court."

These cases hold, if I correctly apprehend their meaning, that in suits in the federal courts, wherein jurisdiction depends upon the diverse citizenship of the parties litigant, the same, to confer jurisdiction, must be brought in the name of litigants of whom it can be properly averred that they are citizens of a named state, and that citizenship cannot be predicated of a partnership or joint-stock association. As already pointed out, the only defendant in this case is the firm of Armour & Co., and, as the firm is not a citizen of any state, it is not made to appear that the controversy is between citizens of differ-

ent states, and therefore it is a suit which is not removable to this court on the ground of diverse citizenship.

In the brief filed in support of the petition for a rehearing, it is argued that the case presents a question arising under the constitution of the United States, in that the state statute endeavors to confer jurisdiction over nonresidents of Iowa, by a service had upon a mere agent, which, it is claimed, cannot be rightfully done, and therefore the suit is removable, in that it presents a controversy arising under the federal constitution. It is well settled that, under the act of 1888, a case is not removable on the ground that it involves a federal question, unless the existence of the federal question is made to appear in the case stated in the plaintiff's pleadings. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511. The validity of the service of the original notice in this case is primarily a question arising under the state statute; and although, in the consideration thereof, a federal question may possibly become involved, it will then be a question presented by the defendant, which may or may not arise, and it cannot be made the basis for the removal of the case to this court on the ground that the controversy tendered by the plaintiff is one arising under the constitution or laws of the United States. It is open to the defendant to present this question in the state court, and, if the ruling is adverse, then the matter can be carried to the supreme court of the United States; but the fact that a federal question of this character may be presented by the defendant does not make the suit brought by the plaintiff a controversy arising under the constitution or laws of the United States, within the meaning of the removal statute. The motion for a rehearing filed by the defendant is therefore overruled, and the case must be remanded to the state court on the ground that this court cannot take jurisdiction over a suit brought against the firm of Armour & Co., the individual partners not being made, in any form, parties defendant.

FIFE et al. v. WHITTELL.

(Circuit Court, N. D. California. June 11, 1900.)

No. 12,837.

1. REMOVAL OF CAUSES—JURISDICTION—PRESUMPTION.

If the right of removal to a federal court does not appear in the record of the state court, it must be clearly shown in the petition for removal, or it will be presumed that it does not exist.

2. SAME—DIVERSE CITIZENSHIP—NONRESIDENT DEFENDANT—PETITION—SUFFICIENCY.

A petition by defendant for removal of a cause to a federal court on the ground of diverse citizenship, which alleges diverse citizenship and residence of the parties, but fails to allege that the defendant is a "nonresident of the state" where the suit is brought, is insufficient to authorize a removal under 25 Stat. p. 433, c. 866, § 2, providing that suits between citizens of different states pending in a state court, involving amounts within the jurisdiction of the federal court, may be removed by the defendant or defendants therein, "being nonresidents of the state."¹

¹ Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullaghan*, 27 C. C. A. 298.

8. SAME.

Where the jurisdiction of a federal court depends on diverse citizenship, either the record or the petition for removal must show that defendant is a nonresident of the state where the suit is brought, and, if this does not appear, the state court retains jurisdiction, though the proceedings for removal may have brought the papers in the case to the federal court.

4. SAME—AMENDING PETITION.

A federal court has no jurisdiction to allow a petition for removal to be amended so as to show that the cause is in fact removable.

Action at law by Ellen A. Fife and another against George Whittell. Motion to remand the cause to the state court. Granted.

Rodgers, Paterson & Slack, for plaintiffs.

J. P. Langhorne and Lloyd & Wood, for defendant.

MORROW, Circuit Judge. This action was brought by the plaintiffs in the state court to recover from the defendant the sum of \$790,362, with interest, as damage suffered and loss sustained by reason of false and fraudulent representations of the defendant. The defendant petitioned for the removal of the cause to this court, on the ground of diverse citizenship of the parties. The cause was brought to this court. The plaintiffs filed a plea to the jurisdiction of this court. The defendant answered. The plea was amended, and, by stipulation of counsel, the answer to the original plea was ordered to stand as the answer to the amended plea. Evidence was taken upon the issues raised, and argument heard upon the matter. The case is now before the court upon the sufficiency of the petition for removal, and the evidence taken upon the issues presented by the amended plea and the answer thereto.

In the petition for removal the defendant alleges:

"That the controversy in this action or suit, and every issue of fact and law therein, is wholly between citizens of different states, and which can be fully determined as between them; that is to say, the plaintiffs, Ellen A. Fife and George S. Fife, are now, and were at the time of the filing of the complaint in this action or suit, citizens and residents of the city and county of San Francisco, state of California, and of the Northern United States judicial district of said state of California, and the defendant, your petitioner, George Whittell, is now, and was at the time of the filing of the said complaint, a citizen and resident of the state of New York."

Plaintiff contends that this allegation is insufficient, for the reason that it is not alleged that the defendant is a nonresident of the state of California. The act of March 3, 1875, amended by the act of March 3, 1887, and corrected by the act of August 13, 1888 (25 Stat. 433), provides, in section 1:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at law or in equity * * * in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid [two thousand dollars]."

Section 2 of the same act provides that:

"Any other suit of a civil nature, at law or in equity [that is to say, any suit other than one arising under the constitution or laws of the United States or treaties made or which shall be made under their authority], of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought in any state

court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being nonresidents of that state."

Where the question of jurisdiction of the United States circuit court is presented, we are confronted at once with the presumption that the cause is without the jurisdiction of the court, unless the contrary affirmatively appears. *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. Insurance Co.*, 109 U. S. 278, 283, 3 Sup. Ct. 207, 27 L. Ed. 932. We must also bear in mind that the acts of 1887 and 1888 were designed to contract the jurisdiction of the circuit courts, both with respect to causes original and by removal. *Hanrick v. Hanrick*, 153 U. S. 192, 197, 14 Sup. Ct. 835, 38 L. Ed. 685; *Railway v. Brow*, 164 U. S. 277, 17 Sup. Ct. 126, 41 L. Ed. 431; *Campelle v. Balbach* (C. C.) 46 Fed. 81. It is also an established rule that parties seeking to remove causes to the United States circuit court are bound to comply strictly with every provision required by the act. One of the provisions of the removal act is that, where a cause of action between citizens of different states pending in the state court involves an amount within the jurisdiction of the United States circuit court, it may be removed to that court by the defendant or defendants therein "being nonresidents of the state." This restriction to the right of removal, based upon the residence of the defendants, is clearly jurisdictional, and, if it does not appear in the record in the state court, it must be clearly shown in the petition for removal as a right which the defendant has and claims, or it will be presumed not to exist. The fact that it may be inferred argumentatively from any averment in the petition as to other facts is not sufficient.

In *Amory v. Amory*, 95 U. S. 186, 24 L. Ed. 428, the defendants alleged that the suit was instituted by the plaintiffs as executors, and under letters of administration issued to them in New York, and that the plaintiffs, as such executors, were citizens of the state of New York. The averment was held insufficient, the court refusing to infer that the plaintiffs were personally citizens of New York. The court said:

"From the language here employed, the court may properly infer that, as persons, the plaintiffs in error were not citizens of New Jersey, as was the defendant."

In other words, the court would infer or presume against jurisdiction, but not in its favor.

In *Martin v. Snyder*, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602, the petition of the defendants for removal of the cause to the United States circuit court alleged "that the controversy in said suit is between citizens of different states, and that the petitioners were at the time of the commencement of this suit, and still are, citizens of the state of Illinois, and that all the plaintiffs were then, and still are, citizens of the state of New York." It was not alleged in the petition that the defendants were nonresidents of the state, and the court did not so infer. So far as diverse citizenship was concerned, the court appears to have had jurisdiction of the case; but, because it was al-

leged that the defendants were citizens of the state of Illinois, the supreme court inferred that they were also residents of the state of Illinois, and that the circuit court was therefore without jurisdiction. Here, again, the court inferred or presumed against jurisdiction, and not in its favor. The presumption that a private corporation is a citizen and resident of the state under whose laws it is organized is not applicable to the citizenship and residence of an individual. *Hanchett v. Blair* (C. C. A.) 100 Fed. 817, 822. In *Black, Dill. Rem. Causes*, § 171, the author, under the chapter title on "Petition and Bond for Removal," discusses the necessary allegations of the petition in relation to citizenship, and says:

"Finally, since the right of removal on this ground is given to the defendant only when he is a 'nonresident' of the state in which the suit is brought, this fact must also appear in the petition for removal."

It is true no authorities are cited as supporting the text, but the author doubtless considered it fully justified by the general principles of jurisdiction, as declared by the numerous cases upon the subject.

My conclusion is that where the jurisdiction of the circuit court depends upon the diverse citizenship of the parties, either the record in the state court or the petition for removal of the cause to the circuit court must show that the defendant is a nonresident of the state where the suit is brought. If this fact does not appear, the state court retains jurisdiction of the cause, notwithstanding the proceedings for removal may have brought the papers in the case to the circuit court. In view of the possibility that the court would so determine this question, the defendant has applied for leave to amend the record so as to show that the defendant is a nonresident of this state. This motion must be denied. The court has no jurisdiction to allow such an amendment. Where a petition for removal in connection with the record in the cause fails to disclose grounds for removal, the docketing of the cause in the circuit court of the United States does not deprive the state court of jurisdiction, and the federal court has no power to grant leave to amend the petition by stating facts that show that the cause was in fact removable. *Powers v. Railroad Co.*, 169 U. S. 92, 101, 18 Sup. Ct. 264, 42 L. Ed. 673; *Murphy v. Gold Co.* (C. C.) 98 Fed. 321. The motion to remand is granted.

In re DAVENPORT.

(Circuit Court, D. Washington, E. D. June 15, 1900.)

1. JURISDICTION OF FEDERAL COURTS—HABEAS CORPUS—DISCHARGE OF STATE PRISONERS.

A federal court has, and should exercise, the power to discharge on a writ of habeas corpus a person held in confinement by state authorities for an act which involves no moral turpitude, and is only claimed to be unlawful because prohibited by a state statute, which, if construed to make such act an offense, is in violation of the constitution of the United States.

2. INTERSTATE COMMERCE—STATE LEGISLATION AFFECTING—CONSTITUTIONALITY.

The authority of a state to enact laws which operate as a restraint upon interstate commerce is limited to measures which are within its legitimate police powers, and are reasonably necessary for the protection of its citizens or their property. A state has no power to forbid traffic in game

imported from another state where it was lawfully killed, and the claim that the prohibition will aid local officers in detecting violations of its game laws is ineffectual to overcome the objection to the constitutionality of such a statute.

Petition for Writ of Habeas Corpus. Case argued and submitted on the petition and return. Petitioner discharged

Forster & Wakefield, for petitioner.

Mount & Merritt, for respondent.

HANFORD, District Judge. By the record in this case it appears that the petitioner, L. M. Davenport, is a citizen of the state of Washington, and is the keeper of a restaurant in the city of Spokane. Upon an information accusing him of violating a statute of this state enacted for the protection of wild game, filed in the superior court of the state of Washington for Spokane county, a warrant in due form was issued out of said superior court, and the petitioner was arrested by the sheriff, and imprisoned awaiting trial. Thereupon he filed his petition in this court invoking the power of this court to release him from imprisonment by a writ of habeas corpus. A writ was issued and served. The sheriff has made a return setting forth the warrant, together with a copy of the information, and an agreed statement of facts upon which the information is founded, in the form of a stipulation signed by attorneys in behalf of the state of Washington and by the defendant's attorneys. The material part of said stipulation is as follows:

"That the said L. M. Davenport is a resident of the city of Spokane, Spokane county, state of Washington, and that he is conducting a restaurant in said city, and that on the 1st day of March, 1900, he had in his possession in said county and state, and offered for sale and sold therein, as a portion of a meal, one quail, and that the said quail was a portion of a box of quail that the said Davenport had purchased in the city of St. Louis, state of Missouri, and caused to be shipped into the state of Washington, and that the said quail, when taken in the state of Missouri, was lawfully taken under the laws of said state."

The statute upon which the prosecution of the petitioner is founded reads as follows:

"Every person who shall offer for sale or market, or sell or barter, any moose, elk, caribou, killed in this state, antelope, mountain sheep or goat, deer, or the hide or skin of any moose, elk, deer or caribou, or any grouse, pheasant, ptarmigan, partridge, sage hen, prairie chicken or quail at any time of the year, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as hereinafter provided." Laws Wash. 1899, p. 278, § 3.

The grounds upon which the petitioner asks for the protection of the federal court are that he is being deprived of his liberty without due process of law, in violation of the fifth and fourteenth amendments to the constitution of the United States, because the act for which he is being prosecuted is not criminal, unless the state law above quoted shall be so construed as to make it a misdemeanor for a restaurant keeper in this state to cook and serve to his customers wild game lawfully captured in another state, and lawfully imported into this state, and, if thus construed, the act is an attempt to restrain interstate commerce, and for that reason void. It is the petitioner's contention that the statute does not apply to sales of

game not killed or taken within this state, or, if the statute is applicable to the case in hand, it is unconstitutional, and in either case he is being imprisoned as if he were a criminal, although the act which is the basis of the charge against him is not *malum in se*, nor a violation of any valid statute.

At the outset, the respondent questions the propriety of this court taking cognizance of the case. It is insisted that the point to be decided touches the sovereignty of the state; that a statute of the state must be construed, and the supreme court of the state is the tribunal specially authorized to determine finally all disputed questions as to the true interpretation and meaning of the state laws, and as to their application to particular cases; that it is a misuse of the writ of habeas corpus for a federal court, having no appellate or supervisory jurisdiction over proceedings of the state courts, to issue that form of process for the purpose of controlling or defeating prosecutions under the penal laws of the state, and for these reasons the petitioner should be remanded, and left to submit all questions as to his rights under the constitution of the United States to be first determined by the state courts, and to apply to the supreme court of the United States by writ of error for redress in case any right which he claims under the constitution and laws of the United States should be denied to him by the courts of the state. I can readily assent to the several propositions advanced by counsel for the state of Washington in this part of their defense as separate and abstract propositions, but to the aggregation, as a conclusion applicable to this case, I do not assent. It is settled by the decisions of the supreme court that in granting or refusing the writ of habeas corpus, when applied for by persons accused or convicted of crimes under state laws, the circuit and district courts of the United States are required to exercise sound discretion, and these courts are not to assume the burden of deciding whether accused persons are guilty or not guilty of acts which are criminal, nor interfere with the state government in the enforcement of its criminal laws, in any endeavor to control the decision of questions of practice, or as to the validity of statutes alleged to be repugnant to the constitution of the state, and this court has steadfastly refused to consider the petitions of persons convicted of such crimes as murder, rape, and embezzlement. *In re Friedrich* (C. C.) 51 Fed. 747; *Id.*, 149 U. S. 70-78, 13 Sup. Ct. 793, 37 L. Ed. 653; *In re Moore* (C. C.) 81 Fed. 356; *In re Considine* (C. C.) 83 Fed. 157. But there is no moral wrong in the act of which the petitioner in this case is accused, and he is innocent of any offense, unless effect be given to the statute so as to deprive him of the right to import from other states supplies for his restaurant which are not in themselves unwholesome nor deleterious to the health, morals, or manners of the people. As the question of first importance in the case is whether the statute upon which the prosecution is based is repugnant to the constitution of the United States, the case is a proper one for the federal court to deal with in the first instance; for, if the state has assumed to enact a law which violates the supreme law of the land, it is the business of the federal courts within the state to protect individuals from being subjected

to prosecutions which amount simply to persecutions, and are violative of the rights guarantied by the national constitution.

It is unreasonable to presume that the legislature of the state of Washington intended to enact a law to prevent the slaughter of game in the state of Missouri, and the title of the statute under consideration shows that its object was to restrain the destruction of wild animals and birds within the state of Washington. Nevertheless the prosecuting officers of the state, and the attorneys specially employed to prosecute this petitioner, insist that the statute above quoted was intended by the legislature to be as broad as its words indicate, and that, within the letter and spirit of the law, it is a misdemeanor to sell within this state birds lawfully bought in another state, where they have been captured and killed at a time and in a manner sanctioned by the laws of that state; and it is their contention that this statute is valid as a police regulation, the purpose of prohibiting the sale within the state of imported game being to prevent evasions of another section of the statute, which prohibits the killing of game within the state, and to make it easier to detect violations of the game laws. It is insisted that the legislature of this state has assumed to make it a misdemeanor for people within this state to have possession of or sell or use articles of food which are wholesome and entirely harmless for the mere purpose of making it easier to enforce the game laws, and that this purpose existing, as supposed, in the legislative mind is potential to validate a statute which but for the particular purpose would be unconstitutional.

This proposition does not appear to me to be sound. In the motive suggested there is no salt to cure the act of unconstitutionality; for if it is legitimate to protect the interests of a few sportsmen, by enacting a law which denies to the many all right to eat imported game, there can be no good reason for denying the power of the state legislature to foster home industry by making laws to prohibit the sale within this state of imported domestic poultry, or beef, or butter. It would certainly be much easier to enforce our local inspection laws, and insure the people against the risk of being defrauded by sale of bad meat or butter, if our markets might be closed to importers of these commodities. But the unconstitutionality of all such local laws in restraint of interstate commerce has been definitely pronounced by the supreme court. Necessity is declared to be the limit of the power of a state in the enactment of laws of this nature. That is to say, mere rules of convenience, which interfere with traffic between states, and which are not necessary as means of self-defense, are void, because they enter within the domain of the power committed by the national constitution to the national government. In the case of *Railroad Co. v. Husen*, 95 U. S. 465-471, 24 L. Ed. 530, the opinion of the court by Mr. Justice Strong contains the following clear statement of the principle applicable to this case:

"It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases,—a right founded, as intimated in *Passenger*

Cases, 7 How. 283, 12 L. Ed. 702, by Mr. Justice Greer, in the sacred law of self-defense. Vide *Neff v. Pennoyer*, 3 Sawy. 283, Fed. Cas. No. 10,083. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. * * * While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws,—it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S. [*Henderson v. Mayor*, etc., of New York, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550], to which we have referred, are very instructive. In *Henderson v. Mayor* the statute of New York was defended as a police regulation to protect the state against the influx of foreign paupers, but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of congress. So, in the case of *Chy Lung v. Freeman*, where the pretense was the exclusion of lewd women, but as the statute was more far-reaching, and affected other immigrants, not of any class which the state could lawfully exclude, we held it unconstitutional."

In their argument counsel for the state have directed my attention to the following authorities, which to some extent support their theory: *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402; *Phelps v. Racey*, 60 N. Y. 10; *State v. Farrell*, 23 Mo. App. 176; *State v. Schuman* (Or.) 58 Pac. 661; *People v. O'Neil* (Mich.) 68 N. W. 227, 33 L. R. A. 696; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259; *Com. v. Savage* (Mass.) 29 N. E. 468; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793. I fully assent to the doctrine of these decisions, holding that it is competent for state legislatures to enact laws for the protection of game, and I do not question the decision of the supreme court of the United States in the case last cited, holding that the legislature of a state has the constitutional power to entirely prohibit the killing of game within the state for the purpose of conveying the same beyond the limits of the state; for it is true, and it is an elementary principle, that the wild game within a state belongs to the people in their collective sovereign capacity. Game is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic or commerce in it. But the power of a legislature in this regard only applies to game within the state which is the property of the people of the state, and no such power to interfere with the private affairs of individuals can affect the right of a citizen to sell or dispose of as he pleases game which has become a subject of private ownership by a lawful purchase in another state. This decision of the supreme court does not, directly or indirectly, support the proposition that the legislature of one state has the constitutional power to prohibit traffic in game imported

from another state; and the other cases cited by counsel, which do seem to sustain their contention, are not binding as authorities in this court, and as they do not, in my opinion, rest upon sound principles, I must decline to defer to them.

It is my conclusion that the statute of the state under which the petitioner is being prosecuted, if applicable at all to the facts of his case, is unconstitutional and void, and therefore the petitioner is restrained of his liberty in violation of the constitution of the United States, and it is the duty of this court to set him at liberty. Petitioner discharged.

WINTERS v. DRAKE.

(Circuit Court, N. D. Ohio, W. D. June 12, 1900.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—PLEADING.

The rule that a cause is not removable, as one arising under the constitution or laws of the United States, unless such fact appears from the plaintiff's pleading, applies only to cases in which the federal question is one inhering in the controversy itself, so that if raised by the defendant, and determined against him by the state court, he may remove it for review by appeal or writ of error to the supreme court; and such rule cannot be so extended as to permit a plaintiff to prevent the removal of a suit against a receiver of a federal court by omitting to state in his pleadings by what court defendant was appointed receiver.¹

2. PLEADING—CONSTRUCTION OF PETITION—FACTS STATED BY IMPLICATION.

A declaration alleging that the defendant was duly and legally appointed receiver of a railroad, and, as such receiver, by order of the court took possession of and operated said road, may be taken as stating, by implication, the court by which the defendant was appointed receiver, according to the fact.

3. REMOVAL OF CAUSES—FRAUD UPON FEDERAL JURISDICTION—SUPPRESSION OF FACTS IN PLEADING.

The omission of a plaintiff in his declaration in an action against a receiver to state that the defendant was appointed such receiver by a court of the United States, where such was the fact, and the absence of such statement is relied upon to prevent the removal of the cause, may fairly be considered as a fraud upon the jurisdiction of the federal court, whether so intended or not.

On Motion to Remand to State Court.

The plaintiff's petition, in its caption and in the body of it, as also the summons or writ, sues the defendant "as the receiver of the Cincinnati, Jackson & Mackinaw Railway Company," but nowhere states the fact that he was appointed receiver, or that he holds and operates the road by order of the United States circuit court for the Northern district of Ohio. The defendant in proper time filed in the state court his petition for removal, setting forth all the requisite jurisdictional facts, and, among others, "that the suit is one arising under the constitution and laws of the United States, to wit, that said suit is against a receiver appointed by a court of the United States," he having been duly appointed by the circuit court of the United States for the Northern district of Ohio, and that he did at the time of the alleged injury, and does now, hold and operate the railroad as such receiver, and not otherwise. The motion to remand is based on the ground that it does not appear by the record in the plaintiff's statement of her case that the defendant is a receiver

¹ Jurisdiction of suits against receiver of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.

appointed by a federal court, nor otherwise that it is a case arising under the constitution and laws of the United States, than by the petition for removal itself, which is not permissible.

Snook & Savage and W. F. Corbett, for plaintiff.

Swayne, Hayes & Tyler and Doyle & Lewis, for defendant.

HAMMOND, J. It must be conceded that the supreme court of the United States, in removal cases, has carried the doctrine that the jurisdiction of the subject-matter must appear on the face of the plaintiff's own case, and cannot be injected into the record by the defendant in making his case for removal, to such extreme length that our jurisdiction here is very doubtful. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Land Co. v. Brown*, 155 U. S. 488, 15 Sup. Ct. 357, 39 L. Ed. 233; *Railway Co. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048; *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; *Railroad Co. v. Barbour*, 19 C. C. A. 546, 73 Fed. 513. And yet it can scarcely be conceived that it is the intention of those decisions to apply the doctrine to a case like this, which presents in such simple form the opportunity, and its use, of defrauding the federal court of its rightful jurisdiction by the designed concealment of the jurisdictional fact that the defendant is the receiver of the federal court. The omission to describe him as such could have, in law, no other effect than that. It takes advantage of the indulgence of an act of congress which allows receivers of federal courts to be sued without leave of the courts, to abuse it, by subjecting such receivers to a jurisdiction they might avoid but for that abuse. Act Aug. 13, 1888, c. 866, § 3 (25 Stat. 436).

Certain it is that it was not the intention of congress to so extend the indulgence. It had the simple purpose of allowing plaintiffs to sue receivers without the delay and expense of obtaining leave from courts often not accessible for that purpose without it. But there is nothing to indicate a surrender so disastrous to all control of those dealing with the receivers, and so enormously embarrassing to the federal courts in the administration of their receiverships, as the contention of the plaintiff in this case, if sustained, would impose. Just think of it. A plaintiff may, if that contention be sound, of his own arbitrary choice deprive every federal court, without exception, of any possible jurisdiction of his suit for damages against a federal receiver. Not even the supreme court of the United States, by writ of error or appeal, could revise his recovery in any respect whatever. And this he could do by the simple device of omitting all mention of the fact in his pleading that he was suing a federal receiver. For, be it remembered, the only usefulness of that fact, in a case like this, is to give the federal court jurisdiction by removal. If the omission may defeat that right, it is a final and fatal defeat. If the defendant cannot set up the fact in his petition for removal, and claim the right of federal jurisdiction, then and there, as one given to him under the constitution and laws of the United States, he can never set it up elsewhere or in any way, and receive that benefit. If in the state court he plead it or set it up in his answer, *cui bono*? It is an immaterial plea or issue,

and he could take nothing by it. It is a mere waste of paper to plead it, for he could not by such a plea transfer the case to a federal court, nor ask any relief because of the fact. It does not go to the merits of the controversy, pertaining only to the matter of jurisdiction, venue, or forum in which the action is to be tried. Except the desired change of forum, there is nothing else involved in the right he claims under the federal laws, and no other federal question, so called. And here, it seems to me, lies the plain distinction between this case and those relied upon by the plaintiff.

Those are cases where the right claimed under the constitution and laws of the United States is of that substantial character which belongs to or inheres in the controversy itself, as a part of its merits,—one that, if the plaintiff do not develop in his case as he pleads it, the defendant may nevertheless plead or set up in his answer; and, although he may not remove the suit to a federal court, in limine, he may, if the federal right be denied him, remove that to the supreme court of the United States from the state court of last resort, and there have it determined by a federal tribunal. But should those decisions have any application to those cases involving a right or claim under the constitution and laws of the United States, like this, where the remedy of a writ of error or appeal to the supreme court of the United States would be unavailing to settle the rightfulness of the claim as one arising under the constitution and laws of the United States? I think not. We must here, however, guard against any possible confusion in the meaning of what has just been said. If the state court should refuse this removal, as I understand is the case, and go on, as it may, with the litigation, the very question we are now considering on this motion to remand would arise, and might be taken from the state court of last resort to the supreme court of the United States. That is to say, the question would be presented to the state and federal supreme courts, respectively, whether or not there would exist a right of removal where the averment that the defendant was a federal receiver had been omitted from the plaintiff's petition and was to be found only in the defendant's removal petition. But that is not the unavailing writ of error referred to in the above-suggested test.

Again, if this motion to remand should be granted, there could be no writ of error from our judgment in that behalf, and the jurisdiction of the state courts would indeed become final. But that is by force of the statute which denies a writ of error from such judgments for the very purpose of making the jurisdiction of the state courts conclusive. Act Aug. 13, 1888, c. 866, § 2, last clause (25 Stat. 435). And here it may be remarked that this feature of the removal acts makes it all the more necessary that the right of removal should not be unduly impeded by carrying too far the doctrine contended for by the plaintiff. It is desired, also, to get away from that possibility of confusion in applying the test of our jurisdiction above suggested, and which seems, to my mind, so conclusive in its favor.

Let us take the case of *Tennessee v. Bank of Commerce*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, for illustration of our meaning. There the federal right relied upon by the defendant bank was that of

an inviolable charter contract of exemption from taxation. While it was held that neither by original jurisdiction nor by removal could a circuit court of the United States acquire jurisdiction unless that fact should appear by the plaintiff's statement of his own claim, it was left open to the defendant banks to set up the exemption in their defense to any suit brought in the state court. And Mr. Justice Gray, quoting from another case, especially calls attention to this right of the defendant to invoke a federal decision of his federal question by his own pleading, in the following words:

"In support of this view it may be added that the defendant in such case is not without remedy in a federal court; for if he has pleaded and relied on such defense in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here." 152 U. S. 462, 14 Sup. Ct. 657, 38 L. Ed. 514.

This is precisely what the Tennessee banks subsequently did, and afterwards their claim of charter exemption was decided against them by the supreme court of the United States. *Bank of Commerce v. Tennessee*, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645; s. c. 163 U. S. 416, 16 Sup. Ct. 1113, 41 L. Ed. 211. Whenever that remedy is not open to a defendant, the rule that he cannot remove his case unless the federal question appears in the plaintiff's statement of his own claim does not apply, in my judgment, since it would come to the absurd result that the plaintiff could exclude him from the federal court altogether by his simple volition, and a careful omission from his petition or declaration of the federal fact, if it may be called so.

Now, if no attempt had been made to remove this case, and the defendant had pleaded and relied on the fact that he was appointed by a federal court as the receiver of a railroad company whose affairs were by that court being administered in foreclosure or insolvent proceedings, the plain answer would have been that nevertheless he was liable to suit in the state court, which is true. It is no defense to a suit for personal injuries that the defendant is the receiver of a federal court, and it presents, and can present, no important issue to be decided against him, nor for him, as to that matter. If the plea presented an issue of fact, as to whether he had or had not been appointed the receiver of a federal court, a decision of that issue in his favor would do him no good, for he could take nothing by it; and he could be no worse off by a decision of that issue against him. It would be what the old pleaders call an "immaterial issue." In no event could he by such a plea remove the merits of his case to a federal court by writ of error. And yet the supreme court has decided that that is the federal fact which constitutes the case one arising under the constitution and laws of the United States, and entitles the defendant to federal jurisdiction or to a federal forum. *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. How can he secure this, if he may not state the fact in his petition for removal? If it be insisted that he may plead it, and that, if the plea goes against him, he may, on writ of error to the supreme court, if that be possible, have the decision against him reversed, then there is only established the fact that he is a receiver of a federal court. It does not bring the plaintiff's suit for injuries, and the question whether the

receiver be liable, and, if liable, for what amount of damages, before any federal tribunal for its determination; and that is the only right which is important to him, and which he can never assert in any way if it be denied to him to assert it in his petition for removal when the plaintiff fails to state it in his cause of action.

This case is more like that of *Railway Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132, than those cited in favor of the plaintiff's contention; the leading one being the *Bank of Commerce Case*, already cited, and another, most relied upon, being the case of *Railway Co. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048, which is cited and distinguished in the *Cody Case*, *supra*, as not being out of harmony with it. In the *Cody Case* the defendant was a federal corporation, and as such entitled to remove the suit. The plaintiff had, as in this case, artfully omitted to state that the defendant was a federal corporation; using very much the same language as that used in the pleading of the plaintiff here. But it was held that the *Skottowe Case*, *supra*, did not apply, and that the defendant company might set up its federal character in its petition for removal.

This view renders it quite unnecessary to consider the question whether it operates as a fraud upon the jurisdiction of the federal court to omit the averment that the defendant receiver was appointed by the federal court, or whether the averment of the plaintiff's declaration that "the defendant, F. B. Drake, was duly and legally appointed receiver of said corporation, and, as such receiver, by order of the court took possession and control," etc., "and on his appointment as such, under and pursuant to the order of the court, took charge of said railroad," etc., "and immediately begun to operate the same for the purpose of carrying passengers and freight, and has ever since operated," etc., imports into the plaintiff's statement, necessarily, the omitted words, viz. "by the United States circuit court for the Northern district of Ohio." But it may be well enough to remark that by analogy from other instances the omitted words might very well be taken to be necessarily implied, as, when it is averred that one is sued "as administrator of the estate of A. B.," it is necessarily implied that he was duly and legally appointed by whatever court had power to appoint, and by that court which in fact did appoint him administrator. It is true that either of more than one court might have the power of appointment, and likewise the administrator may have been in fact appointed by more than one court, as might a receiver. Still, in aid of the jurisdiction, where the character or capacity is sufficiently, though not fully, described, it will be implied, according to the precise fact, which is only imperfectly stated, or, on the other hand, mere surplusage may be rejected in aid of the suit, if the whole declaration shows the true intentment. *Curtis v. Bowrie*, 2 McLean, 374, Fed. Cas. No. 3,498; *Braden v. Hollingsworth*, 8 Humph. 19. The court appointing the executor or administrator need not be named in the pleading, but may be implied even where the stricter rule applies against a representative plaintiff. 8 Enc. Pl. & Prac. 667, citing *Langdon v. Potter*, 11 Mass. 313; *Brown v. Nourse*, 55 Me. 230; *Ellis v. Appleby*, 4 Ry. & Corp. L. J. 462; *Champlin v. Tilley*, 3 Day, 305; *Jordan v. Hamlink*, 21 D. C. 189. The defendant's representative ca-

capacity may be stated less technically and precisely than a plaintiff's, and, of course, being largely a matter of evidence, as to him the implication in pleading is the more readily indulged. 8 Enc. Pl. & Prac. 683. The rule permitting implication in pleading as to the name of the court appointing an administrator, according to the fact, adjusts itself still more readily to the case of suits against receivers, though no case has been found ruling the point.

As to the question of intentional fraud upon the jurisdiction of the federal court by omitting to describe the defendant receiver as one appointed by a federal court, it may be said that, whether the omission be intended to prevent a removal or not, the effect is, if the plaintiff's contention be well founded, just the same, and the removal becomes impossible. In such cases the fraudulent intention may be conclusively assumed, upon the familiar principle that one always intends, in law, the necessary consequences of that which he does, and will not be heard to aver to the contrary. Mr. Justice Miller states the proposition briefly when he says, in *Wilson v. Bank*, 17 Wall. 473, 486, 21 L. Ed. 728, that "the general legal proposition is true, that where a person does a positive act, the consequences of which he knows beforehand, he must be held to intend those consequences." One who makes a voluntary conveyance will be held to intend the hindrance it brings to his creditors, although he did not realize the fraudulent character of the act, or know of the conditions which in law make it fraudulent. *Mitchell v. Beal*, 8 Yerg. 134; *Freeman v. Pope*, 5 Ch. App. 538; *Id.*, 9 L. R. Eq. 206; *Bump, Fraud. Conv.* 70. So, if one, without any right or reasonable ground to sue another, joins him as a home defendant with one against whom he has a cause of action, being a citizen of another state, and the joinder has the effect to defeat the right of removal to a federal court, he commits a fraud upon that jurisdiction, although he may not have been aware of the effect, or may not have had it in his mind to defraud the jurisdiction, as he does in fact. Certainly he will not be allowed to profit by his ignorance in that regard, and take the benefit of his act, to the detriment of the adversary party. He stands in the same attitude as if he had deliberately and artfully done the act of which he desires to take advantage. *Arrowsmith v. Railroad Co.* (C. C.) 57 Fed. 165; *Arapahoe Co. v. Kansas Pac. R. Co.*, 4 Dill. 277, Fed. Cas. No. 502; *Landers v. Felton* (C. C.) 73 Fed. 311. Mr. Justice Miller said in one of these cases last cited, "We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right" (the right of the removal). This motion to remand might well be denied, therefore, on the ground that the omission to describe the defendant as a receiver appointed by the United States court operated to defraud the defendant of his right of removal, whether so intended or not. Motion denied.

ACTIENGESELLSCHAFT VEREINIGTE ULTRAMARINE FABRIKEN,
VORMALS LEVERKUS, ZELTNER & CONSORTEN
IN NURNBERG, v. AMBERG.

(Circuit Court, D. New Jersey. May 7, 1900.)

UNFAIR COMPETITION—PACKAGES AND LABELS—RIGHT TO EXCLUSIVE USE.

To entitle a manufacturer to protection in the exclusive use of the style of package and label adopted by him as to shape, colors, and general appearance, it must appear not only that he was the first to use such dress for his goods, but that its use by him has been general, continuous, and exclusive, so that it has become a distinguishing mark of his products.

In Equity. Suit for relief by injunction against unfair competition in trade. On final hearing.

Frederick W. Holls, for complainant.

Louis C. Raegener, for defendant.

KIRKPATRICK, District Judge. The complainant herein is a corporation engaged in the manufacture of ultramarine wash blue and coloring matter, in the city of Nuremberg, in the kingdom of Bavaria, which it alleges that it and its predecessors have continuously since 1851 marketed in a box of a particular kind, size, and style, thereby giving to their product a distinct and well-marked individuality, which differentiated the same from all other wash blues, by whomsoever made, and caused the same to be widely and generally and favorably known to the trade by such distinguishing marks. The bill charges that the defendant, with knowledge of these facts, and with intent to mislead the public, and induce them to buy his inferior product of wash blue, has, without complainant's consent, put upon the market, in substantially the same dress, his packages of ultramarine wash blue, thereby creating an unfair competition in trade, whereby the complainant is injured in its business, and the public deceived. Injunctive relief is prayed for. The package to the use of which the complainant claims the exclusive right consists of a box about $4\frac{1}{2}$ inches long, $3\frac{1}{2}$ inches wide, and $1\frac{1}{2}$ inches deep. It is made of pasteboard, covered on the outside with blue paper having numerous gold stars printed upon it, and having the edges of both the box and its lid bordered with gold-colored paper. Upon the outside and top of the lid of each box is affixed a label printed in blue ink upon white ground. The words "Nuremberg Ultramarine Works" are printed thereon in blue ink, and the words "Trade-Mark" and "Schutzmarke" printed in red ink, and also in undulating lines. The label is divided into three panels inclosed in lines printed in blue ink, and forming parallelograms. Directions for its use are printed in blue ink in the outer two of the three panels, while within the large middle division, besides the printing and undulating lines above referred to, is a coat of arms consisting of three red shields, containing the monogram "U N" and the word "Germany" printed in red at the bottom of the label. Upon one end of complainant's box there is affixed another label, containing a shield and monogram "U N," with the word "Schutzmarke" printed in blue ink on white paper; and at the opposite end of the box

there is another label, printed in blue and gold, upon white paper, containing representations of gold medals said to have been awarded at World's Fair held in Paris in 1867. The defendant admits that, so far as appearance goes, his package, with its cover and labels, would be sufficiently similar to that of complainant to entitle it to the relief prayed for, but he denies that the complainant has any exclusive property right in the box and label sued on. The issue made by the parties is one of fact. The burden of proof is on the complainant to establish its right. To entitle the complainant to a decree, the court should be satisfied that the complainant, or some one through whom it claims, was the first to adopt this particular style of dressing for ultramarine wash blue, and that since such adoption its usage by them has been general and continuous and exclusive. Their product must have become known to the general trade by this distinguishing mark, so that the use of it or its semblance by other dealers would have created confusion in the minds of intending purchasers, and they thereby induced to buy the goods of another believing them to be complainant's product. The testimony of Johannes Zeltner (who speaks from information only) tends to show that the complainant began the use of this particular style of packing for its goods in 1851, and has used it continuously since. He also swears that to his knowledge it was not used by any other dealers, but he fails to state what his opportunity for observation has been. On the other hand, Henry Merz, Margaretha Lautenschlager, Leon Hirsch, and Maurice D. Eger, importers, manufacturers, and dealers in ultramarine blue, all of whom reside in the United States, swear positively of their own knowledge that boxes similar in size and decoration to that described in complainant's bill have for nearly 20 years been imported into the United States from Germany and France, and that Heller & Merz, American manufacturers, have also used the boxes and labels for many years. Henry Merz, one of defendant's witnesses, testifies that he has been a manufacturer and dealer in wash blue in the United States; that for upwards of 20 years he has been acquainted with the trade, and that he has never known the imported product to be received into the United States except in boxes substantially similar in size and style of decoration to those used by complainant. He mentions names of several foreign manufacturers other than complainant, who, during all the 20 years, have been using the same style of dressing for their goods. Mr. Merz also testifies that the firm of which he was a member used for 18 years similar boxes and labels for packing ultramarine wash blue manufactured by them in the United States. Leon Hirsch, who has been for 18 years importer of ultramarine wash blue into the United States, buying from merchants in Germany, Saxony, and France, swears that all goods handled by him were packed in blue boxes, with gilt stars and edges, marked with a white label printed in blue, with smaller labels on the ends containing the word "Trade-Mark" and a gilt representation of gold medal, all substantially like that used by complainant. To the same effect is the testimony of Margaretha Lautenschlager and Maurice D. Eger. The evidence, taken as a whole, fails to satisfy me that the complainant has any

exclusive right to the use in this country of the box and labels described in its bill, or that said boxes and labels have become distinguishing marks by which its ultramarine wash blue has become known to the trade, or that their use by the defendant creates any confusion in the trade whereby dealers or purchasers or the general public are deceived. The bill should be dismissed.

McGOURIN v. UNITED STATES.

(District Court, N. D. Florida. June 9, 1900.)

1. COMMISSIONER'S FEES—METHOD OF COMPUTING FOLIOS IN DOCKET ENTRIES.

An order of court requires each commissioner to keep a docket, in which should be entered the proceedings in a cause. Where it appears that these entries are not a mere recital, but a chronological entry of steps taken in the cause, the commissioner is entitled to charge 15 cents per folio, counting each separate entry with relation to a distinct step or proceeding in the case as a separate folio, although they may relate to the same case and be entered under the same caption.

2. SAME—PER DIEM FOR HEARING.

Paragraph 3, § 847, Rev. St., provided, "For hearing and deciding on criminal charge, five dollars a day for the time necessarily employed." Such section does not suggest any particular description of criminal charge for which such per diem is chargeable, and it must be accepted in its general sense, and include hearing on capias and bench warrant.

3. SAME—FEES FOR COPIES OF SUBPŒNAS.

A rule of court requiring the clerk to make copies of all process issued by the court, including subpoenas for witnesses, and providing that all persons on whom process is served shall have a copy thereof, is binding on a commissioner, and he is entitled to fees for copies of subpoenas issued by him in criminal cases to be heard before him.

4. SAME—UNEXECUTED WRITS.

If a warrant of arrest is returned by the marshal as "Not found," this is such a return as should be entered by the commissioner, and is a proper claim against the government.

5. SAME—FILING COPIES OF AFFIDAVIT.

A commissioner is entitled to charge the usual fee for filing copies of affidavits taken before other commissioners in the district, and which have been attached to warrants and returned before such commissioner.

6. SAME—VERIFICATION TO DEPUTY MARSHALS' ACCOUNTS.

Up to the time a commissioner is notified of a change in the regulations relative to the authentication of deputy marshals' accounts for charges and fees in cases heard before such commissioners, he is entitled to charge for fees earned relative to oath and jurat to such accounts, which had been theretofore required by regulations from the department.

7. SAME—COPIES OF AFFIDAVITS.

The act of August 18, 1894, requires all officers or magistrates issuing warrants to attach thereto a certified copy of the complaint; and, where this is done by the commissioner, he is entitled to the statutory fee for the copy.

8. SAME—SEPARATE COMMITMENTS FOR DEFENDANTS JOINTLY ARRESTED.

The circumstance that two or more defendants are arrested under the same warrant does not necessarily make it the duty of the commissioner to commit the said defendants jointly under the same temporary commitment. An allowance for separate writs, when issued, is deemed proper; and where the defendant has been brought before a commissioner, and committed pending the hearing, it is not necessary to issue another temporary commitment, where the hearing is continued, if the defendant is recommitted to the custody of the same jailer pending a further disposition of the cause.

9. SAME—PER DIEMS IN POOR-CONVICT CASES.

The act of May 28, 1896, prescribing a new set of fees for commissioners, applies only to the new set of commissioners to be appointed July 1, 1897; and the old fee bill applied to commissioners up to that time.

Buckner Chipley and Henry Bellinger, for petitioner.

John Eagan, U. S. Dist. Atty.

SWAYNE, District Judge. The petition shows that the petitioner has complied with all the requisites of the act of congress of March 3, 1887, conferring jurisdiction on this court to hear causes of this nature. The petition, having been dismissed before the entry of final judgment, was revived under the act of February 26, 1900, and now comes on for final hearing on petition, demurrer, plea, and agreement of facts. Taking up the schedules, as they are presented in the petition and demurred to in toto by the district attorney, I have arrived at the following conclusions relative to the legal principles applicable thereto:

Schedule A includes charges for docket entries relative to the issue of process, return, date of taking affidavit, date of hearing, disposition of cause, etc., in compliance with the order made by this court on the 5th day of May, 1881, made by Circuit Judge Pardee, whereby commissioners are required to keep such a docket, in which shall be entered the time of taking the affidavit, the issuing of process, the hearing, and orders relative to bail and discharge and binding over. Petitioner contends that, as each order or proceeding is entered in a separate paragraph, he is entitled to be paid at the rate of 15 cents per folio for each of such entries, under paragraph 8, § 828, Rev. St. which reads, "For entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, certificate, return or report, for each folio, fifteen cents" (which act is made applicable to commissioners by paragraph 7, § 847, Rev. St.), "and for any other service the same compensation as is allowed to clerks for like service."

Section 854, Rev. St., provides:

"The term 'folio' in this chapter shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty shall not be counted, except where the whole statute, notice, or order contains less than fifty words."

In the case of *U. S. v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273, the supreme court held:

"A commissioner of a circuit court is an officer of the court, authorized by law, and is entitled to his fees * * * for making entries on the docket, in various cases, of the name of an affiant, his official position, if any, date of issuing warrant, name of defendant and witnesses, and final disposition of the case, when required by rule of court."

And the same court, in passing on the construction of paragraph 8, § 828, Rev. St., in *U. S. v. Kurtz*, 164 U. S. 50, 17 Sup. Ct. 15, 41 L. Ed. 347, relative to the making up of final records, holding such to be but an instrument, in connection with analogous entries to the one in litigation under this schedule, says:

"By his method of computation the clerk charges for each entry many of which are less than a dozen words in length, as for one hundred words.

This may be proper where the charge is made under the first clause of the paragraph, 'for entering any return, rule, order, etc.,' upon the journals of the court."

See, also, *Cavender v. Cavender*, 10 Fed. 828, 3 McCrary, 383. This question has been adjudicated before by this court. See *Marsh v. U. S. (D. C.)* 88 Fed. 879.

In view of these decisions, my attention has been called to a decision of the comptroller (In re Cowles, 5 Dec. Compt. 120), which, together with a former decision of the comptroller (In re Speed, 1 Bowler, 197), are the only cases I have been able to find bearing on this question. After reading the latter decision over carefully, I am unable to find any reference to the case of *U. S. v. Kurtz*, although the latter was decided in October, 1896, and the former case in September, 1898. The comptroller either was unacquainted with this case, or chose to ignore the latter clause in the Kurtz Case as obiter dicta; but, even conceding that such is the case, it seems to me that in a decision of as far-reaching consequence as this one of the comptroller, an opinion of the supreme court should be entitled to some consideration, or, at least, comment. In the Cowles Case the comptroller says:

"If the contention of the clerk, in the broad sense in which he asserts it, is correct, that he is entitled to a fee of 15 cents for every entry he may make in making up the record in a cause concerning a rule, return, order, continuance, judgment, decree, or recognizance, regardless of the number of words in such entry, then no meaning is attached whatever to the words, 'for each folio, fifteen cents.'"

The comptroller seems to misconstrue the meaning of the word "entry." In the making up of records, especially journal entries, the entry is the only evidence of a rule, order, return, etc. So far as the statute relative to fees is concerned, the entry is the thing itself. It is not an entry concerning a rule, but is the entry of the rule and order itself. It is certainly true that congress intended to attach meaning to these words.

In the practice of the court it has never been contended that a caption was essential to the separation of entries, in order to make such distinct and independent. The officers charging these fees have never admitted, and in reason could not admit, that because separate matters referring to or embodying separate proceedings were collected under a caption, merely descriptive of a cause then pending before the court, thereby fixed and solidified such entries into a single record. If such entries are properly separated into paragraphs, so that they can be distinguished as applicable to certain proceedings, they seem to me to be as separate and distinct as though the same caption were interpolated at the beginning of each of such entries. The comptroller seems to hinge his decision on the question of separate or common caption, but I am unable to see the nice distinction drawn by him. The commissioner's docket is to this court what the journal is to the clerk. The ruling of the supreme court is entirely applicable to all the facts relative to these items, and hence govern entirely. In the finding of facts filed in this cause a specimen of such docket entries is set out in full, taken

from an actual entry made, and to me fully bears out the contention of the petitioner relative to the separation of such entry.

Schedule B: Paragraph 3, § 847, Rev. St., provides, "for hearing and deciding on criminal charge, five dollars a day for the time necessarily employed." The statute does not provide any description of criminal charges such as are properly brought before a court, leaving the question for judicial interpretation. It is my opinion that when a prisoner is brought before a commissioner in accordance with law who stands charged with the commission of a criminal offense against the United States, and the commissioner is thereby called upon to exercise a judicial function of his office, in whatever manner this may be, whether to determine probable cause for binding him over, to admit him to bail, to discharge him on bond, or to commit him temporarily pending further investigation, he has thereby complied with the above provision, and is entitled to his per diem. When the district court is not in session, a commissioner may properly take jurisdiction to fix bail for a prisoner under arrest upon a bench warrant or *capias* issued upon an indictment found before a federal court; and if the deputy marshal who makes the arrest carries the man before the commissioner, it is the commissioner's duty to fix the amount of bail, and, in default of bond, to issue final mittimus, which act is clearly judicial. In *U. S. v. Jones*, 134 U. S. 483, 10 Sup. Ct. 615, 33 L. Ed. 1007, the supreme court held:

"The decision of a commissioner of the circuit court upon a motion for bail and the sufficiency thereof * * * are judicial acts, on the hearing and deciding of criminal charge, within the meaning of Rev. St. § 847, providing for per diem compensation."

See, also, *Harper v. U. S.*, 21 Ct. Cl. 56, and *Rand v. U. S.* (D. C.) 36 Fed. 671.

And, indeed, this interpretation seems also to have been accepted by congress in framing the provision in the act of May 28, 1896, providing a new schedule of fees for the commissioners. It appears from the schedule that all these per diems were earned and charged before the proviso in said act became effective, to wit, July 1, 1897. Item 3 in said schedule differs from the other items in this: that it is claimed that a per diem is due the petitioner for the hearing on a continued hearing of a criminal charge then pending before him. The account states that the continuance was necessary to obtain the attendance of witnesses, and, in the absence of proof to the contrary, the court feels bound to allow this item.

In Schedule C the petitioner claims fees at the rate of 10 cents per folio for making copies of subpoenas issued for the attendance of witnesses before him in criminal cases pending and to be heard. Rule 6 of the rules of practice of this court provides:

"All process of this court shall be served by the marshal or his deputy in the same mode and manner that a like process of the state court is directed by law of the state of Florida to be served, unless a different mode of service is required by the laws of the United States or the rules of this court. * * * and the clerk shall, at the time of issuing every process, make as many copies of the same as there are persons to be served, marked "A true

copy," and the same shall be delivered to each and every person on whom service is made by the marshal or his deputy, and return thereof indorsed on the original writ, which shall speedily be returned into the clerk's office."

In the case cited above (*U. S. v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273) the court held that the commissioner was an officer of the court which appointed him, and that "a commissioner is entitled to a fee for making and certifying copies of subpœna when required by rules of court." When the commissioner issues a subpœna, it is the process of the court, and is returned and filed by the clerk with all the papers. The contentions of the commissioner in issuing process are exactly analogous to those of the clerk, and although the above-quoted rule does not in terms apply to the commissioner, yet it seems a fair intent in framing these rules to provide that all process should be served by the marshal, who should receive with the original process as many copies as there were persons to be served, and I am of the opinion that the term "clerk" also means "commissioner." There is no other method in the state of Florida for making service of subpœna *ad test.*, except by copy, and hence I conclude that the petitioner rightfully prepared these copies of subpœnas, and is entitled to charge therefor.

Schedule D: The petitioner claims compensation for filing and entering the return of process upon which no service had been effected in criminal cases in which warrants had been issued, but which were returned into the commissioner's court with such fact indorsed thereon. The return of a writ to the court or officer issuing the same is an act which does not depend on the varying circumstance of its execution. If an execution is returned "*Nullum bonum*," or the warrant or summons "*Not found*," this is a return; and a fee for the entry of such return and the filing of process is a proper claim. *Faucett v. U. S.*, 26 Ct. Cl. 154; *Marvin v. U. S. (C. C.)* 44 Fed. 405; *Goodrich v. U. S. (D. C.)* 42 Fed. 392; *Clough v. U. S. (C. C.)* 47 Fed. 791; *In re Gourdin (D. C.)* 45 Fed. 842; *Rand v. U. S. (D. C.)* 48 Fed. 357; *U. S. v. Rand*, 3 C. C. A. 556, 53 Fed. 348; *Hallett v. U. S. (C. C.)* 63 Fed. 817; *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. 743, 35 L. Ed. 388.

Schedule E: The petitioner claims fees for filing copies of complaints made before other commissioners, who had issued warrants thereon with said copies attached, and which were returned before the petitioner to be heard. This copy of the original affidavit is the foundation of the jurisdiction of a commissioner other than the one taking the affidavit. It is not properly a part of the warrant, but is merely attached to the warrant, in order to be kept with the same and go into the hands of the proper commissioner, who should then file the same, together with the return of the warrant, and proceed to dispose of the case. It is no contention on the part of the government that a filing fee of 10 cents for each paper in a case is not proper, and the same has been invariably allowed.

Schedule F: The petitioner claims fees for administering oaths to deputy marshals to accounts for services in cases disposed of before the petitioner prior to September 30, 1895, and for certificates to original and duplicate of each of said accounts. The petitioner claims that the same is according to practice then prevailing and the

regulations of the department of justice. The supreme court, in *U. S. v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273, decided January 7, 1895, held that:

"A commissioner is entitled to his fee for administering oaths to deputy marshals to verify their accounts for services, when the regulations of the department of justice requires such officers to certify on oath that their accounts rendered to the marshal are correct."

As near as I can ascertain, it was some months after this before the department changed this regulation relative to the rendition of these accounts, and it went into effect after these fees had been earned; hence, under the ruling in the above case, these fees are proper.

In Schedule G the petitioner claims compensation for entering on his docket certain orders of continuance made in criminal cases disposed of before him. This charge seems to be in addition to the ordinary charge for entries in his docket as set out in Schedule A. I think such entries, where the order to that effect has been made, are very essential to the proper conduct of the case. The docket should certainly show such continuance, where the fees of witnesses, the deputy marshal, and the commissioner are to some extent dependent on such continuance, and the commissioner's fee therefor is proper under the ruling set out in Schedule A. See *Heyward v. U. S. (D. C.)* 37 Fed. 764.

In Schedule H the petitioner claims compensation for making copies of affidavits taken before him in criminal cases, which copies were attached to the warrants issued thereon, in order to give jurisdiction to hear the cause to the nearest commissioner to the place of arrest. The act of congress of August 18, 1894, says:

"It shall be the duty of the marshal, his deputy or other officers to take the defendant before the nearest circuit court commissioner * * * for a hearing, commitment or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint." 28 Stat. 416.

It makes little difference whether the commissioner was in doubt as to the place where arrest was to be effected, or whether he knew that the warrant would be returned to him. It should be the invariable practice of the commissioners to attach copies of the affidavit to the warrant, as a defendant fleeing from justice might then be returned by the deputy marshal, and, if arrest is effected within the judicial limits of his district, the prisoner may thereupon be taken before the nearest commissioner. This law seems mandatory upon the commissioner, and his fee for such copies at the rate of 10 cents per folio should be allowed.

In Schedule I the petitioner claims compensation for taking testimony and making transcript of same under rules of court in criminal cases disposed of before him, which were disallowed by the accounting officers, who alleged the same to be excessive; but, there being no showing to this effect, the oath of the petitioner and the approval of his accounts must be accepted as binding on this court, and this item will be allowed.

Among the items contended for by the petitioner in Schedule J is a fee for issuing separate commitments, where two or more persons

are arrested on the same warrant. The accounting officers contend that only one is necessary. There may be many circumstances which would render such commitment necessary or reasonable, and I am unwilling to lay down a rule for the guidance of the commissioners in this respect. It would be just as reasonable to say that all persons brought before a commissioner on any day should be committed under one commitment. I think this matter should be left within the sound discretion of the commissioner as a federal officer, and should not be open to review either by the accounting officers or the court, and the commissioner's fees for such commitments are allowed.

In item 2 the petitioner claims compensation for issuing two or more temporary commitments to hold the prisoner pending final examination. Where the further continuance is rendered necessary, the original temporary commitment is all that is necessary to hold the defendant, as he may be taken from the jail and remanded without further writ,—a temporary commitment not being fully executed until the final disposition of the case; and I think any further writ unnecessary.

In item 7 the petitioner had charged per diem and fees under provisions of section 847, Rev. St., in poor-convict cases. These items were disallowed, presumably on the theory (although not stated) that the act of May 28, 1896, prescribing a new set of fees for the new commissioners, went into effect July 1, 1896; but upon a casual reading of said act it clearly appears that the same is applicable to the new set of commissioners called "United States Commissioners," and took effect July 1, 1897; and during the interval from the time of its passage until said date the old commissioners should charge and receive compensation under said section of the Revised Statutes.

There are several other items which raise no question of law. This court has approved each of the said items in the current quarterly accounts as presented, and which now form part of the file and records of this court, and, as such order is *prima facie* evidence of the correctness of said items, in the absence of clear and unequivocal proof, on the part of the court should be conclusive. *U. S. v. Jones*, 134 U. S. 483, 10 Sup. Ct. 615, 33 L. Ed. 1007; *Kinney v. U. S. (C. C.)* 54 Fed. 313.

EMBLEM v. LINCOLN LAND CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1900.)

No. 1,315.

1. PUBLIC LANDS—CONTROL OF DISPOSITION—POWERS OF CONGRESS.

The paramount control over the disposition of the public lands of the United States remains in congress, and the fact that a contest over the right of entry of such lands is pending before the land department, a creation of congress, and not of the constitution, does not deprive congress of such paramount control; and it may at any time, by an act passed for that purpose, withdraw such contest from the jurisdiction of the department, and itself determine the rights of the parties.

2. SAME—DECISION OF CONTEST BY SECRETARY—RIGHT OF SUCCESSOR TO ANNUL.

A secretary of the interior has no power to annul a decision of his predecessor which determines the rights of the parties to a contest for entry

of public lands; such determination being a judicial act, which can only be reviewed by the courts.

3. SAME—CONTEST OF ENTRY—RIGHTS OF CONTESTANT.

Section 2 of the act of May 14, 1880 (21 Stat. 141), giving a contestant who has paid the land-office fees, and procured the cancellation of a prior entry of public lands, a preferred right to enter the same, gives such contestant no vested rights in the land until the cancellation of the existing entry; and hence, where the decision of the land officers, so far as a contest had progressed, was adverse to the contestant, and during the pendency of the proceedings congress deprived the land department of further jurisdiction by the passage of a special act confirming the title of the entryman, the contestant acquired no vested rights in the land which a court can recognize or enforce.

4. SAME—PAYMENT OF CONTEST FEES.

The payment of contest fees and costs by a contestant of an entry of public land gives him no right in the land, unless the contest results in the cancellation of the prior entry.

Appeal from the Circuit Court of the United States for the District of Nebraska.

T. J. Mahoney (E. R. Duffie, on the brief), for appellant.

J. W. Deweese (T. E. Bishop, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. George F. Emblen filed his bill of complaint in the circuit court against George F. Weed and others, the object of which was to divest out of the defendant Weed the legal title to certain lands acquired by him under a patent from the United States, issued in pursuance of an act of congress, and vest the title thereto in the complainant, and for other relief. The circuit court sustained a demurrer to the bill, and the complainant appealed. Upon a full consideration of the record and arguments at the bar, and briefs of counsel, we find the opinion of Judge SHIRAS (94 Fed. 710), who ruled the case at the circuit, contains an accurate statement of the case made by the bill; and, as his opinion sustaining the demurrer to the bill expresses the law of the case, we adopt the same as the opinion of the court:

"In the bill demurred to it is averred that on September 19, 1885, one George F. Weed made a cash pre-emption entry of the S. E. $\frac{1}{4}$ of section 22, township 2 N., of range 48 west, at the land office of the United States in the city of Denver, Colo.; that on the 4th day of October, 1888, the complainant entered a contest against this entry on the ground that the entryman, Weed, had not complied with the requirements of the law with respect to his residence on the premises, and that in fact the entry was made for speculative purposes, the intent being to establish a town thereon; that the purpose of complainant in making such contest was not only that the laws of the United States regulating cash pre-emption entries on the public lands should be complied with on part of said Weed, but that, by defeating the entry made by Weed, the complainant might be enabled to enter the land under the provisions of section 2 of chapter 89 of the statutes of the United States, approved May 14, 1880 (21 Stat. 140), which section reads as follows: 'Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands: provided, that said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported.'

It is further averred in the bill that a hearing upon the contest made by complainant against the entry made by Weed was had before the register and receiver of the land office at Denver, who on May 21, 1889, ordered a dismissal of the contest on the ground that the allegations on which the same was based were not sustained by the evidence; that thereupon the contestant, being the complainant herein, appealed to the commissioner of the general land office at Washington, as he had the right to do, and upon the hearing of the appeal the commissioner sustained the same; that thereupon George F. Weed moved before the commissioner for a rehearing on the evidence, and the officials and inhabitants of the town of Yuma, which it was shown had been located on the premises, asked leave to intervene for the protection of their rights; that the commissioner ordered a rehearing of the matter before the register and receiver; that, before this rehearing was had, a new land district was created at Akron, Colo., the land in question being within the new district thus created; that the receiver and register of the new district ordered the rehearing to take place at Akron on the 16th day of September, 1890; that the contestant did not appear at this time, but filed objections to the jurisdiction of the local offices at Akron, averring that the receiver at Akron was an interested party, being the owner of a part of the town of Yuma, under title derived from Weed, the pre-emption claimant; that the officers of the land district of Akron overruled the objections to the jurisdiction, and, upon hearing the evidence adduced on behalf of Weed, found in his favor, and dismissed the contest; that thereupon complainant appealed to the general land office at Washington, and the commissioner affirmed the action of the local land office, from which ruling complainant further appealed to the secretary of the interior, John W. Noble, by whom the action of the local officers and of the commissioner was affirmed by a decision entered January 9, 1893, and subsequently complainant filed a motion for review before Secretary Smith, upon the hearing of which it was ordered by the secretary of the interior that a rehearing of the whole contest should be had before the local officers, and in obedience to this order the register and receiver of the land office at Akron set the case for hearing on the 3d day of January, 1894, at which time Weed and the parties interested obtained a continuance of the hearing, it being charged in the bill that this continuance was obtained for the purpose of procuring the passage of an act of congress confirming the title of the original entryman, George F. Weed, which act was in fact passed and approved December 29, 1894 (28 Stat. 599), the same being in the words following: 'Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the pre-emption cash entry numbered 4,990, of George F. Weed, made at the district land office at Denver, Colorado, on the 19th day of September, 1885, for the southeast quarter of section twenty-two (22), township two (2) north, of range forty-eight (48) west, which tract embraces the town of Yuma, Colorado, the county seat of Yuma county, Colorado, be, and the same is hereby, confirmed, and that patent of the United States issue therefor to the said Weed.' Complainant further avers that, while this bill was pending before the houses of congress, full information was furnished them of the exact status of the contest over the title to the land; that, when the bill was passed, the question of the title thereto was pending in the land department, which, under the constitution and laws of the United States, is solely charged with the duty of determining the rights of pre-emption and contestants, and that congress had no right or power to adjudicate on the question of the title to the premises in dispute, and, furthermore, that under the provisions of section 2 of the act of congress of May 14, 1880, hereinbefore cited, complainant had a vested right to enter the land upon the determination of the contest then pending between himself and Weed, and that, if complainant had been permitted to carry through the contest to a final determination, he would have succeeded in procuring a cancellation of the Weed entry; and that the passage of the act of congress above cited, and the issuance of the patents thereunder, deprived complainant of a vested right, without due process of law. It is also averred in the bill that in the year 1886 the town of Yuma was located on part of the premises, and a large number of lots have been sold to various parties named as defendants to the bill;

it being charged that these parties had full knowledge of the facts when they bought under the titles based on the Weed entry. The prayer of the bill, in substance, is that the several defendants be decreed to hold the title to the property in trust for the use and benefit of complainant, and that it be decreed that the patent issued under the act of congress to George F. Weed conveyed no title in the premises, as against the rights of complainant.

"To this amended bill a demurrer is interposed on behalf of the principal defendants, thereby presenting the question whether the matters recited in the bill entitle the complainant to any relief in the premises. The bill admits that the legal title to the land has never vested in the complainant, and that by virtue of the patents issued under the provisions of the act of congress adopted December 29, 1894, the title to the realty has passed to the defendants; but the contention of complainant is that the act of congress is unconstitutional and void, for two reasons: First, that, as the contest over the title to the land was pending before the land department, congress had no jurisdiction over the land, and could not confirm the entry made by Weed; and, second, that by initiating the contest over the validity of the Weed entry, and by payment of the costs and expenses incurred in making the contest, complainant had obtained a vested right or interest in the land, of which he could not be deprived by legislative action. The denial of the power of congress to confirm the entry made by Weed, because of the pending of the contest before the land department, seems to be based, in the allegations of the bill, upon the assumption that, under the constitution and laws of the United States, the land department is solely charged with the duty of determining the rights of pre-emptors and contestants, and therefore congress cannot legislate with respect thereto. In view of the fact that the different branches of the land department are the creation of congress, and not of the constitution, it must certainly be true that the paramount control over the disposition of the public lands of the United States remains in congress, and the mere fact that a contest was pending before the tribunal created by congress to hear and determine the same did not nullify this paramount control bestowed by the constitution itself upon congress to dispose of the public lands belonging to the United States. It is within the power of congress to terminate the existence of the land department, or to declare that it shall no longer exercise jurisdiction over contests pertaining to the right to enter or pre-empt any of the public domain; and when congress passed the act of December 29, 1894, it, in effect, declared that the jurisdiction of the land department over the question of the validity of the Weed entry was at an end. It cannot be questioned that it is within the power of congress to change or terminate the jurisdiction of the district or circuit courts over given subjects, and, in the absence of a saving clause in the act, jurisdiction over pending cases ceases upon the taking effect of the act. *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; *Railroad Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231; *Gurnee v. Patrick Co.*, 137 U. S. 141, 11 Sup. Ct. 34, 34 L. Ed. 601. The same effect must be given to a statute which intends to put an end to further contest over a disputed title. Thus, in *Re Hall*, 167 U. S. 38, 17 Sup. Ct. 723, 42 L. Ed. 69, it appeared that, acting under authority previously conferred on it by congress, the court of claims had rendered judgment in favor of one Hall against the District of Columbia for the sum of \$8,644.19, with interest thereon from January 1, 1877. Upon appeal to the supreme court, it was held that there was error in the matter of allowing interest from that date, and the judgment was reversed, and the case was remanded to the court of claims for correction of this error. The mandate was filed in that court; but, before a new judgment had been entered in conformity with the opinion of the supreme court, congress passed an act depriving the court of claims of jurisdiction, and the supreme court held that 'the effect of the passage of the repealing act was to take away the jurisdiction of the court of claims to proceed further in those cases which were founded upon the act thus repealed. This the congress had the power to do.' The general rule applicable to cases of this character is laid down by the supreme court in *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, in which it is held that, except in cases of vested rights, the power of congress to control the disposition of the public lands is absolute;

and the contention of complainant that the control of congress over the disposition of the land in dispute had ceased to exist, because there was pending before the officers of the land department a contest over the validity of the Weed entry, cannot be sustained. Do the facts averred in the bill show that complainant had obtained such a vested right in or to the land in dispute that thereby the same had ceased to be within the control of congress,—a vested right of such a character that the court can enforce it by a decree conveying the title of the land to complainant?

"The history of the case, as recited in the bill, shows that the decision of the register and receiver at Akron, dismissing complainant's contest and affirming the validity of the Weed entry, had, upon appeal, been confirmed by the commissioner at Washington, and on appeal had been finally confirmed by the secretary of the interior, John W. Noble, under date of January 9, 1893. The averments of the bill further show that, after John W. Noble had been succeeded in office by Secretary Smith, a petition for a review of the order made by Secretary Noble was filed in the office of the secretary of the interior, and was by him entertained and granted, and the case was sent back to the local land office for a further hearing on the facts. What effect on the rights of the parties had this order granted by Secretary Smith, whereby it was sought to nullify and set aside the final judgment of the land department upon the question of the validity of the Weed entry, evidenced by the order of Secretary Noble confirming, on appeal, the action of the commissioner of the general land office, which in turn confirmed the decision and findings of the register and receiver? Is it open to each succeeding secretary of the interior to rehear cases decided by his predecessor in office? In *Noble v. Railroad Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123, it is said: 'A revocation of the approval of the secretary of the interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was therefore void. As was said by Mr. Justice Grier in *U. S. v. Stone*, 2 Wall. 525, 17 L. Ed. 765, one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.' It is clear from the averments of the bill that the complainant has never yet succeeded in obtaining an adjudication holding that the Weed entry is invalid; but, as already stated, it is shown that up to this time the adjudications of the land department have sustained the validity of the Weed entry. If it be held that it was open to Secretary Smith to annul the finding and decision of his predecessor in office, and to send the case back to the local land office for a rehearing upon the facts, yet, as the local officers have not taken further action, there is no decision holding the Weed entry to be invalid; and until that is done no right exists in complainant to make entry of the land, and thereby acquire an interest in the same. Under the provisions of the act of congress of May 14, 1880, upon which complainant relies, before a contestant becomes entitled to enter land, he must procure a cancellation of the pre-emption or other entry which he contests, and until this is done no right to make entry thereof exists in his behalf. The complainant herein does not aver that he has ever succeeded in obtaining a cancellation of the Weed entry, but, on the contrary, the facts averred in the bill show that this entry yet remains uncanceled. The real contention of the complainant is that, if he had been permitted to continue the contest in the land department, he would have succeeded in obtaining a cancellation of the entry, and that congress had no right to terminate the jurisdiction of the land department, and thus deprive him of the privilege of continuing the litigation over the validity of the Weed entry. By filing the present bill the complainant practically admits that the jurisdiction of the land department over the matter is at an end, and therefore complainant now appeals to the court upon the theory that he has such a vested interest in the land that he is entitled to a decree conveying to him the legal title of the premises, and cites the cases of *U. S. v. Fitzgerald*, 15 Pet. 407, 10 L. Ed. 785; *Smith v. U. S.*, 10 Pet. 330, 9 L. Ed. 442; *Delassus v. U. S.*, 9 Pet. 133, 9 L. Ed. 71; and *Magann v. Segal*, 34 C. C. A. 323, 92 Fed. 252,—in support of his contention; but an examination of these cases shows that none of them gives support to the rule contended for by complainant. As

is pointed out in *Frisbie v. Whitney*, 9 Wall. 187-196, 19 L. Ed. 668: 'The courts may very properly correct the injustice done by the land officers in refusing to accord rights, however inchoate, which are protected by laws still in existence, while they can only consider vested rights when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they are founded. The argument is urged with much zeal that, because complainant did all that was in the power of any one to do towards perfecting his claims, he should not be held responsible for what could not be done. To this we reply, as we did in the case of *Rector v. Ashley*, 6 Wall. 142, 18 L. Ed. 733, that the rights of a claimant are to be measured by the acts of congress, and not by what he may or may not be able to do; and, if a sound construction of these acts shows that he acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient.'

"The act of congress upon which complainant relies in this case conferred upon him the privilege of entering the land in dispute when, and only when, he should succeed in canceling the prior entry in favor of Weed. This he has not yet succeeded in doing. He entered the contest against Weed in October, 1886, but never obtained a cancellation of the entry; the decisions of the land department being adverse to him until in December, 1894, congress passed an act confirming the Weed entry, and thus made it impossible for the land department to further entertain the contest over the validity of the Weed entry. That entry therefore remains uncanceled, and therefore a right to enter the land has never become vested in the complainant. He has never made an entry upon the land, nor has he perfected a right to make an entry thereof by securing a cancellation of the Weed entry, and therefore he has no vested right or interest in the land of which he can avail himself to defeat the operation of the act of congress confirming the Weed entry.

"Some reliance is placed, in argument, upon the fact that complainant has paid the costs of the contest and certain fees to land department officials. These payments were made with full knowledge of the fact that they would not affect the right to the land unless the Weed entry was canceled. The payments were not made with the expectation that by reason thereof the land department would convey the title to the complainant, but they were made in aid of the contest which complainant initiated against the Weed entry, and complainant well knew that these payments would not give him any right to enter the land unless he succeeded in procuring a cancellation of the previous entry made by Weed; and, as he has failed in his effort to procure a cancellation of this entry, he has not established a right to enter the land by the mere payment of the costs and fees. Under the act of May 14, 1880, it is the procurement of a cancellation of a previous entry, and the payment of the land-office fees, that creates the right to a preference in the entry of the land upon the part of the contestant. A performance of one only of the conditions is not sufficient. Both conditions are essential in the creation of the right. The complainant admits that he has not secured the cancellation of the Weed entry, and therefore has failed to show that he has become entitled to enter the land. He never has entered the same, and therefore has no right in the land. He has not perfected a right to enter the land, having failed to secure a cancellation of the Weed entry, and therefore there is no ground shown upon which the court could base a decree that the defendants hold the legal title for his benefit. The utmost he can claim, in view of the facts recited in the bill, is that, if he had been permitted to prolong the contest over the Weed entry before the land department, he might have succeeded in ultimately procuring a cancellation of the entry; but this court cannot accept, as ground for its action, a possibility of this kind, in view of the requirements of the act of congress that the contestant must succeed in procuring a cancellation of the existing entry before he becomes entitled to create a right in the land by making entry thereof. The demurrer is therefore sustained, and the amended bill is dismissed on the merits, at the costs of complainant."

The decree of the circuit court is affirmed.

AMERICAN SCHOOL OF MAGNETIC HEALING v. McANNULTY.

(Circuit Court, W. D. Missouri, W. D. June 14, 1900.)

1. AUTHORITY OF POSTMASTER GENERAL.

Under 26 Stat. 466, giving the postmaster general authority, on evidence satisfactory to him that any person or company is engaged in conducting any scheme or device for obtaining money through the mails by means of false pretenses, to direct postmasters to return to the sender all letters or other matter directed to such person or company, an order by the postmaster general directing all letters addressed to the complainants to be returned to the senders is not in excess of his authority.

2. SAME—RIGHT TO USE THE MAILS—PROPERTY.

The right to use the mails is a statutory privilege, and not property in the constitutional sense, and hence an act of congress giving the postmaster general authority to determine whether a person has forfeited the right is not obnoxious to the constitution, inasmuch as it does not deprive him of his property without due process of law, or subject him to punishment for an offense.

3. SAME—ARBITRARY POWER—JURISDICTION OF COURT.

The mere fact that the power conferred on the postmaster general by 26 Stat. 466, giving him authority to order all mail directed to parties engaged in any scheme to obtain money through the mails by false pretenses to be returned to the senders, is an arbitrary power, and may be abused, does not justify a court in assuming to control its exercise.

Harkless, O'Grady & Crysler (F. N. Judson and David Overmyer, on the brief), for complainants.

William Warner, U. S. Atty., and Edward A. Rozier, U. S. Atty., for defendant.

THAYER, Circuit Judge. On May 15, 1900, the postmaster general, in pursuance of section 2 of an act of congress approved September 19, 1890 (26 Stat. 466, c. 908), and by authority of section 4 of another act approved March 2, 1895 (28 Stat. 964, c. 191), directed J. M. McAnnulty, the defendant above named, who is postmaster at Nevada, Mo., to return to the senders thereof "all letters, whether registered or not," which arrived at said office addressed to the above-named complainants, and to stamp thereon the word "Fraudulent," or to transmit said letters to the dead-letter office at Washington, D. C., to be disposed of as other dead matter, under the laws relating thereto, when there was nothing on said letters to indicate who were the senders of the same. This order contained a finding by the postmaster general, in accordance with the acts of congress above mentioned, that it had been made to appear upon evidence satisfactory to him that the American School of Magnetic Healing, S. A. Weltmer, the president thereof, and J. H. Kelly, its secretary, were engaged at Nevada, Mo., in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises. A bill of complaint was thereupon filed by the complainants herein, they being the same persons whose mail was interrupted by the aforesaid order, the object of said bill being to obtain an injunction restraining the postmaster at Nevada from obeying said order. A rule to show cause why a temporary injunction as prayed for should not be awarded has been duly issued and served, and the question to be determined at this time is whether the com-

plainants, on the showing made, are entitled to the interlocutory relief prayed for.

Counsel for the complainants concede that it has been settled by at least two decisions of the supreme court of the United States (Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93) that under the power conferred upon the legislative branch of the government to establish post offices and post roads, congress has full control of the entire postal system of the country, and may lawfully determine what shall and what shall not be carried in the mails, and that the judicial branch of the government has no right to override or interfere with the will of congress on that subject. They also concede the elementary proposition that whenever, for the purpose of executing the laws, an executive officer is vested by congress with discretionary powers, the courts can neither interfere by mandamus nor by injunction with the exercise of such powers. *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *Stotesbury v. U. S.*, 146 U. S. 196, 13 Sup. Ct. 1, 36 L. Ed. 940; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437; *City of New Orleans v. Paine*, 147 U. S. 261, 13 Sup. Ct. 303, 37 L. Ed. 162; *Noble v. Railroad Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123. Notwithstanding these concessions, it is claimed, however, that in the present instance the postmaster at Nevada may be lawfully enjoined from obeying the order of his superior officer, and this contention appears to be based mainly on two grounds: First, that the order under which the postmaster is acting is void because the postmaster general exceeded his authority under the statute in directing the return of "all letters, whether registered or not, and other mail matter"; and, second, that it is void because the statute under which the postmaster general acted attempts to devolve on that officer powers which cannot be lawfully exercised by an executive officer. The language of the statute (26 Stat. 466) on which reliance is placed to sustain the first of these propositions is as follows:

"The postmaster general may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any office at which registered letters arrive directed to any such person or company or to the agent or representative of any such person or company * * * to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof."

By the fourth section of the act of March 2, 1895, the powers conferred upon the postmaster general by the statute last quoted were extended to and made applicable "to all letters or other matter sent by mail."

It is manifest from an inspection of these statutes that congress has in express terms conferred upon the postmaster general the power to prohibit the delivery of any and all mail matter to a person whom that officer, after a due investigation, finds to be engaged in conducting through the mails either a lottery or a scheme to obtain money by

false and fraudulent pretenses; and it is doubtless true that it intended to confer that power because of the difficulty which would generally be experienced in separating lawful mail matter from that which is unlawful, if the postal department was only authorized to withhold and return such letters as relate to the unlawful business in which a party is found to be engaged. Congress did not deem it expedient to cast on the post-office department the duty of making an inquiry or finding as to the character of every letter which was suspected to be nonmailable, when evidence was adduced which satisfied the postmaster general that the party addressed was using the mails for the purpose of conducting a lottery, or to obtain money by fraudulent representations. The first ground of objection to the order, namely, that it is too comprehensive in its terms, is untenable, and must be overruled.

In support of the second and most important objection to the order of the postmaster general it is urged, in substance, that the right of a citizen to make use of such facilities as the post-office department at any time affords for the transportation of mail matter is property, within the meaning of that word as used in the fifth amendment to the federal constitution; that the acts of congress aforesaid, under which the postmaster general derived his authority to issue the order in controversy, devolve on that officer the power to hear evidence, and to determine in the light thereof whether a person is engaged in a scheme to defraud; that, as the result of such an adjudication, a citizen may be deprived of his property by a proceeding before an executive officer which is essentially of a judicial character; and that such a power cannot be devolved upon an executive officer consistently with our theory of government. In other words, the second objection to the order of the postmaster general necessarily involves the proposition that the statute under which he acted is in violation of the federal constitution, and for that reason void. The same propositions, in substance, were presented to the circuit court of appeals for the Sixth circuit in *Association v. Zumstein*, 15 C. C. A. 153, 67 Fed. 1000, and were by that court held to be untenable. An attempt is made, however, to distinguish the case at bar from the case last cited because of the fact that in the latter case the complainants were alleged to be conducting a lottery, while in the case in hand the complainants were charged with using the mails to obtain money by false pretenses. It is said arguendo that, although it may be that congress can lawfully empower the postmaster general to determine whether one is engaged in conducting a lottery, yet the determination of the question whether one is engaged in a scheme to defraud is a different and more difficult inquiry, involving, as it does, a decision of mixed questions of law and fact, and that the power to decide questions of that nature, when a property right is involved, belongs exclusively to the judiciary, and cannot be delegated to an executive officer. The court is of opinion, however, that the reasons thus advanced for the purpose of avoiding the force of the decision in the Sixth circuit are unsound. It is sometimes more difficult to analyze business ventures in which persons are engaged, and determine whether they involve the essential features of a lottery, than it is to determine, with respect to other enterprises in

which men may become engaged, whether they are schemes to defraud. In either case the officer exercises the same quasi judicial functions which have been exercised by the various executive departments since the foundation of the government, in that he hears proof and decides issues of fact as well as questions of law. The power exercised, and the consequences of its exercise, are in each instance the same. Therefore, if it be true, as counsel for complainants seem to concede, that the postmaster general may lawfully determine whether persons are conducting a lottery, and deprive them of the use of the mails for that reason, it must be equally true that he may be empowered to determine whether persons are making use of the mails in furtherance of a scheme to defraud.

The questions at issue in this case were also elaborately considered by the supreme court of the District of Columbia in *Dauphin v. Key*, 11 D. C. 203. The decision in that case arose under section 3929 of the Revised Statutes, prior to the amendment thereof on September 19, 1890 (26 Stat. 468, c. 908, § 2). Construing that section of the Revised Statutes, which then, as now, authorized the postmaster general to withhold and return mail matter which was addressed to persons who were found to be engaged in conducting lotteries or schemes to defraud by the use of the mails, the court held, for reasons which commend themselves to this court as entirely sound, that the right which may at any time be accorded to a citizen by existing laws to use the mails for the transmission of mail matter is a mere privilege created by legislative enactment, which may be modified or withdrawn by the same authority that created it, and that the privilege in question is not property in the constitutional sense, of which one may not be deprived except in accordance with the judgment of some judicial tribunal or by due process of law. It was further decided in the same case that the statute was not intended to, and that it did not in fact, empower the postmaster general to inflict punishment for a wrongful or criminal act. It was conceded by the court that a power to convict and punish a person for an offense could not, as a matter of course, be devolved upon an executive officer, but it was said of the legislation in question that it was not punitive in its character, but preventive, the sole object being to prevent the misuse of the mails, and to arm the head of the postal department with a power which would be adequate to accomplish that object. It is hardly necessary to observe that, if the right to use the mails is a statutory privilege, and not property, within the meaning of the fifth amendment to the federal constitution, then no fault can be found with the statute now under consideration, because it devolves on the postmaster general the duty of ascertaining by satisfactory evidence if one is using the mails to defraud, and makes his right to use the mails dependent upon that finding. Congress has the right to exclude from the mails every species of mail matter that, in its judgment, ought not to be carried therein; and when it determines, as it has done, that persons who are employing the mail for the purpose of conducting lotteries or schemes to defraud shall not be allowed to receive their mail, it can authorize an executive officer of the postal department to determine the fact on which the right to receive mail depends by any appropriate method

of procedure, inasmuch as such determination of the fact does not, under the operation of the law, deprive the party concerned of his property, or subject him to punishment for an offense, within the meaning and intent of the organic law.

On the hearing of the motion for a temporary injunction much stress was laid in argument on the fact that the power conferred on the postmaster general is of an arbitrary character, and, if erroneously exercised at any time, is liable to occasion great loss and inconvenience to the citizen. On this ground a strong plea was made that the courts should, if possible, so construe the statute as to enable them to control the exercise of the power in question by reviewing the decision of the head of the post-office department, in whom the power has been lodged. In answer to this suggestion it is sufficient to say that, in whosoever hands power is lodged, whether in the judicial or executive branch of the government, it is liable at times to be abused, or erroneously exercised; and the fact that a particular authority may be abused is in itself no reason why a court should assume a jurisdiction to control its exercise which does not of right belong to it. Moreover, if the action of the postmaster general was liable to be arrested on any and every occasion where a party complaining of his action sees fit to appeal to the courts, it is probable that the statute would not afford as efficient means for preventing the misuse of the mails as congress intended it to afford. But, be this as it may, the court is satisfied that it cannot lawfully grant a temporary injunction. The motion to that effect is accordingly denied, and the rule to show cause why a temporary injunction should not issue is discharged.

CAREY v. ROOSEVELT et al.

(Circuit Court of Appeals, Second Circuit. May 28, 1900.)

No. 24.

JUDGMENT—PERSONS BOUND—EXECUTORS AND TRUSTEES UNDER WILL.

A judgment against defendants as administrators with the will annexed is not binding on one of the same persons in his capacity as a trustee under the will, or upon the beneficiaries of the trust, as to property which had been delivered to the trustees prior to the institution of the action against the administrators, where it is not shown that, as a matter of fact, the defense was made on behalf of the trust estate, at its expense and for its protection.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In 1886 John Glenn, a citizen of Virginia, as trustee for the benefit of the creditors of the National Express & Transportation Company, a Virginia corporation, brought an action at law against Amos Cotting, a citizen of the city and state of New York, before the circuit court for the Southern district of New York, to recover the amount of two calls made upon Cotting for the payment of his subscription to the stock of said company, in which suit Cotting appeared. Bills in equity were brought in the same court to restrain the prosecution of divers suits of this character which had been commenced about the same time, and, pending the litigation upon these equity suits, agreements for the extension of time to plead in the Cotting suit were entered into by the respective attorneys. Cotting died on May 12, 1889, his will was pro-

bated and letters testamentary were issued in June, 1889, the executors thereafter died, and letters of administration with the will annexed were issued to John E. Roosevelt and Katie T. Schermerhorn on January 30, 1891. By the will, after provisions for the benefit of the testator's wife, the residuary estate was given to a trustee for the benefit of the testator's children and his wife. She died before 1892. Thereafter the trustee named in the will resigned, and on February 29, 1892, John E. Roosevelt and W. Emlen Roosevelt were appointed his successors. The administrators with the will annexed, having, as they supposed, collected nearly all the assets, brought an action in the supreme court of the state of New York to settle their accounts in March, 1892, in which action their accounts were approved, and they were ordered on April 8, 1892, to transfer the assets to the trustees under the will, which was done on the same day. In June, 1893, the bills in equity were dismissed, and the action of Glenn against Cotting was revived against his administrators with the will annexed on September 6, 1893. Up to this time this claim had not been presented against the estate for payment, and the administrators were not aware of its existence or of the existence of the action at law until November, 1892. They defended this suit, and judgment was rendered against them as administrators on February 28, 1895, for \$6,221.90. In September, 1895, Glenn applied to the surrogate's court for leave to issue execution against the administrators, and the petition was dismissed in December, 1896. In May of that year the complainant in this suit, George G. Carey, a citizen of Maryland, was appointed to succeed Glenn as trustee for the creditors of the National Express & Transportation Company. When the action at law was revived, the only cash assets of Cotting's estate in the hands of his administrators were \$142.50. They held two claims against insolvents, of very uncertain value, upon which they hoped that something more would be received. After that time, they received in cash \$842.29. The present suit is a bill in equity against the trustees of the Cotting estate, the executor of his wife, his two children, and three minor grandchildren, to impress the trust fund with a trust in favor of Carey, as trustee, for the amount of the judgment against the administrators, with interest. The circuit court for the Southern district of New York, before which the trial was brought, directed the trustees to pay the amount from the trust fund, and charge it against the shares of the beneficiaries. 91 Fed. 567.

Geo. H. Yeaman, for appellants.

Latham Reid, for infant appellants.

Arthur H. Masten, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

SHIPMAN, Circuit Judge (after stating the facts as above). Upon the argument of this case, it appeared that sundry questions of law had been eliminated during the progress of the suit. The original bill contained no averment that the trustees of Cotting's estate had defended the action at law against the administrators, or paid the expenses of that suit, or taken part therein as trustees, either with or without the knowledge of the beneficiaries or of the plaintiff in the action; and the bill rested upon the judgment against the administrators, the nonexistence of assets in their hands, the delivery of the estate to the trustees, and a consequent liability in equity of the trustees and the beneficiaries to pay the judgment from the principal or income of said estate. Upon a demurrer to this bill, the principal question argued before Judge Coxe, who was presiding in the circuit court, was whether a judgment obtained against an administrator with the will annexed was conclusive evidence against a legatee. 81 Fed. 608. It had been settled in New York and elsewhere, where

statutory systems in regard to the estates of deceased persons do not alter the rule, that a judgment against an executor is not evidence against the heir or devisee. *Ingle v. Jones*, 9 Wall. 486, 495, 19 L. Ed. 621; *Sharpe v. Freeman*, 45 N. Y. 802. And Judge Coxe was of opinion that it was established in jurisdictions other than the courts of New York, which had not passed upon the question, that a legatee is in privity with the executor, and bound by a judgment against him (*First Baptist Church v. Syms*, 51 N. J. Eq. 363, 28 Atl. 461), but that such a rule was not applicable under the facts of this case, because no statute made the legatees liable to pay the judgment against an executor, and, inasmuch as their title or succession to the residuary estate occurred before the institution of the suit against the administrators with the will annexed, there was no privity between them and the legatees; or, as is said in *Black on Judgments*, "The executor of an estate is in privity with a legatee of personalty until the legacy is delivered, and consequently the latter is concluded by a judgment against the former." The judgment is conclusive against the unadministered personalty in the hands of the executor. 2 Black, Judgm. § 561; *Freem. Judgm.* § 162; *Masten v. Olcott*, 101 N. Y. 153, 4 N. E. 274. In this case, before the administrators had notice of the claim the residuary estate had been delivered to the legatees. The correctness of this decision is not now attacked, and the case is presented upon the amended bill, in which the complainant averred that the defense of the action at law was conducted, and all proceedings therein were taken, by the defendants, with the knowledge and consent, and at the instance and request, of the beneficiaries under said will, and of the defendants John E. Roosevelt and W. Emlen Roosevelt, as trustees of the trust created by the said will of Amos Cotting, for the sole benefit of the trust estate and of the trustees and beneficiaries; that a large proportion of the expenses of such defense was borne by the said trustees, and paid by them out of the trust funds; that the beneficiaries consented to such payment of the charges so made against their respective ratable shares in the trust funds; and that said trustees and beneficiaries were informed as to the nature of and issues in said action at law, and took an active part in the defense thereof, with the intent and purpose of protecting the said trust funds, and their respective shares and interests therein. Upon the bill as amended proofs were taken, and the case went to final hearing. It is not now contended with any earnestness that, unless the averments inserted by amendment are found to have been proved, Roosevelt, as trustee, is bound by the judgment against him as administrator with the will annexed. The party sought to be bound by the former judgment must not only have been a party to both actions, "but he should have appeared in the same capacity or character." 2 Black, Judgm. § 536; *Collins v. Hydorn*, 135 N. Y. 320, 32 N. E. 69; *Sharpe v. Freeman*, 45 N. Y. 807; *Bank v. Shuler*, 153 N. Y. 173, 47 N. E. 262; *Rathbone v. Hooney*, 58 N. Y. 463. The judgment against the administrators with the will annexed is not binding upon the same persons in another capacity, but it is asserted that the fact that John E. Roosevelt was the administrator without assets, and is the trustee with abundant assets, makes it probable that he was defending the suit as trustee

and for the benefit of the estate, was making the estate liable for the expenses of the defense, and was doing all with the knowledge of his co-trustee and the beneficiaries; and the complainant therefore urges that the probabilities are strongly in favor of the truth of the amended averments. Again, it is conceded that this suit was not brought under section 1837 of the New York Code of Civil Procedure, which is as follows:

"An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an estate, or the next of kin or legatee of a testator, to recover, to the extent of the assets paid or distributed to them for a debt of the decedent, upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for the purpose, does not impair his right to maintain such an action."

In this record no attempt was made to prove that the original claim was a debt of the decedent. The complainant relied upon the judgment, and all defenses which Cotting might have had against the existence or the validity of the claim were of no avail. In the appellee's brief the only point now in controversy is stated as follows:

"The admissibility and conclusive effect of this judgment as against the appellants is, then, the decisive point in this case; for, if not conclusive, we may admit that, on the record as it stands, we have not made out our case, and the various defenses of laches, the statute of limitations, and the lack of jurisdiction of the Virginia court are still open to discussion (5th, 6th, 8th assignments of error), and the point that complainant has not proved a 'debt' of Amos Cotting (13th, 14th, 15th, 20th, 21st assignments) is well taken. The question, then, is whether or not the evidence shows that the defendants (appellants) were 'identified in interest' with the immediate parties to the action at law, and were the real 'principals behind the formal parties.'"

This is a question of fact. John E. Roosevelt and Mrs. Schermerhorn, as administrators, defended against the action at law; Mr. Roosevelt being the acting administrator. He told his co-administrator, his co-trustee, and Jameson Cotting, a son of the testator, the fact of the revival of the suit, and told them nothing more. They took no part in the litigation, and knew nothing, practically, about it. He employed counsel, and, being a lawyer, overlooked or superintended the defense, did not counsel or advise with the co-administrator, his co-trustee, or either of the beneficiaries on the subject, but managed it himself, through his counsel, and paid no part of the expenses from either principal or income of the trust estate. He had from the estate, as administrator, after April 8, 1892, \$984.79; and he paid for the expenses of this suit \$1,004.38, and whatever more is due is due only from the administrators. He testifies that the action at law was not defended for the benefit of the trust estate, or the beneficiaries under the trust; that he assumed the responsibility of making the defense under the advice of his counsel; that it was made entirely as administrator, and in no respects as trustee. At first thought, this would appear to be a strange and perhaps unnatural state of facts, but nonaction on the part of the trustees was probably predetermined, so as not to bind the trust estate; and in view of the testimony of Mr. Roosevelt, and from the probability that, if he understood the advantages resulting from not binding the trust estate, he would act

accordingly, we are of opinion that the averments introduced into the bill by amendment have not been proved, and are not true. A finding that they had been proved would indicate an arrant perversion of truth by the administrator, in regard to a matter in which he had no pecuniary interest. The decree of the circuit court is reversed, with costs, and the cause is remanded to that court, with instructions to dismiss the bill, with costs.

NEVADA CO. v. FARNSWORTH.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1900.)

No. 1,333.

1. EVIDENCE—HEARSAY.

A letter between third parties, reciting statements said by the writer to have been made to him by defendant, is not admissible against defendant to prove such statements, unless it is shown that he authorized or knew of the writing of the letter.

2. TRIAL—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

Where a complaint by a corporation for money had and received was based expressly on the ground that the money was furnished by plaintiff to defendant, as its agent, with which to buy certain property, and that defendant purchased the property for much less than the amount represented, it was not error for the court to refuse to charge that plaintiff could recover if it appeared that defendant had been a promoter of the corporation, and afterwards purchased the property, and made a secret profit on it, such issue not having been presented by the pleadings.

In Error to the Circuit Court of the United States for the District of Utah.

See 89 Fed. 164.

This is an action for money had and received, which was brought by the Nevada Company, the plaintiff in error, against Philo T. Farnsworth, the defendant in error. The complaint stated two independent causes of action of the same class in separate counts. Upon the first cause of action a verdict was returned against the Nevada Company, while upon the second cause of action a verdict was returned in its favor. The present writ of error, which was sued out by the plaintiff, challenges the judgment against the plaintiff which was rendered on the first count of the complaint. In that count the plaintiff averred, in substance, that between July 15, 1897, and August 24, 1897, the plaintiff company constituted Philo T. Farnsworth, the defendant, its agent to buy certain real and personal property in the state of Nevada, which may be described generally as the Frank Bradley group of mining claims, the W. S. Gage group of mining claims, and the Mitchell & Miller property,—the latter consisting of 160 acres of land, certain water rights, a 10-stamp mill, assay office, and other buildings; that on July 15, 1897, August 24, 1897, and August 27, 1897, it sent to the defendant altogether the sum of \$60,000 to make the purchase of the properties aforesaid; that the defendant afterwards represented that he had invested the money so sent to him in the purchase of the Bradley mines for the sum of \$26,750, and in the purchase of the Gage mining claims for the sum of \$27,250, and in the purchase of the Mitchell & Miller property at the price of \$4,750; that in point of fact said defendant paid for the Bradley mines only \$9,000, for the Gage mining claims only \$4,250, for the Mitchell & Miller property only \$4,250, making an aggregate expenditure of \$17,500 for the purchase of said properties; and that by reason of the facts aforesaid the defendant, on August 27, 1897, became indebted to the plaintiff in the sum of \$42,500, for which it demanded judgment.

Charles C. Dey (J. A. Street and Cephas Brainerd, on the brief), for plaintiff in error.

John M. Zane (Joseph L. Rawlins and Barlow Ferguson, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The chief question which this record presents for our determination is whether the trial court erred in refusing to direct a verdict for the Nevada Company on the first count of its complaint for the sum of \$41,250, with interest thereon from August 27, 1897. The principal contention urged upon the argument—and it is also the main proposition which is advanced in the brief—is that an instruction to this effect, which was requested, ought to have been given at the conclusion of the evidence. We shall accordingly direct our attention in the first instance to this proposition. Concerning some of the facts that are alleged in the complaint there was no controversy at the conclusion of the trial. It was proven beyond peradventure, and so the jury were instructed, that Farnsworth, the defendant, did receive from the plaintiff the sum of \$60,000 at the time stated in the complaint; that this sum was paid to the defendant on account of the purchase of the three properties mentioned above, to wit, the Bradley mines, the Gage mining claims, and the Mitchell & Miller property; and that when the money was so paid to the defendant the plaintiff company supposed that the defendant had contracted in its name to pay for said properties the sum of \$60,000 in the aggregate, whereas the price actually paid therefor by the defendant was only \$17,500, as was alleged in the complaint. There was a controversy, however, before the jury as to the capacity in which the sum of \$60,000 was received by the defendant. The plaintiff claimed, as alleged in its complaint, that it paid the money to the defendant as its agent, believing that he had bought the several properties in its name, or for its account. On the other hand, the defendant testified in his own favor to the following effect: That in the latter part of June, 1897, prior to the organization of the Nevada Company, he took Anson P. Stokes, who was one of the promoters of the plaintiff company, to visit and inspect the three properties aforesaid, telling him at the time that he (Farnsworth) controlled all of the properties; that, after inspecting the same, Stokes inquired for what price in the aggregate the several properties could be bought, and was told by the defendant that he would make the price therefor \$60,000; and that, after some further inquiries, and a further examination of the properties, Stokes agreed with him definitely to take the properties at the price last mentioned. The defendant also testified that at the time of these negotiations between himself and Stokes he had secured options upon the properties which enabled him to control and sell them as his own; that this was what he meant when he told Stokes that he controlled the properties; and that shortly after the aforesaid agreement was entered into, to wit, on July 15, 1897, he received a check from Stokes in the sum of \$5,000 to apply on the purchase

price. The subsequent payments of \$25,000 on August 24, 1897, and of \$30,000 on August 27, 1897, which made up the sum of \$60,000 that was received by the defendant, appear to have been made with checks which were drawn by the plaintiff company, and were made payable to the defendant's order, and were by him collected. In view of the defendant's testimony to the effect above stated, it must be conceded that there was some evidence before the jury which tended to establish the defendant's claim that he did not receive the sum of money in controversy as agent of the plaintiff company, to be expended on its account in the purchase of the properties, but that he received it in his own right, in payment for properties which he had sold to Stokes, one of the promoters of the company, before it was organized. It is true that the defendant admitted in the course of his examination that shortly after, or perhaps contemporaneously with, his alleged agreement to sell the properties, he was advised by Stokes that a company would be organized forthwith to take over the properties, and that he agreed, at Stokes' solicitation, to become the general manager of such company when it was formed, and also to take stock therein; and that, in accordance with such agreement, he did become the general manager, and a shareholder of the plaintiff company, when it was organized. It is also undisputed that the defendant not only failed to advise Stokes or the plaintiff company how much he had paid for the several properties in question, but that he studiously withheld such information from them; and it is also true that the record contains an abundance of evidence which tends to show that the plaintiff company supposed that the defendant was acting as its agent when it paid him the sum of \$55,000 to be expended in its behalf. But these were facts and circumstances which only served to discredit the defendant's claim that he sold the properties to Stokes individually for \$60,000, and that the money paid to him was received in his own right as vendor; and it was the province of the jury to decide how far such facts and circumstances did discredit the defendant's contention, and how far they served to disprove his statement that he sold the properties to Stokes as property which was at the time subject to his disposition and control.

The trial court submitted the issues of fact arising upon the testimony aforesaid under instructions that neither party has seen fit to challenge in this court. It charged the jury, in substance, that, to entitle the plaintiff to a verdict on the first count, it must show that the defendant acted in its behalf, and as its agent, in purchasing the several properties, but that they should regard the fact of such agency as sufficiently established in either of the following events: First, if the defendant purported to act for the plaintiff in purchasing the several properties, but did so without its authority, and the plaintiff subsequently ratified the transaction; second, if the plaintiff paid the defendant the sum of money in controversy in the belief that he was acting for it, and the defendant's conduct previously thereto had been such as to reasonably induce the plaintiff company to entertain that belief; or, third, if the defendant knew, when he received the money from the plaintiff, that it supposed him to be acting for it, and as its agent, although the

defendant had done nothing previously to induce such a belief in the mind of a reasonable person. On the issues thus presented the finding was in favor of the defendant. The learned judge of the trial court did not set the verdict aside, although he was requested to do so, from which action on his part we must infer that, after listening to the evidence as it was adduced, he did not regard the action of the jury as so far opposed to the weight of proof as to warrant the conclusion that its action was superinduced by passion or prejudice. This court, as a matter of course, has no power to annul the verdict merely because it does not seem to be supported by the weight of testimony. It is our function to determine as a matter of law whether there was any substantial evidence to sustain the defendant's contention upon the first count, and, for the reasons heretofore indicated, we are constrained to hold that there was.

In behalf of the plaintiff it is claimed that a material error was committed in excluding a letter which was written by J. G. Stokes to his father, Anson P. Stokes, at Salt Lake City, under date of August 23, 1897. This letter detailed certain statements relative to the purchase of the three properties in controversy which were said to have been made by the defendant to J. G. Stokes at Salt Lake City nearly two months after the alleged sale of the properties by the defendant to Anson P. Stokes for the sum of \$60,000. It was not shown that the defendant either authorized the letter in question to be written, or that he saw the same, and was acquainted with its contents, before it was mailed. The letter appears to have been a private communication from the son to the father, in which the former, of his own volition, merely repeated certain representations, which, as he claimed, had been made to him by the defendant on the return of J. G. Stokes from New York, whither he had gone with his father to assist in the organization of the Nevada Company after arrangements had been consummated for the acquisition of the properties in controversy. In view of the circumstances under which the letter was written, it seems to have been hearsay testimony, so far as the defendant was concerned, and inadmissible against him for that reason, as the trial court properly decided.

It is finally claimed on behalf of the plaintiff company, although very little space is devoted to the discussion of the point in the brief, that the trial court erred in refusing to give the following instructions, which were requested by the plaintiff:

"Promoters of a corporation are persons who negotiate for and take part in procuring the formation and organization of a corporation. Anson Phelps Stokes and J. G. Phelps Stokes are shown by the evidence to have been promoters of the Nevada Company, and if you find from the evidence in this case that the defendant, Farnsworth, co-operated in any way with Anson Phelps Stokes in getting up the corporation to purchase and work mines and mining claims in Nevada, and consented to take stock in such company, and to be its general manager, and furnished any information to be used for the purpose of inducing others to take stock and become interested in such proposed corporation, and upon the organization of the company he became a stockholder and the general manager, then Farnsworth would also be considered one of the promoters of the plaintiff corporation. If you find Farnsworth was a promoter

of the corporation, then he could not purchase the Bradley, Gage, and Mitchell & Miller properties after becoming a promoter, and sell them to the corporation at an advance, without being liable to refund to the corporation any secret profits he made; and the plaintiff can treat him as an agent, and recover in this suit the whole amount of the difference between the price he paid and the price he received, with interest."

There are two reasons, in our opinion, why the refusal to give these instructions cannot be regarded as a material error entitling the plaintiff to a new trial. In the first place, the complaint on which the case was tried was not framed with a view of recovering the money sued for upon the ground that the defendant was a promoter of the Nevada Company, and that, being such, his conduct had operated as a fraud upon persons who subsequently became stockholders of that company. The charge contained in the first count of the complaint is very specific, and to the effect that the plaintiff company constituted the defendant its agent to buy the properties in controversy, and that it sent a certain sum of money to him as its agent to consummate the purchase, which money he received for the purpose of disbursing as the plaintiff's agent. If the plaintiff company intended to ask a recovery on the additional ground that the defendant, by his prior dealings with Stokes, became one of its promoters, and for that reason was not entitled, under any circumstances, to charge the company, when it became organized, more for the properties in controversy than they had cost him, then the complaint should have foreshadowed that ground of recovery by some appropriate allegations, so as to distinctly tender the issue whether the defendant was a promoter. That issue cannot be said to have been raised by the pleadings, and for that reason the trial court would have erred if it had permitted the issue to be raised for the first time by the instructions. In the second place, when the verdict of the jury is construed in the light of the pleadings and the evidence, it is apparent that they found and determined that the defendant, having secured an option on the properties in controversy which enabled him to control the same, had in fact sold the properties to Stokes individually for \$60,000, and had done so before he consented to take part in the organization of the Nevada Company, or to become a shareholder therein, or the general manager thereof. In view of this finding by the jury, it would seem that the defendant could not be charged with liability as a promoter. It is also questionable whether an action at law to recover secret profits realized by a promoter can be maintained in the federal circuit court, where the distinction between proceedings at law and equity is still maintained and carefully observed. This latter point was discussed to some extent on the argument by counsel for the defendant, but we find it unnecessary to decide the point, and would not be understood on the present occasion as expressing any opinion thereon. The judgment below is affirmed.

FARNSWORTH v. NEVADA CO.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1900.)

No. 1,334.

1. APPEAL—ASSIGNMENTS OF ERROR.

The record on appeal should not be incumbered with numerous assignments of error when a few would suffice to present in an intelligible manner all of the material questions involved in the case. The assignment of a large number of errors raises no presumption that the judgment is erroneous.

2. SAME—REVIEW—ADMISSION OF EVIDENCE.

When a complaint states two or more causes of action, a judgment obtained thereunder cannot be reversed because of the admission of evidence which was competent under either count; and no obligation rests upon counsel, when offering testimony, to announce in advance to which count it is addressed, unless required to do so by the trial judge.

3. EVIDENCE—ACTION FOR MONEY RECEIVED—RELATIONS OF PARTIES.

In an action by a corporation to recover money alleged to have been intrusted to defendant to pay for certain property which he represented that he had bought in its behalf at a price which was greatly in excess of that actually paid by him, plaintiff claiming the right to recover the excess as money received to its use, it is competent for the plaintiff to show the relations existing between the parties at the time of the transactions, and for that purpose the statement filed by the plaintiff with state officers at the time of its incorporation, showing defendant to be one of its directors and its general manager, and a copy of the proceedings of the directors in which he was elected general manager, are admissible where it is shown that defendant had knowledge of such action, and that he in fact acted as general manager from the time of the organization of plaintiff.

4. SAME—INTRODUCTORY STATEMENTS BY WITNESS.

In such case the admission in evidence of a general introductory statement by the president of the corporation as a witness that he was ignorant of the business of mining, for which purpose the corporation was organized, was not material error.

5. SAME—STATEMENTS OF PARTY.

Statements made by defendant to officers of plaintiff before or after negotiations for the purchase of the property were begun respecting such property or its value were competent as bearing on the question whether plaintiff had reason to believe that defendant was acting as its representative in making the purchase.

6. SAME—TELEGRAMS BETWEEN THIRD PERSONS.

A telegram sent by a third party to the president of the corporation, containing representations as to the value of the property, and a statement that defendant recommended its purchase, together with the answer thereto, authorizing the purchase on certain conditions, were admissible against the defendant where there was testimony tending to show that the first telegram was submitted to and approved by him before it was sent.

7. SAME—RECEIPTS.

Defendant having represented to plaintiff that he had paid towards the purchase of the property the sum of \$20,000 in discharge of an indebtedness from him to the company for stock purchased, his receipt for such stock was admissible as showing the receipt by him of the sum of \$20,000, or its equivalent, to be applied towards the purchase.

In Error to the Circuit Court of the United States for the District of Utah.

J. L. Rawlins (John M. Zane and Barlow Ferguson, on the brief), for plaintiff in error.

Charles C. Dey (J. A. Street and Cephas Brainerd, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This writ of error brings before us for review the judgment in favor of the Nevada Company upon the second count of the complaint in the suit which was brought by that company against Philo T. Farnsworth, the present plaintiff in error. The judgment rendered in the same action upon the first count of the complaint, which was in favor of the defendant, has been reviewed and affirmed under a writ of error that was sued out by the plaintiff. *Nevada Co. v. Farnsworth*, 102 Fed. 573. The judgment on the second count being in favor of the plaintiff below for the sum of \$77,122.74, including interest, the defendant below also sued out a writ of error to obtain a review of that judgment. The causes of action stated in the first and second counts of the complaint were of the same class. In the second count of its complaint the Nevada Company alleged, in substance, that in March, 1898, the defendant below represented to it that he had purchased on its behalf and for its account the property of the Ione Gold-Mining Company, situated in the state of Nevada, for the sum of \$150,000; that at various dates between March 1, 1898, and March 18, 1898, it paid to the defendant, for the purpose of purchasing said property, the sum of \$130,000 in cash; that contemporaneously with such payments the defendant represented to the plaintiff that he had canceled a debt which he then owed to the plaintiff in the sum of \$20,000 for 200 shares of its capital stock theretofore issued to him, by paying said sum of \$20,000 to the Ione Gold-Mining Company on account of the purchase of its property for the sum of \$150,000 as aforesaid; that in point of fact the defendant only expended for the purchase of the property of the Ione Gold-Mining Company the sum of \$80,000; and that by virtue of the facts aforesaid the defendant became indebted to it on March 18, 1898, in the sum of \$70,000, for which amount, with legal interest, it craved judgment.

The plaintiff in error has assigned 52 errors, 37 of which relate to the admission of evidence, and the remainder to the refusal of the trial court to give 13 instructions that were asked in behalf of the defendant, Farnsworth. The charge of the trial court covered the material issues in the case, and it was so far satisfactory that neither party saw fit to reserve any exceptions thereto. A careful examination of the record and of the proceedings at the trial, so far as they are disclosed by the present bill of exceptions, satisfies us that many of the alleged errors that have been assigned are without substantial merit, and that they do not present questions of sufficient importance to deserve special notice in an opinion of an appellate court. This court has repeatedly condemned the practice of incumbering a record with numerous assignments of error when a few would have sufficed to present in an intelligible manner all of the material questions that are involved in the case. *Railway Co. v. Elliott*,

102 Fed. 96. And so long as the practice is pursued of filing an assignment of errors embracing every point, whether material or otherwise, which the ingenuity of counsel can suggest, we shall only deem it our duty to notice specially those exceptions which, upon a careful consideration of the record, seem to have most merit. Any other method of procedure would require us to write lengthy opinions of no practical importance, and would involve much unnecessary labor. In preparing an assignment of errors it should not be assumed that the fact that many errors are assigned will in itself create a presumption that the judgment is erroneous.

Before considering the exceptions to the admission of evidence that are most important, and on which chief reliance seems to be placed, it will be proper to observe that, as the complaint which was filed by the plaintiff company contained two causes of action, and as the trial involved an investigation of two independent transactions, one of which took place in August, 1897, and the other in March, 1898, the bill of exceptions undoubtedly contains some evidence which could not be regarded as relevant if the second count had been tried separately. Counsel for the plaintiff in error have assumed, apparently, that, when evidence was offered to sustain the allegations of the complaint, it was the duty of counsel for the plaintiff company to indicate to the court and jury to which count the evidence was addressed, and some of the exceptions seem to be framed upon the theory that, if any of the testimony which is contained in the defendant's bill of exceptions is not strictly relevant to the second count of the complaint, it should be adjudged immaterial and incompetent. This view of the case must be rejected as erroneous. When a complaint states two or more causes of action, a judgment obtained thereunder cannot be reversed because of the admission of evidence, if the evidence whose competency is challenged was admissible to sustain either count of the complaint; and in such cases no obligation rests upon counsel, when offering testimony, to announce in advance to which count the evidence is addressed, unless they are required to do so by the trial judge. The result is that, in considering the exceptions to the admission of evidence, they must be adjudged untenable whenever they relate to testimony that was relevant, and competent to sustain either cause of action.

It is first assigned for error that the trial court erroneously admitted two exhibits which showed that the defendant was a director of the plaintiff company, and that he was elected as its general manager immediately after its organization. These exhibits consisted—First, of a statement which was filed with the secretary of state of the state of New Jersey by J. G. Phelps Stokes, as president of the Nevada Company, for the purpose of obtaining its charter; and, second, a copy of the proceedings of the first directors' meeting of the company, which was held in Jersey City on July 22, 1897. The first of these exhibits contained a list of the directors and officers of the company, in which list the name of the defendant, Farnsworth, appeared as one of its directors and as its general manager. The second of the exhibits contained a resolution of the board of directors, by which Farnsworth was made general manager of the company at a salary of \$3,600

per year. These exhibits were objected to by the defendant below on the ground, as it seems, that he was not present at the meeting of the directors when he was elected general manager, and had neither taken part in the organization of the company nor consented in express language to serve as a director. But the record recites that there was evidence that copies of these exhibits were mailed to the defendant, and that they were received by him as early as August 1, 1897. It also recites that there was other evidence which showed that the defendant was verbally informed that he had been elected a director and general manager, and that he had thereafter served the company in the latter capacity. We think that it was entirely competent for the plaintiff, both under its first and its second causes of action, to show the relation that the defendant had sustained to the plaintiff company since it was incorporated, and during the period of the transactions which were under investigation, and that the exhibits were properly admitted in evidence for that purpose, inasmuch as the defendant had been furnished with copies thereof, and had never declined the office of director after being advised of his election, and had in fact served as general manager of the company from the date of its organization. We can perceive no error in the admission of these exhibits.

It is claimed that an error was committed by the trial court in permitting J. G. Phelps Stokes to testify, in answer to a question, that he "was new in the precious metal mining business" at the time the Nevada Company was organized and began its operations in the state of Nevada. This testimony was objected to upon the general ground that it was incompetent and irrelevant. It does not appear from the bill of exceptions now before us whether this evidence was introduced in support of the first or the second cause of action. From the context we should infer that the testimony was elicited mainly with reference to the first cause of action. But, be this as it may, we think that the action of the trial court in admitting the proof, it being merely an introductory statement of the witness, was not a material error which would, in any event, justify a reversal of the judgment. It was a general fact, which, in a case of this character, the plaintiff company was entitled to establish.

It is next urged that the trial court erred in allowing the same witness to testify to certain representations that were made to him on February 21, 1898, with respect to a rich strike that had been made on one of the claims of the Ione Gold-Mining Company, and was a part of the property which was subsequently purchased by the plaintiff company for the sum of \$150,000. It is claimed in behalf of the defendant that this testimony was irrelevant and immaterial, because the representations were made to Stokes before any negotiations looking to the purchase of the property of the Ione Gold-Mining Company had in fact taken place, and because the defendant was simply charged in the complaint with a breach of duty as agent, and was not accused of making any specific false representations. It is doubtless true that the right to recover under the second count did not depend upon showing that the representations in question were made, and that the same were false. Nevertheless, we think that it was competent for the plaintiff company to show

when and how the properties of the Ione Gold-Mining Company were first called to its attention by the defendant, and that it was competent to prove in that connection the statements respecting the properties, or any part thereof, which the defendant at that time made, or which he may have made subsequently before the purchase was consummated. This evidence had some tendency, we think, to show whether the plaintiff company had reason to suppose that the defendant was acting as its agent when the purchase of the properties of the Ione Gold-Mining Company was consummated.

Complaint is also made of the admission in evidence of an agreement between the defendant and J. G. Phelps Stokes and John Sherman Hoyt on July 22, 1897, which agreement between said parties showed, in substance, that the defendant was to take 250 shares of stock in the Nevada Company; that Stokes and Hoyt were to advance the money to pay for the stock, holding the same as collateral, which money was to be refunded by the defendant within three years; and that in the meantime the dividends declared upon the stock were to be received by the defendant. This item of evidence was undoubtedly irrelevant so far as the second count of the complaint was concerned, but it is manifest that the agreement in question was offered in evidence solely for the purpose of sustaining the first count, and, as it appears to have been introduced for that purpose only, its admission cannot be held to affect the judgment on the second count, which is now under consideration.

Two telegrams were read in evidence in the course of the trial; one being a telegram which was sent by J. G. Phelps Stokes to his father, Anson Phelps Stokes, on February 24, 1898, and the other a reply thereto, which was received on February 28, 1898. The first of these telegrams contained an inquiry whether an immediate purchase of the properties of the Ione Gold-Mining Company would be approved. It also contained certain representations as to the value of the property, and a statement that the defendant, Farnsworth, strongly recommended the purchase. The reply thereto authorized the purchase of the properties in question if the defendant, Farnsworth, would take and pay for \$20,000 worth of the new capital stock of the Nevada Company. These telegrams were objected to, when offered, as being communications that had passed between third parties, and, for that reason, not binding upon the defendant. Other testimony was offered, however, which tended to show that, before the first of these telegrams was sent, it was exhibited to the defendant, and that he approved of its contents, and authorized its transmission. This latter testimony, in our judgment, made the two telegrams competent and relevant evidence as against the defendant, although on their face they purported to be communications that had taken place between third parties.

The defendant further asserts that the trial court erroneously admitted in evidence a receipt which was signed by himself on March 31, 1898, acknowledging the receipt of a certificate for 200 shares of new stock in the Nevada Company. In support of this contention it is said that the admission of this receipt was erroneous because the action was for money had and received, and that in that

form of action nothing could be recovered from the defendant except money that had actually been paid to him. The receipt, however, and the testimony which was introduced in connection therewith, showed that the certificate of stock was executed and delivered to the defendant as full-paid stock on the assumption that he had canceled his indebtedness to the Nevada Company for the par value of the stock, to wit, \$20,000, by paying an equivalent sum towards the purchase of the properties of the Lone Gold-Mining Company. Under these circumstances we think that the receipt was properly admitted in evidence for the purpose of showing the receipt by the defendant of the sum of \$20,000, or its equivalent.

The foregoing exceptions which have been noticed comprehend those that were taken to the admission of evidence which seem to have most weight and to deserve special notice. Without pursuing this branch of the case at greater length, we shall content ourselves with the statement that no incompetent testimony appears to have been admitted during the trial which would justify a reversal of the judgment.

Concerning the exceptions that were taken to the refusal of the court to give the 13 instructions that were asked by the defendant, we deem it only necessary to say that, after an examination of these instructions, we have concluded that, in so far as they contain correct declarations of law, they were fully covered by the elaborate instructions that were given by the trial court of its own motion. This seems to have been the view that was entertained by counsel for the defendant when the case was tried, since the record recites that when an exception was taken to the refusal of the defendant's instructions counsel stated to the court, in substance, that, in so far as he was then advised, the instructions asked were covered by the court's instructions, and that he saved an exception, not because he was at the time aware of any error that would be committed by refusing them, but merely "as a matter of precaution." As heretofore stated, no exception was taken in behalf of the defendant to any part of the elaborate charge which was delivered by the learned trial judge; and as counsel for the defendant, after listening to the same, were unable to direct the court's attention to any proposition of law that was not covered by the charge in chief, it is safe to assume that further instructions were unnecessary, and would not have aided the jury in reaching a correct result.

In conclusion it may be said that a careful inspection of the record has convinced us that the verdict of the jury was for the right party, and for the right amount. Indeed, it is difficult to understand, in view of the testimony, how the jury could have reached a different conclusion. The judgment below is therefore affirmed.

GIESEN v. LONDON & NORTHWEST AMERICAN MORTG. CO., Limited.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1900.)

No. 1,339.

1. CORPORATIONS—RIGHTS AND LIABILITIES OF STOCKHOLDERS IN FOREIGN CORPORATIONS—LAW GOVERNING.

When a person subscribes for stock in either a domestic or a foreign corporation, he thereby consents to be governed by the provisions of its charter or the general law under which it is incorporated, and by such by-laws as the corporation may lawfully enact, and that his rights and liabilities as a stockholder shall be tested and determined by such laws.

2. SAME—ENFORCEMENT OF RIGHTS UNDER FOREIGN STATUTE.

When a foreign sovereignty, having authority to do so, confers upon one of its corporations the right to readjust its indebtedness in a given manner, or to liquidate its affairs, or to make assessments upon its shareholders, the right so conferred will be recognized and enforced by the courts of the United States, provided the foreign statute accords to all creditors and stockholders equal privileges, without reference to their place of residence or citizenship, and does not contravene the general policy of our laws.

3. SAME—LIABILITY OF STOCKHOLDER FOR ASSESSMENT—FAILURE TO HAVE STOCK TRANSFERRED.

Defendant, a citizen of the United States, became a subscriber to the stock of an English corporation, upon which he made a partial payment. He was entered as a shareholder upon the books of the company, and received a certificate of stock, which bore a printed indorsement to the effect that no transfer of the shares would be registered except on return of the certificate. The by-laws of the company required a fee for registration of transfers, and the British laws imposed a penalty for the registration of any transfer unless the assignment bore a revenue stamp. Defendant sold and assigned his certificate, but no stamp was affixed thereto, and he took no steps to have a transfer made on the company's books. A request afterwards made by the assignee for a transfer was refused because of nonpayment of the fee, and no transfer was ever made. For some two years after the assignment, defendant continued to sign receipts for dividends at the request of the assignee. Subsequently proceedings were commenced, in accordance with the English law, to liquidate the affairs of the company, and with the approval of the court having due authority therefor, in such proceedings, assessments were levied upon the shareholders for the benefit of creditors. *Held*, that defendant was liable for such assessments, as a stockholder, and that such liability was enforceable in the courts of the United States.

4. SAME—POWER TO REGULATE TRANSFER OF STOCK.

A statutory provision that a corporation shall on application by a transferrer of stock therein, enter the name of the transferee on its register of shareholders in the same manner as if the application was made by the transferee, does not render invalid a by-law of a corporation requiring the payment of a small fee for making such transfers.

In Error to the Circuit Court of the United States for the District of Minnesota.

This action was brought by the London & Northwest American Mortgage Company, Limited, the defendant in error, and an English corporation, against Peter Joseph Giesen, the plaintiff in error, to recover the sum of \$2,919.90, exclusive of interest; said sum being the amount, in the aggregate, not including interest, of six calls or assessments on 100 shares of its capital stock, that had been levied, with the approval of an English court, in the course of a proceeding pending therein to liquidate the affairs of the plaintiff company. The case depends for its decision upon a special finding of facts made by the trial court, from which we extract the following find-

ings: In the year 1885 Albert Scheffer, A. E. Hendrickson, and E. J. Hodgson, of St. Paul, Minn., became interested with certain residents of London, England, in the promotion of an English corporation to be organized for the purpose of carrying on a loaning business. The funds were to be raised in part by subscriptions to the stock of the corporation, but principally by the sales of its debentures in Great Britain. The principal place of business of the corporation was to be in London, but its funds were to be loaned in the state of Minnesota and other adjoining states, through the sole agency of said Scheffer, Hendrickson, and Hodgson, who were to contribute at least \$100,000 towards the enterprise. Pursuant to this scheme the plaintiff company was organized on March 17, 1886, under and pursuant to the provisions of an act of parliament of the kingdom of Great Britain and Ireland, which was approved on August 7, 1862, and subsequently amended, and, together with its amendments, is generally known as the "Companies Acts, 1862 to 1890." After the company was organized a contract was entered into on October 14, 1886, between it and said Scheffer, Hendrickson, and Hodgson, of St. Paul, Minn., whereby it was agreed that the latter should be the advisory board and agents of the plaintiff company in America, and should continue to act as such advisory board and agents so long as they conducted the business to the satisfaction of the directors, or so long as it should be for the interests of the shareholders, of which the directors were to be the sole judges. Said Scheffer, Hendrickson, and Hodgson were to have power to negotiate loans for the plaintiff company, but were not to make loans to an amount exceeding £2,000 without consulting the board, and were not to loan upon any property more than 50 per cent. of its value. The directors of the plaintiff company agreed to remit from time to time to said agents, or to place to their credit in a bank in St. Paul, Minn., such sums of money as said agents might require immediately for investment; and said agents were to be held jointly and severally responsible for the care of said money until it was loaned, and the securities therefor were duly delivered and recorded. Pursuant to this agreement said Scheffer, Hendrickson, and Hodgson, as agents for the plaintiff company, and under the title of "advisory board," carried on the mortgage-loan business of the plaintiff at the city of St. Paul, Minn., until some time between June 1, 1892, and October 1, 1892, when they resigned. Their duties as such agents consisted in making loans for the plaintiff company upon real-estate security, and in collecting the interest and principal due thereon. They also solicited subscriptions to the capital stock of the plaintiff company, and one of said agents, to wit, E. J. Hodgson, acted as secretary of the advisory board, and conducted most of its correspondence. All loans made or collected by the board were reported monthly to the plaintiff's office, in London. The only books which said agents kept, pertaining to the plaintiff's business, were a cash book and a loan register, transcripts from which books were regularly forwarded to the home office. Said advisory board never assumed or held itself out to the defendant or to the public as possessing the power to issue or transfer any shares of the capital stock of the plaintiff company. On or about April 1, 1886, the defendant, Giesen, at the solicitation of Albert Scheffer, subscribed for 100 shares of the capital stock of the plaintiff company, which were of the par value of £10 sterling each; and that number of shares of stock were duly allotted to the defendant, and the defendant's name was duly entered upon the stock register of the plaintiff company as the owner of the shares so subscribed and allotted. The defendant paid to the plaintiff company on account of said stock the sum of £2 sterling on each share thereof, or, in the aggregate, £200 sterling. On August 25, 1887, a certificate for said 100 shares of stock was duly issued by the plaintiff company, and the same was delivered to and accepted by the defendant. On the back of this certificate was a printed indorsement to the effect that no transfer of said shares would be registered unless accompanied by the certificate. No transfer of said shares has ever been entered upon the books of the plaintiff company, and the defendant since April 21, 1886, has appeared in the plaintiff's register of members as the owner and holder of said 100 shares of stock. In the month of August, 1889, the defendant sold his stock to Albert Scheffer, one of the advisory board, and indorsed his

name in blank on the back of the aforesaid certificate, and delivered the same to Scheffer, receiving therefor the sum of \$1,000. Some two years later, on or about October 16, 1891, the defendant, at the request of said Scheffer, executed and delivered to a company which was known as the American Mortgage & Security Company, which was a corporation organized under the laws of the state of Minnesota, an instrument in writing whereby he bargained, sold, assigned, and transferred to it the aforesaid 100 shares of stock in the plaintiff company; but no new consideration was paid to the defendant upon the execution of the last-mentioned assignment. Said written assignment last aforesaid was not stamped, nor has it since been stamped, with a revenue stamp, such as is required by the English stamp acts to entitle said transfer to registration upon the books of the plaintiff company. Under English laws the registration of said transfer without the proper revenue stamp would have subjected the officer registering the same to a penalty. The defendant, Giesen, never applied to the plaintiff company, nor to any officer thereof, to have the aforesaid transfer of his stock registered upon the books of the plaintiff company. The only notice that was ever given by the defendant to the plaintiff company of the sale of his stock, except such as was given to the plaintiff's agents, as aforesaid, who composed its advisory board in the city of St. Paul, was a notice given by a letter written at St. Paul on June 20, 1894, which letter was written after proceedings to liquidate the affairs of the plaintiff company had been taken, and after an assessment of £1 per share had been levied upon shareholders in the course of said proceedings. In the month of November or December, 1891, the American Mortgage & Security Company transmitted by mail to the plaintiff company the aforesaid written assignment of the defendant's stock, for the purpose of having the same transferred upon the plaintiff's books; but the plaintiff company immediately returned the same to the sender, and refused to record the transfer, for the reason that the fee for making such transfer, which was authorized by the plaintiff's articles of association, had not been paid. No fee was in fact tendered by the American Mortgage & Security Company for making said transfer, and no further effort was made to obtain a transfer upon the company's books. Moreover, the assignment of the stock was not stamped, as it should have been to entitle it to transfer under English laws.

Between October 31, 1887, and March 31, 1892, the plaintiff company declared nine dividends upon its capital stock, including that which was registered in the name of the defendant. The dividends payable to the defendant and to other American shareholders of the plaintiff company were on each occasion sent to Hodgson, as secretary of the advisory board, for distribution among such shareholders. The first dividend was in the form of separate checks, which were made payable to the shareholders, respectively, and was accompanied with a letter of advice to the respective shareholders. All of the remaining dividends were forwarded in gross to said Hodgson, for distribution by him among the shareholders. As respects the last seven of said dividends, an entry was made on the plaintiff's dividend book showing the payment of the said dividends to the defendant; and as respects five of these dividends, to wit, the first, second, fourth, seventh, and eighth, the entries upon the plaintiff's books showing the payment of the dividends to the defendant were made in pursuance of receipts therefor which were signed by the defendant. The last of these receipts was dated October 15, 1891, and was for a dividend on the stock to June 20, 1891. These receipts, however, were signed by the defendant, at the request of Albert Scheffer, a member of the plaintiff's advisory board, to enable him or the American Mortgage & Security Company to obtain the dividends. When the receipts were so obtained, they were forwarded in due course of mail to the plaintiff company. A resolution to wind up the affairs of the plaintiff company was adopted on October 25, 1893, in accordance with English laws; and thereafter a compromise agreement between the plaintiff company and its creditors was proposed, which was duly approved on December 6, 1893, by the English court, to wit, the high court of justice, that had jurisdiction of the liquidation proceedings. On June 30, 1896, another resolution for winding up the plaintiff company was passed, and approved by the high court

of justice; it having been found impossible to liquidate the affairs of the company in accordance with the first scheme which was formulated for that purpose. The assessments, on account of which the present action is brought appear to have been made during the course of the aforesaid liquidation proceedings, and to have been levied strictly in accordance with the companies acts, 1862 to 1890, under and in accordance with which said liquidation proceedings were inaugurated. In view of the aforesaid findings, which have been stated in substance, the trial court concluded that the plaintiff below was entitled to recover, and it accordingly rendered a judgment in its behalf for the sum of \$4,866.50, to reverse which the defendant below sued out a writ of error.

C. D. O'Brien (Thomas D. O'Brien, on the brief), for plaintiff in error.

W. H. Yardley, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

When a person subscribes for stock either in a domestic or a foreign corporation, he thereby consents to be governed by the provisions of its charter or the general law under which it is incorporated, and by such by-laws of the corporation as may be lawfully enacted, and that his rights and liabilities as a stockholder shall be tested and determined with reference to such laws. The fact that a stockholder of a corporation is not a citizen or resident of the state or country where the corporation was incorporated does not exempt him from the operation of any of those provisions of the act of incorporation, be it a general or special act, which determine the rights and liabilities of domestic shareholders, and regulate their dealings with the corporation. Every corporation carries its charter wherever it goes and is allowed to transact business; and, while a corporation may be restricted in the exercise of some of its powers while doing business in a foreign state, yet every one who deals with it is bound to take notice of the authority that is conferred upon it by the act from which it derives its corporate existence. This is especially true of one who subscribes for stock, and thereby becomes a member of the company. *Relfe v. Rundle*, 103 U. S. 222, 226, 26 L. Ed. 337; *Silver Mines v. Brown*, 19 U. S. App. 203, 208, 7 C. C. A. 412, 58 Fed. 644. It has also been held that when a foreign sovereignty, having authority so to do, confers upon one of its corporations the right to readjust its indebtedness in a given manner, or to liquidate its affairs, or to make assessments upon shareholders, the right so conferred will be recognized and enforced by the courts of the United States, provided the foreign statute accords to all creditors and shareholders equal privileges, without reference to their place of residence or citizenship, and does not contravene the general policy of our laws. *Railway Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020. See, also, *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. Ed. 262; *First Nat. Bank of Deadwood v. Gustin-Minerva Con. Min. Co.*, 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676. It follows, therefore, that the defendant was and is

subject to all the provisions of the companies act of 1862 and the subsequent amendments thereof, that his rights are to be determined thereby, and that he can only avoid liability as a shareholder by showing that, prior to the commencement of the liquidation proceedings against the plaintiff company, he had done whatever was necessary under the provisions of that act to have his stock transferred upon the company's books, and his name stricken from the list of registered shareholders or contributories. The findings by the trial court show that the defendant did nothing personally, prior to the commencement of the liquidation proceedings, to have his name removed from the list of registered shareholders. It is true that he had indorsed his stock certificate, and had subsequently executed a written assignment of his shares in the company, but he had made no application to it to have the stock transferred on its books; and it seems obvious, from the fact that he receipted for dividends for more than two years after he had sold and assigned his stock, that he must have been aware that his transferee had not made an application to have the stock transferred on the company's books, or that, if such application had been made, it had been for some reason denied, and that his name was still borne on the books as a registered shareholder. In point of fact, the stock was not transferred on the books when a transfer was solicited in December, 1891, because the transfer fee prescribed by the by-laws of the company was not paid; and, under the findings by the trial court, it is also manifest that the transfer of the stock could not have been lawfully made when it was solicited by the transferee, because the assignment of the shares was not stamped as it should have been to entitle it to registration. Under these circumstances it is clear, we think, in view of the construction that has heretofore been placed on the companies act by the courts of Great Britain, that the defendant, Giesen, cannot successfully claim exemption from liability as a stockholder. In the leading case of *Oakes v. Turquand*, L. R. 2 H. L. 325, 345, 349, the principle was established, and has since been firmly adhered to, that under the companies act a person who is liable to assessment, and to have his name placed on the list of contributories in liquidation proceedings, is any person who has agreed to become a member of the company, and whose name is upon the register of stockholders. A person whose name so appears upon the register of stockholders when liquidation proceedings are instituted (the same having been placed there originally with his consent) cannot avoid liability as a shareholder, and is estopped from so doing, although he was induced to become a subscriber through fraud. And in *Gustard's Case* (*In re European Central Ry. Co.*, L. R. 8 Eq. 438, 443), wherein it appeared that a stockholder had sold and assigned his stock prior to liquidation proceedings, and had sent the transfer to the company's office to be recorded, and had not been notified that the company had declined to transfer it because of the alleged nonpayment of calls, it was held that the company was under no obligation to send a notice of its refusal to make the transfer, and that it was the stockholder's duty to see that everything was complete, or, in other words, that everything had

been done to entitle him to a transfer of the shares upon the company's books. In this country it has also been decided, under statutes requiring transfers of stock to be made on the books of the corporation, that the corporation may treat those persons as shareholders whose names appear as such on the books of the company, notwithstanding the fact that they have sold and assigned their stock to a third party, who has not perfected the transfer. *Richmond v. Irons*, 121 U. S. 27, 58, 59, 7 Sup. Ct. 788, 30 L. Ed. 864; *Hawkins v. Glenn*, 131 U. S. 319, 334, 335, 9 Sup. Ct. 739, 33 L. Ed. 184. This court has also pointed out on several occasions that a transfer of stock which is good and effectual, as between the vendor and the vendee, to vest the latter with a complete equitable title, may not be effectual to relieve the vendor from his liability to the corporation or its creditors, because in all matters relating to the internal government of the corporation the latter are entitled to treat those persons as shareholders whose names appear upon the register of shareholders, until their shares are transferred upon the books in the mode prescribed by the company's charter and by-laws. *Bank of Commerce v. Bank of Newport*, 27 U. S. App. 486, 489, 11 C. C. A. 484, 63 Fed. 898; *Horton v. Mercer*, 36 U. S. App. 234, 238, 239, 18 C. C. A. 18, 71 Fed. 153.

The claim is interposed on the part of the defendant that when, in December, 1891, the American Mortgage & Security Company, the assignee of the stock, transmitted the assignment thereof to the plaintiff company, and asked to have it transferred upon the company's books, the latter company had no power to demand a fee for recording the assignment, and that, having made the demand without authority, the stock should be treated as having been duly transferred upon the books at that time. This contention is based on the ground that the provision contained in the company's articles of association, requiring the payment of a fee of two shillings and sixpence for entering transfers, is in conflict with the companies act. We are unable to hold, however, that there is any conflict between the act and the articles of association; for while it is true that the act provides, in substance, that a company shall, on application of the transferrer of any share in the company, enter in its register of members the name of the transferee in the same manner as if the application for such entry was made by the transferee, yet it cannot be inferred, we think, that this provision of the companies act was intended to prevent the members of a company from establishing by their articles of association reasonable rules and regulations governing the transfer of stock. A rule like the one now under consideration, exacting the payment of a small fee to cover the necessary expense of making such transfers in an orderly manner and keeping a suitable record thereof, cannot be said to be unreasonable, and on that account void. But, even if this view were erroneous, there seems to be no escape from the conclusion, in view of the findings by the trial court, that the American Mortgage & Security Company was not entitled to have the assignment of the stock registered upon the books at the time such request was made, or at any time thereafter, because the assignment was not stamped

in conformity with English laws, and because the officer of the plaintiff company who was requested to enter and record the assignment would have incurred a penalty by so doing.

Upon the whole, we feel constrained to hold that the defendant's name was properly placed on the list of contributories in the liquidation proceedings, because he was a registered shareholder when those proceedings were inaugurated, and had not therefore taken the necessary steps to make it the legal duty of the plaintiff company to transfer his stock upon the books. The creditors of the plaintiff company are entitled to treat the defendant as a stockholder, under the provisions of the act from which the company derived its corporate existence, and by becoming a stockholder the defendant agreed to become bound and to have his rights determined by the provisions of that act. The judgment below being for the right party, it is accordingly affirmed.

RELIABLE INCUBATOR & BROODER CO. v. STAHL

(Circuit Court of Appeals, Seventh Circuit. June 5, 1900.)

No. 626.

1. BILL OF EXCEPTIONS—FILING AFTER TERM—WAIVER OF OBJECTION.

Counsel for a defendant in error do not waive the right to object to a bill of exceptions on the ground that it was not filed until after the term by failing to make the objection before such bill was signed and filed, where they were not at that time aware that no order extending the time had been obtained.

2. SAME—REQUISITES—SHOWING EXTENSION OF TIME.

When a bill of exceptions is presented for signature after the term at which the judgment was rendered, it should contain an explicit statement of any order extending the time for its settlement, so as to show that the signing and filing of the same were within the time allowed, or, if waiver of time is relied on, a distinct statement of consent by the adverse party or counsel, or a written agreement showing such consent; and under no ordinary circumstances, if at all, will affidavits be received by the appellate court to establish such facts, if omitted, and in no case to establish consent when disputed.

3. SAME—EXTENSION OF TIME FOR FILING.

An order extending the time for the preparation and filing of a transcript of the record beyond the term does not operate to extend the time for signing and filing a bill of exceptions.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

On motion to strike out bill of exceptions.

The defendant in error has moved to strike from the record the bill of exceptions. The trial was had at the January term, 1899; motions for a new trial and in arrest of judgment were overruled and judgment entered on April 3d; and on April 18, 1899, the petition for a writ of error, an assignment of errors, and supersedeas bond were filed, and an order entered allowing the writ of error. On May 13th an order was entered extending until July 3d the time within which to complete and file the transcript of the record; and at the ensuing June term, on July 3d, time for filing the transcript was extended to the 1st day of August. No entry of an order giving time for the filing of a bill of exceptions was made at the January term, but at the June term, on July 1st, an order was entered (though it is not set out in the transcript) extending to July 13th the time of defendant to file bill of exceptions. On July 13th the bill was signed and filed, but it contains no statement of time

allowed for the preparation or filing thereof. At the hearing of the motion by this court, on the first day of the present session, affidavits of counsel on both sides were read. Two affidavits of Mr. Thomason, one of the counsel for the plaintiff in error, made, respectively, on April 30th and May 1st, were read. The first is to the effect that on May 13th he obtained of Judge Allen, in chambers, at Chicago, the order extending to July 3d the time for filing the transcript; that on May 29th, as nearly as he can recollect, he obtained of Judge Allen an order, a copy of which, unsigned, is attached to the affidavit, extending the time to file the bill of exceptions and the transcript of record to July 3, 1899; that he bases his recollection of the order, which was taken from his personal files of the case, on the date written in lead pencil thereon, and on other circumstances stated; that on June 26th he received from L. H. Berger, of counsel for defendant in error, a letter of that date acknowledging the receipt of "your papers in appeal," which, the affidavit says, included a bill of exceptions, and saying that he would be at Springfield on the 3d to present objections; that on July 1st he received from the clerk of the court a letter notifying him of the order of that date extending the time to file bill of exceptions to July 13th, of which order he had since received and presents a certified copy; that on July 7th he received of L. H. Berger and C. A. Babcock, attorneys for defendant in error, the letter of that date to the effect that they had learned at Springfield, on the 3d, of an order of the judge extending for 10 days the time for filing the bill of exceptions, expressing their willingness to examine the bill if presented to them in time, but saying that they could not enter into any agreement or stipulation as to the bill of exceptions, nor agree upon any bill of exceptions, though, if corrected to conform to their objections, they would have nothing to present to the court, but otherwise would have to meet the court on the 13th and point out any defects they should see; that on July 13th the attorneys for the plaintiff in error appeared in chambers before Judge Allen, at Springfield, and a typewritten statement of "objections to the proposed bill of exceptions" was filed by plaintiff's attorney, a copy of which is attached to the affidavit; that the court then and there signed the bill of exceptions, without objection being made or exception taken; that on April 9, 1900, he received from Judge Allen the letter of that date, of which a copy is given, to the effect that the judge had no recollection about signing the bill, "but supposed, doubtless, that it was signed within the time, or within an extension of the same," within which the bill should have been signed, and that he did not recollect of any objection having been made at the time. The affidavit also sets out correspondence in August, 1899, showing a refusal of counsel for the defendant in error to enter into a proffered stipulation for the suppression of certain exhibits included in the bill of exceptions. The second affidavit says "that April 3, 1899, a motion was heard by Judge Allen, in chambers, at Springfield, Illinois, to increase damages, and denied. The court then and there granted defendant twenty days within which to file a bill of exceptions. April 18, 1899, the attorneys for the defendant appeared before Judge Allen, in chambers, at Springfield, and filed its petition for writ of error, an assignment of errors, and its bond on writ of error, and got a further extension of time for thirty days from his honor within which to file said bill of exceptions; and, to the best of my recollection and belief, both plaintiff and his attorneys, C. A. Babcock and L. H. Berger, were present at the time said extension was granted. May 13, 1899, I personally applied for and obtained the order of that date, which is of record, extending the time to file the transcript of record to July 3, 1899; and I then supposed that both the bill of exceptions and the transcript were covered by said order, but becoming aware before the commencement of the June term that said order of May 3 [13?], 1899, as drawn, did not expressly extend to the said bill of exceptions, I applied for and obtained the order referred to in my affidavit of the 30th ultimo, now on file." The affidavit of Mr. Emmons, also of counsel for the plaintiff in error, is to the effect that the annexed letter of July 12, 1899, and accompanying objections to the bill of exceptions, were left with him by Berger or by Babcock; that the letter and signatures thereto are in the handwriting of Babcock, and also the changes and interlineations in the statement of objections; "that, according to his best recollection, up to the time said bill of exceptions was signed" the attorneys for the appellee

made no objections, orally or in writing, that the time for the signing of said bill of exceptions had expired; that, as one of the attorneys for the plaintiff in error, he went to Springfield on June 30, 1899, and, with the attorneys for the defendant in error, appeared before the judge for the purpose of settling the bill of exceptions, at which time the attorneys for the defendant in error pointed out alleged omissions in respect to the charge of the court to the jury; that thereupon the judge informed counsel that they must settle on the contents of the bill, and that on Saturday, July 1st, the judge, on his request, granted to the plaintiff in error an extension of time of 10 days from July 3 to July 13, 1899, to file a bill of exceptions, and that until after the printing of the record he never knew that the clerk of the circuit court, in entering of record the extension, used the word "transcript" instead of "bill of exceptions." The letter of July 12th, referred to, says: "Inclosed please find copy of the objections and corrections we propose to the proposed bill of exceptions, and which we mail this p. m. to Clerk Jones." The objections and corrections so proposed all had reference to the contents of the proffered bill, and ended with a statement containing the following: "Not having been furnished with the reporter's notes, or the papers from which the bill of exceptions is made up, nor with the proposed bill of exceptions itself, we can neither say that the evidence set out in the proposed bill is correctly stated, nor that it is not; nor are we able to correct what appear to be inaccuracies in the supposed copy furnished us. We ask the court to preserve in some proper form this objection, in case the court signs and seals the proposed 'bill' as a bill of exceptions in this case, but do not wish to be understood as asking for further time to consider the proposed bill, but ask that the proposed bill be refused by the court, and no further time be granted, upon the ground that a very unusual time has already been allowed in which to prepare and properly submit to opposing counsel a proper bill of exceptions." The clerk made no mistake in entering the order of July 1st. The affidavit of Mr. Berger, counsel for the defendant in error, is explicit to the effect that neither he nor his associate, Babcock, was at Springfield on July 13, 1899, and at that place or elsewhere was present at the signing of the bill of exceptions, or consented to the filing of the same, and further says "that during said January term of said court no leave of court was asked, granted, or obtained for preparing, signing, or filing a bill of exceptions in said cause, and that this affiant never received during the January term, 1899, of said court any bill of exceptions, or anything that purported to be a copy of any bill of exceptions, in said cause," and that he never during that term, nor at any other time, consented to the filing of any bill of exceptions in the cause. The hearing of the motion, begun on the first day of our present session, was suspended in order to enable the plaintiff in error to apply to the circuit court to correct its record so as to show the giving of time for the filing of the bill of exceptions, but that court, it is admitted, refused to act in the premises; and the plaintiff in error has interposed a motion for a certiorari to bring up the document entitled "Objections to the Proposed Bill of Exceptions," and with the motion has presented a copy certified to be "a true copy of the objections and corrections to the bill of exceptions filed in a certain cause," etc., but not certifying or showing, by file mark or otherwise, the date, or even the fact, of the filing of the document.

Frank D. Thomason, for plaintiff in error.

J. F. Carroll, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. The motion for a certiorari need not be considered. The document sought to be brought up is not mentioned in the bill of exceptions, was in no way made a part of the record, and, if contained in the transcript, could be of no more significance upon the motion to strike out the bill of exceptions than when satisfactorily proved by affidavit. There can be no doubt that the paper was sent

by counsel for the defendant in error to the clerk of the court, and it was perhaps placed on file; but the assertion that it was filed by plaintiff's attorney on July 13th, besides being an evident mistake, is not clearly consistent with the statement in one of the affidavits "that the court then and there signed the bill of exceptions, without objection being made or exception taken." On the entire showing, it is evident that the attorneys for the defendant in error, at the time the bill was filed, and possibly until they came to examine the printed transcript, believed that there had been a regular extension of time for the signing and filing of the bill. It is certain that on July 3d they learned of the extension ordered three days before, and not unnaturally they may have assumed that that order was made within the time of a previous extension which had been duly ordered. Their mistake in that respect, however, did not alter the fact that during the term at which the judgment was rendered no order was entered allowing time beyond the term for signing and filing the bill, and did not place the plaintiff in error in a worse position than if the specific objection to the signing of the bill had been interposed at the time of signing. There is no proof which tends even remotely to show a purpose to waive the objection, or to consent to the signing of the bill out of proper time. When, during the term at which a judgment is rendered, it is proposed to allow time beyond the term for the filing of a bill of exceptions, it is well that a notation of the fact be made upon the docket of the court, or by an entry upon the order book; but when, after the term, the bill is presented for signature, it should contain an explicit statement of the extension, such as to demonstrate that both the signing and the filing are within the time allowed, or, if a waiver of the time is to be asserted, a distinct statement of the fact of consent by counsel or party present at the time of signing, or, what would be still better, a written agreement indorsed upon or attached to the bill showing that consent. Under no ordinary circumstances, if at all, will affidavits be received to show such consent,—certainly not when the fact is disputed, as it is here. Indeed, it is not clear that consent after the expiration of the term is available. In *Waldron v. Waldron*, 156 U. S. 361, 378, 15 Sup. Ct. 387, 39 L. Ed. 457, it is said, "The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered was lawful, if done by consent of parties, given during that term." It may be, however, that the cases cited do not go that far. *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. Ed. 113; *Davis v. Patrick*, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090; *Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162. See, also, *Muller v. Ehlers*, 91 U. S. 249, 23 L. Ed. 319; *Morse v. Anderson*, 150 U. S. 156, 14 Sup. Ct. 43, 37 L. Ed. 1037; *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195.

The suggestion that, by the order giving time for the preparation and filing of the transcript of the record in this court, the circuit court retained jurisdiction of the case for the purpose of signing the bill of exceptions, is manifestly untenable. The motion to strike out is sustained.

GIBBS v. MCNEELEY et al.

(Circuit Court, D. Washington, W. D. June 8, 1900.)

1. MONOPOLIES—ACTION UNDER ANTI-TRUST LAW—PLEADING.

A complaint in a civil action, based on the anti-trust law of 1890, alleging an illegal combination by defendants in restraint of trade, is fatally defective, where it fails to show that plaintiff has suffered damage by reason of such combination.

2. SAME—ILLEGAL COMBINATIONS WITHIN THE STATUTE—RIGHT OF ACTION FOR DAMAGES.

An association of manufacturers of shingles within a particular state, formed for the purpose of securing concerted action between its members to prevent overproduction and establish uniform prices and grading, is not an illegal combination in restraint of interstate or foreign commerce, within the meaning of the anti-trust law of 1890, or subject to federal control; and the fact that through the action of the association the mills of its members were closed for a certain time, and the price of shingles was raised, but not to an extent alleged to be unreasonable or exorbitant, does not give a dealer in shingles for export a right of action against it or its members under such law.

3. SAME.

The action of an association of manufacturers in adopting a resolution denouncing a dealer in the product they manufactured, who bought and shipped such product to customers in other states and foreign countries, and in printing such resolution in circulars, and mailing the same to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and gives the person injured a right of action in a circuit court of the United States, under the anti-trust law of 1890, to recover the damages sustained.

Action to recover damages claimed on account of an unlawful combination to restrain interstate and foreign commerce, and a conspiracy on the part of the defendants to establish and control prices of the product of the mills employed in manufacturing red-cedar shingles, in the state of Washington, and to limit the production of red-cedar shingles so as to prevent demoralization of the market by overproduction, and also to recover damages alleged to have been caused by the defendants and others, forming an unincorporated association of shingle manufacturers under the name and style of the Washington Red-Cedar Shingle Manufacturers' Association, by the circulation through the mails and publication of false and defamatory statements concerning the plaintiff, and intended to injure him in his business as a buyer and exporter of red-cedar shingles. Demurrer to complaint overruled.

T. O. Abbott, for plaintiff.

Bates & Murray, for defendants.

HANFORD, District Judge. The plaintiff's amended complaint sets forth four separate causes of action. The material allegations to be considered may be condensed into a few sentences. The plaintiff shows that for several years he was engaged in business at Tacoma, in the state of Washington, as a buyer and exporter of red-cedar shingles; that red-cedar shingles are a staple article of manufacture in the state of Washington, the market for which is mostly in other states and in Canada; that the defendants, and other persons, firms,

and corporations named in the complaint, are manufacturers of red-cedar shingles, owning and operating mills in several different places in this state, and that they have formed and constitute an unincorporated association having for its object the prevention of injurious competition, and that the organization and maintenance of said association is in violation of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (1 Sup. Rev. St. [2d Ed.] 762). For a second cause of action the complaint alleges, in addition to the matters already recited, that the association has established prices for red-cedar shingles below which members are not allowed to sell, said prices being a little higher than the market prices prior to the formation of the association; that the plaintiff's customers refused to buy at the prices fixed by the association, causing him damage in the loss of trade to the amount of \$1,200. For a third cause of action the complaint alleges, as additional matter, that the association caused all the shingle mills owned and operated by its members to shut down for a period of 60 days for the purpose of preventing an oversupply, and that by restricting the production of red-cedar shingles the plaintiff sustained further damages by loss of trade to the amount of \$1,000. For a fourth cause of action the plaintiff charges that the defendants and other members of the association, with intent to injure the plaintiff and to destroy his business, at a meeting of the central committee of the association, adopted certain resolutions containing false and defamatory statements concerning the plaintiff, charging that the plaintiff was endeavoring to injure the market for Washington red-cedar shingles; that plaintiff had no money invested in his business as a dealer in shingles; that he was without credit, and was irresponsible, and was not an honorable and legitimate dealer in shingles; that the officers of the association caused said resolutions containing said false and defamatory matters to be written and made a part of the records of the association, and caused the same to be printed as a circular, and to be distributed through the United States mails, addressed to each manufacturer of shingles in the state of Washington, and to various wholesale and retail dealers, including customers of the plaintiff in the United States and Canada, and to a number of newspapers and trade journals having circulation among the plaintiff's customers; that as the result of said combination and conspiracy among the defendants and other members of said association, and of the acts and things complained of, odium and discredit were cast upon the plaintiff, and his customers thereafter refused to buy shingles of him, and the manufacturers of shingles who theretofore had transacted business with him refused to sell shingles to him, and by that means his business was totally destroyed, to his damage in the sum of \$15,000.

1. The complaint in its statement of the first cause of action is radically defective, in this: that it does not allege that any damage has resulted to the plaintiff from the acts complained of, and for that reason the demurrer will be sustained.

2. The gist of the second cause of action is that the plaintiff has been damaged by diminution of trade in consequence of the action of the association in raising the price of shingles; and the third cause of

action is similar, the complaint being that a shrinkage of the plaintiff's business was caused by the action of the association in suspending the operation of mills controlled by it, so as to prevent an overstocking of the market. Both of these causes of action appear to be predicated upon a notion that because the plaintiff was a buyer and exporter of shingles he had a vested right to the benefit of unrestrained competition for trade among manufacturers, and that the plaintiff has a vested right at all times to have a surplus of shingles on the market so that he may enjoy that advantage in buying to supply the demands of his customers, and that by depriving him of these benefits and advantages the association has committed a legal wrong, and deprived him of valuable property rights, for which he is entitled to recover damages. There is no allegation in the complaint that the price of shingles fixed by the association is higher than the reasonable price, considering the necessary cost of production, and allowing something for the value of the timber to the owners of the land upon which it grows, and a reasonable profit to the manufacturers, nor that the wants of consumers have not been promptly supplied. On the contrary, the pleader has boldly advanced the selfish theory that, unless conditions are maintained so that a middleman or speculator may operate with profit to himself, he has a right to compensation in damages from the owners of mills who refuse to operate for his benefit, or to sell the product at prices satisfactory to him, regardless of losses which may result to them from such operation. It is a well-known and lamentable fact that for half a century loggers have been permitted to cull the magnificent forests of this state, wasting the greatest of her natural endowments, by cutting fir and cedar trees recklessly, sending only the best logs to the mills to be manufactured into lumber for shipment to market in distant states and countries, leaving the residue to decay upon the ground, or give additional energy to the destructive force of forest fires in the summer months. They have paid but little for stumpage, and frequently their hired laborers have been defrauded of their wages. Unrestrained competition has been the means by which this state has been stripped of its wealth. Cedar trees standing and growing in our forests are a blessing to the state, and they ought to be preserved, at least until their value is appreciated, so that the crop which has required many centuries of time for its perfection will be worth to owners of the land something more than the price which a farmer may reasonably expect for his annual production. It seems ridiculous that while land producing wheat, hay, vegetables, or fruit in this state usually brings annual returns over and above expenses of cultivating and harvesting of from \$10 to \$50 per acre, the average market price for a fee-simple title to timber land in western Washington has never yet been above \$10 per acre. An association which will check the wanton destruction of cedar trees in this state, by reckless lumbermen, for the benefit of speculators, instead of being condemned, deserves the gratitude of the commonwealth. No principle of natural justice is appealed to by that part of the complaint now under consideration, and I do not think that the act of congress commonly designated as the "Anti-Trust Law of 1890," to which the complaint refers, can be fairly construed so as

to make the Washington Red-Cedar Shingle Manufacturers' Association a criminal organization, so long as its operations are properly conducted, and kept within the scope of the object for which the association was formed, as set forth in its constitution, the first article of which reads as follows:

"The title of this organization shall be the Washington Red-Cedar Shingle Manufacturers' Association, and its object shall be to secure a full understanding of the conditions surrounding the red-cedar shingle market throughout the United States; the establishing of uniform rules for grading and manufacturing; the establishing of uniform rates and prices; and for purpose of carrying out such other measures as may be deemed for the welfare and in the interest of the manufacturers of red-cedar shingles."

There is in this declaration no hint of a purpose to create a monopoly, or to place any burden upon interstate or foreign commerce. The association, judged by the instrument which defines its object and circumscribes its powers, is innocent of any wrong intent, because its object is to influence the conduct of its members, and not to assail the rights of others. Concert of action for mutual protection among farmers or craftsmen or miners whose operations are entirely within the state may indirectly affect the prices or the abundance of commodities brought for sale within the state by importers, as well as commodities produced within the state for sale elsewhere; but associations of persons not themselves engaged in interstate commerce, having no object other than to protect their own rights and serve their own interests in business operations wholly confined within the state, cannot be held to be amenable as violaters of the anti-trust law, which is necessarily so limited as to reach only combinations intended to prevent competition in interstate or foreign commerce.

The distinction between the business of manufacturing staple commodities for sale to whomsoever will buy, whether for home consumption or transportation to distant markets, and interstate commerce, is very clearly brought into view, and the principle upon which I intend to rest in making this decision is explained, in the opinion by Chief Justice Fuller in the case of *U. S. v. E. C. Knight Co.*, 156 U. S. 1-11, 15 Sup. Ct. 253, 39 L. Ed. 329. The sense of that decision is epitomized in the following excerpts:

"The relief of the citizens in each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it became a matter of such public interest and importance as to create a common charge or burden upon the citizen,—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by the means of which a tribute can be exacted from the community,—is subject to regulation by state legislative power. On the other hand, the power of congress to regulate commerce among the several states is also exclusive. The constitution does not provide that interstate commerce shall be free, but, by the grant of this legislative power to regulate it, it was left free except as congress might impose restraints. * * * 'Commerce undoubtedly is traffic,' said Chief Justice Marshall; 'but it is something more; it is intercourse. * * * That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.' *Gibbons v. Ogden*, 9 Wheat. 189-210, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419-448, 6 L. Ed. 678; *License Cases*, 5 How. 505-599, 12 L. Ed. 256;

Mobile Co. v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Lelsy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; In re Rahrer, 140 U. S. 545-555, 11 Sup. Ct. 865, 35 L. Ed. 572. * * * Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not a primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. * * * The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state, and belongs to commerce. * * * Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade; but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy. * * * It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such, or to limit and restrain the right of corporations created by the states or citizens of the states in the acquisition, control, or disposition of property, or to regulate or prescribe the price or prices at which such property or the product thereof should be sold, or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted."

See, also, Kidd v. Pearson, 128 U. S. 1-26, 9 Sup. Ct. 6, 32 L. Ed. 346.

The more recent decision of the supreme court in the case of Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211-248, 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. —, does not conflict with the decisions above cited. That case is to be distinguished from the one under consideration by the fact that it involved an agreement between manufacturing firms and corporations located in several states, binding themselves to refrain from all competition with each other for the sale of iron pipe in the 36 states and territories named in the agreement.

The history of the hop industry in this state may be referred to as an illustration. There was a time when the production of hops was a favorite industry in this state, but during several years past it has grown more and more into disfavor because it has been unprofitable, and interstate commerce in this commodity has been diminished by reason of the conversion of many hop fields into meadows and vegetable gardens. It may be true that the hop farmers, acting individually and without advice from any one, have, one after another, converted their hop fields; but if they had joined an association of farmers who for general welfare had adopted efficient measures to obtain true information with regard to the supply and demand for hops and other products of the state, and had conformed to an intelligent resolution of the association to meet an increasing demand for onions, potatoes, and hay, instead of continuing to lose the value of their labor and the use of their farms, year after year, by producing

hops in excess of the requirements of the market, it would certainly be tyrannical for the courts to punish them for resulting losses of profit by dealers and speculators in hops. In my opinion, it would be equally absurd to apply coercive measures to compel shingle manufacturers to operate their mills without profit to themselves, or to forbid them to have the benefit of co-operation for their own advantage. The demurrer to the second and third affirmative defenses will be sustained on the ground that the object of the association is not unlawful. The anti-trust law was not intended to oppress any class, and it cannot be so construed as to prohibit the right of manufacturers, whether acting individually or in concert, to be prudent, and use common sense in maintaining reasonable prices, and avoiding losses by overproduction.

3. According to the statement of the fourth cause of action, the association appears to have been used for a purpose not suggested by its constitution, and highly prejudicial to the plaintiff. In my opinion the complaint states a good cause of action to recover damages for libel, and the only question as to the right of the plaintiff to maintain the action in this court is whether the facts alleged make a case of which jurisdiction is given to this court by the terms of the anti-trust law. The first and second sections of the act declare contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries, and all attempts of persons to monopolize interstate and foreign commerce, to be illegal, and the seventh section reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

It is essential to a right of action pursuant to this law to show that the defendants have entered into a combination or conspiracy to restrain or monopolize interstate or foreign commerce, and that the plaintiff has been injured in his business or property by an act of the defendants pursuant to their agreement with each other, and intended to affect interstate commerce, and the injury must be of a pecuniary nature, involving a loss of business or damage to property. I find that all the requirements of the statute are met in the plaintiff's statement of his fourth cause of action. He does directly and positively charge that the defendants have entered into a combination to restrain interstate and foreign commerce, and constitute an organization; that at a meeting of the central committee, controlling the affairs of the association, a resolution denouncing the plaintiff was adopted, and recorded, so as to be preserved in the records of the association; that said resolution was printed and widely distributed as a circular, and especially directed to persons, firms, and corporations in the state of Washington, and in other states, and in Canada, with whom the plaintiff had theretofore transacted business as a buyer and exporter of shingles. The resolution was obviously intended to create a prejudice against the plaintiff, and to have the effect to impair his credit,

and to destroy his business, by inducing his customers to forsake him; and the complaint alleges that the plaintiff has been injured in his business by reason of what the defendants have done in pursuance of their unlawful combination against his business. The resolution is not a regulation of the conduct of the association or its members, and they were not minding their own business when they adopted it, but is an agreement on their part to assail the character of a man engaged in interstate commerce, for the purpose of crippling him as a competitor for trade. By annihilating a man of experience and skill in a particular branch of commerce, the restraint upon commerce is quite as effectual as would be any contract binding him to abstain from competition.

Demurrer to fourth cause of action overruled.

EARLE v. MILLER.

(Circuit Court, E. D. Pennsylvania. July 2, 1900.)

No. 3.

BILLS AND NOTES—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

An affidavit of defense in a suit by a receiver of an insolvent bank on a note of which the bank was a bona fide holder for value before maturity, alleging that defendant was an accommodation maker, and that the indorsers, who were not parties to the suit, had a certain sum on deposit in the bank when it became insolvent, which occurred after the note became due, but containing no allegations showing that they still owned such deposit, or that they desired to have the same used by the maker as a set-off in the suit against him, is insufficient to entitle him to set off the amount of such deposit on the ground that he was merely surety on the note, which was discounted by the bank in due course of business, in ignorance of his relation to the indorsers.

Action by George H. Earle, Jr., receiver of the Chestnut Street National Bank, against B. F. Miller. Motion for judgment for want of sufficient affidavit of defense. Granted.

Charles Biddle and Asa W. Waters, for plaintiff.

Wm. J. Turner, for defendant.

McPHERSON, District Judge. This is a suit upon a promissory note, of which the Chestnut Street National Bank was the bona fide holder for value before maturity, having discounted it in due course of business. So far as appears, also (there is no averment to the contrary), the bank had no knowledge that the defendant was an accommodation maker, and therefore the fact that in reality he was not a principal upon the note, but a surety (whether or not such knowledge is ever material), is of no importance in the present suit. The bank, and the plaintiff as its receiver, had the right to treat him as he appeared upon the face of the note, without regard to the undisclosed equities that may have existed between the indorsers and himself. The note was due at the time of the bank's insolvency (in this respect the case differs from several decisions that have been cited), and, if the fact of insolvency fixed the status of the parties, their respective rights were as follows:

- (1) The bank had an immediate right of action upon the note, both against the maker and against the indorsers.
- (2) The indorsers had an immediate right of action against the bank upon their deposit.
- (3) The maker had no deposit, and had no right of action otherwise against the bank.

Conceding for present purposes that, if the bank or the receiver had sued the indorsers, the latter might have set off their deposit, it is difficult to see upon what ground the maker can use the indorsers' deposit in this action against himself. There is no averment that he owns the deposit; and (assuming the fact of suretyship to be of importance) he has no right to require the bank to apply it in reduction of his own liability, upon the ground that he was merely a surety, for the bank discounted the note in ignorance of the relation between the indorsers and himself. If he may now set off the deposit, the result will be that the indorsers, who will probably receive only a percentage of their claim as depositors, will be enabled to use the deposit at its full value, to pay their own debt to the defendant.

Moreover, there is no averment that the deposit is still the property of the indorsers. The affidavit merely says that the indorsers had a certain sum to their credit "at the time of the appointment of the receiver"; but whether the deposit is still theirs, does not appear. They had a perfect right to dispose of it to a stranger, and, so far as the affidavit discloses, they may have taken this course. Neither does it appear that, even if they still own the deposit, they desire to have it used as a set-off in the present suit. It may be of more advantage to them to transfer the claim in discharge of a liability to another person; and it would certainly present a curious situation, if the defendant were permitted to use the deposit as a set-off against the note, while the indorsers may already have used it for another purpose, or while they retain the power thus to use it, and therefore to destroy its availability for the purpose now in view. They are not parties to this suit, and nothing appears to show that they are bound by the defendant's action.

No case has been cited that supports the defendant's position, unless it be *Bank v. Kinsler*, 16 Wkly. Notes Cas. 509. For that decision no reasons were given by the court, and the reporter's brief memoranda of the remarks made by the judges during the argument are obviously of very little weight. Assuming that the report is correct, it does not follow that the decision is based upon the objections that were suggested to counsel while the discussion was going on. In the end, the court may have had other reasons for the decision. Upon further consideration, the two judges that heard the case may have differed in opinion, or they may have been influenced by the practical reason that the question was doubtful, and that such a question ought to be decided upon a trial, rather than upon an affidavit of defense,—to say nothing of other possible reasons. If the court had supported their judgment by the same course of argument that is now presented by the defendant's counsel, my sincere respect for the eminent learning and ability of Judges Hare and

Mitchell would have inclined me to give great weight to their opinion, but, as I do not know upon what ground the judgment rests, I am constrained to decide the point in accordance with my own view of the law.

The rule for judgment is made absolute.

In re PARK.

(District Court, W. D. Arkansas, Texarkana D. June 7, 1900.)

1. BANKRUPTCY—RIGHTS OF BANKRUPT—EXEMPTIONS.

Under Bankrupt Law, § 47, cl. 11, requiring the trustee to set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court, as soon as practicable after his appointment, a bankrupt cannot be denied his exemptions because he has not accounted for all his assets, or has fraudulently transferred his property.

2. SAME.

Where property claimed by a bankrupt as exempt has been sold by the trustee, the exemption should be set apart out of the proceeds of the sale.

In Bankruptcy. Bankrupt's claim for exemptions.

Wm. S. Curran, for bankrupt.

Jones & Hudgins, for creditors and trustee.

ROGERS, District Judge. By section 47, cl. 11, of the bankrupt law, it is made the duty of the trustee to set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court, as soon as practicable after his appointment. It does not appear in this case that the trustee has ever discharged this duty. The referee has found that the bankrupt was entitled to his exemptions as scheduled by him. No exceptions were taken to the finding of the referee with reference to the value of the property. The exceptions seem to be based upon the fact that the bankrupt has not accounted for all of his assets, and is in possession of portions of his assets which were not turned over to the trustee. This is no reason why he should not have his exemptions. If he has in his possession, or under his control, assets which he has not accounted for, the trustee has his remedy. If he has fraudulently transferred property to other persons, the referee has his remedy, but the bankrupt should not be denied his exemptions on account thereof.

It is not necessary to consider the objections in detail. If the trustee has not set apart the exemptions belonging to the bankrupt, it is his duty to do so. If he has sold the property which the bankrupt claimed as exempt, and therefore cannot set apart his exemptions, as claimed, then the exemptions should be set apart to him out of the proceeds of the sale of the goods turned over to the trustee. The trustee, on setting apart the exemptions, should make his report at once to the referee.

An order will be entered by the clerk directing the trustee to set apart to the bankrupt his exemptions as set forth in his petition and schedule, and, if the same have been disposed of by the trustee, he will set apart his exemptions, under the direction of the referee, out of the proceeds of the sale of the merchandise.

FARBENFABRIKEN OF ELBERFELD & CO. v. UNITED STATES (two cases).

PICKHARDT et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. May 28, 1900.)

Nos. 2,871, 2,872, 2,899.

1. CUSTOMS DUTIES—CONSTRUCTION OF TARIFF ACTS.

The term "derived from," used in a tariff act to describe a product, has its ordinary meaning of "produced from," and relates to the physical substance from which such product is obtained, and not to its chemical relationship.

2. SAME—CLASSIFICATION—COAL-TAR DYES.

The term "artificial alizarin," as used in tariff acts, has acquired a definite, fixed meaning, by which it is limited to such dyestuffs as are derived from anthracene; and colors known as "blacks" and "browns" and "cœrulein," which are not so derived, although they respond to all the alizarin tests, are not within paragraph 469 of the free list of the tariff act of 1897, but are dutiable under paragraph 15, as coal-tar colors or dyes not specially provided for.

3. SAME.

Coal-tar colors or dyes which are not derived from anthracene are not "artificial alizarin dyes," within the meaning of paragraph 368 of the free list of the tariff act of 1894, although they respond to all the alizarin tests, but are dutiable under paragraph 14, as coal-tar colors or dyes not specifically provided for.

Lacombe, Circuit Judge, dissenting.

Appeals from the Circuit Court of the United States for the Southern District of New York.

These three appeals from the decision of the circuit court for the Southern district of New York relate to the proper classification for dutiable purposes of dyestuffs made from coal tar. Nos. 2,871 and 2,872 each relate to the colors or dyes known as "diamond blacks," and described as "alizarin black F" and "alizarin black G A." No. 2,871 arose under the tariff act of 1894, commonly known as the "Wilson Act," and the importations were classified for duty by the collector at 25 per cent. ad valorem, under paragraph 14 of that act (28 Stat. 509), which imposed that duty upon "all coal-tar colors or dyes, by whatever name known, and not specially provided for in this act." The importers protested that these dyes were on the free list in paragraph 368, as "alizarin and alizarin colors or dyes, natural or artificial." No. 2,872 arose under the tariff act of 1897, known as the "Dingley Act." The collector classified the colors for duty at 30 per cent. ad valorem, under paragraph 15, which placed that duty upon "coal-tar dyes or colors, not specially provided for in this act." The importers protested that they were on the free list. The Pickhardt Case arose, also, under the act of 1897, and related to importations of two dyes, known, respectively, as "alizarin brown" and "cœrulein." The collector classified them for duty at 30 per cent. ad valorem, and the importers protested upon the ground that they were on the free list. The appropriate paragraph of the free list will be quoted hereafter. The board of general appraisers sustained the action of the collector in each case, and the circuit court affirmed the decision of the board of general appraisers. 99 Fed. 553, 554, 719.

Arthur H. Masten, for appellant Elberfeld & Co.

W. Wickham Smith, for appellants Pickhardt et al

Charles D. Baker, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). Alizarin is "a peculiar red coloring matter (C₁₄. H₈. O₄.) formerly obtained from madder, and extensively used as a dyestuff. It is now artificially

prepared on a large scale from anthracene (C₁₄. H₁₀.), a product of the distillation of coal tar." Cent. Dict. Alizarin obtained from madder was further described by the board of general appraisers as follows:

"Owing to its frequent use, in former years, in dyeing fabrics red, particularly the color known as 'Turkey red,' it became commonly known as 'alizerin red,' although it was commonly used to produce purples and other shades in dyeing and printing, according to treatment or the nature of the mordant employed upon the fabric; and the colors thus produced ranked as fast to the influences of light and air and to milling and fulling. It was included with madder and its extracts in the free list of most of our earlier tariff acts."

This article, called "natural alizarin," has now disappeared from the market, and the article obtained from anthracene, "the last hydrocarbon of commercial importance obtained in the classification of coal tar," from which all the colors called "artificial alizarin" are produced, has taken its place as a dyestuff. The idea of converting anthracene into alizarin was conceived by two German chemists, Griebe and Liebermann, who obtained patents for the process in the United States and in other countries in 1869. Subsequently the validity of the United States patent was brought before the federal courts of this country, and in the opinion of the supreme court upon the subject, which was written in 1884 (*Cochrane v. Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. 455, 28 L. Ed. 433), it is said, "The articles in market called 'artificial alizarin' at the present day are substances all of which are made from anthracene." The fact, as found by the circuit court, that artificial alizarin has acquired in the historical literature on the subject, among scientists and in the discussions by the courts, "a definite, fixed meaning, by which it is limited to such dyestuffs as are derived from anthracene," has an important bearing upon the construction which should be given to the paragraphs of the free list respecting this article in the successive tariff acts. An additional important historical fact is that, after the artificial alizarin had become an established dye, other dyes, not from anthracene, but from other products of the distillation of coal tar, were also obtained, and, "by the aid of chemical science and investigation, dyes which produced different colors and different shades of the same color were discovered from time to time; and the production of dyes from coal tar became an industry of large importance, because very beneficial in the manufacture of various kinds of fabrics." *U. S. v. Sehlbach*, 33 C. C. A. 277, 90 Fed. 798. These new dyes are valuable, because they dye in colors that are, like artificial alizarin colors, fast to milling and fulling and to light and air. No one of the dyes which are the subject of these appeals was produced from anthracene. The language of the provisions in the free list in the various statutes with respect to alizarin is as follows:

Act Feb. 3, 1875, § 8.	Act 1883, § 2503.	Act 1890, par. 478.	Act 1894, par. 838.	Act 1897, par. 469.
Alizarin.	Alizarin, natural or artificial.	Alizarin, natural or artificial, and dyes commercial- ly known as "alizerin yellow," "alizerin orange," "alizerin green," "alizerin blue," "alizerin brown," "alizerin black."	Alizarin and aliz- arin colors or dyes, natural or artificial.	Alizarin, natural or artificial, and dyes derived from alizarin or from anthra- cene.

The act of 1883 unquestionably referred, by the term "artificial," to the anthracene produced alizarin. In 1890 the different coal-tar dyes which were commercially known as "alizarins" had come into use; and the free list of the act of that year upon the subject of alizarin was framed for the purpose of including this whole class of dyes, either popularly or accurately styled "alizarin," and this manifest fact was recognized in the decisions which construed paragraph 478 of that act. *U. S. v. Sehlbach*, *supra*. In 1894 commercial designation was dropped from the statute, and alizarin colors or dyes, natural or artificial, were named. It is now urged by the importers that this language includes all dyes or colors produced from coal tar, which have the quality of fastness in use peculiar to alizarin colors. There would be great force in this construction if the paragraph had not dropped the commercial designation which was specifically included in the preceding act, and if "artificial alizarin" had not theretofore acquired a specific meaning. While the words "alizarin dyes, natural or artificial," would naturally seem to have a broad meaning, and include all dyes which accomplished the results which alizarin dyes accomplish, yet the known history and meaning of the term, which tends to show that "artificial" is not a mere adjective, but means derived from anthracene, prohibit a broad construction. While this is true in regard to the term "artificial alizarin," it is said that the paragraph places alizarin colors or dyes, natural or artificial, in the free list, and that these words imply something more than alizarin, natural or artificial. Alizarin, whether natural or artificial, is a color for dyeing fabrics, and, though originally used for producing "Turkey red," was early used for producing a variety of colors, according to the nature of the mordant which was employed; and the term "artificial alizarin colors or dyes" has no larger meaning than "artificial alizarin," and the two terms are synonymous. In the act of 1897 the legislature recognized that the language in paragraph 368 of the act of 1894 was liable to diverse constructions, and accordingly intended to make it plain that the new paragraph was applicable only to dyes, natural or artificial, as those terms have heretofore been explained. There is little room for the claim that, if the word "derived" is to have its ordinary meaning, coal-tar dyes not made from anthracene or from madder are in the free list. It is, however, said in the *Pickhardt Case* that, while the dyes in that case were not a product of anthracene, they were "derived" from anthracene, "in the chemical sense of having anthracene as a base, or responding to the chemical tests for anthracene." For example, Prof. Chandler, recognized everywhere as an accurate and learned chemist, says that, to a chemist, the term "derived from" signifies that the body to which the term is applied bears a certain chemical relation to the one from which it is said to be derived; being a typical group of chemical atoms, which group, more or less modified, appears in every substance said to be derived from it. It is further said that chemical analysis does not determine the physical substances out of which these dyes are made, and that therefore for such information resort must be had to the manufacturer, or to the patents, if any, under which they were made. It is not important to de-

termine whether these dyes were derived from anthracene, in the chemical sense, for they were not a product of or made from anthracene; and the term "derived from" is to be understood in its commonly received and popular sense. "It is entirely well settled that, in the interpretation of the revenue laws, words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that differs from the ordinary understanding of the word." *Lutz v. Magone*, 153 U. S. 105, 14 Sup. Ct. 777, 38 L. Ed. 651; *U. S. v. Fuel Co.*, 172 U. S. 339, 19 Sup. Ct. 200, 43 L. Ed. 469. It is obvious that the popular meaning of the term is the meaning given in lexicons, and which is obtained by transmission or produced from, and refers, in this case, to, its physical origin. The term is used in the act of 1897, as it has been used elsewhere, to mean produced from anthracene. Under the paragraph as thus construed, it is not contended by Pickhardt and Kuttroff that their dyes are in the free list. The decisions of the circuit court in the three cases are affirmed.

LACOMBE, Circuit Judge. As to action No. 2,871, which arose under the act of 1894, I think the article imported, even if not "artificial alizarin," is "an artificial alizarin dye," whether such phrase be construed popularly, commercially, or scientifically. Moreover, I am persuaded that congress, when it substituted the broad phraseology of the act of 1894 for the enumeration of some of the alizarin dyes contained in the act of 1890, intended to enlarge the free list, and used words apt to convey such intent. It seems equally clear, however, that paragraph 469 in the act of 1897 was intended to restrict free entry to such dyes only as were made from alizarin or from anthracene. Therefore I concur in the opinion of the court as to the actions arising under the later act.

GRIMES v. ALLEN.

(Circuit Court of Appeals, Seventh Circuit. May 17, 1900.)

No. 562.

PATENTS—VALIDITY AND INFRINGEMENT—MACHINERY FOR PUMPING OIL WELLS.

The Allen patent, No. 328,099, for a device for converting motion in oil-pumping apparatus, in which one or more eccentric disks, with loosely-mounted rings, are attached intermediate the ends of an upright driving shaft,—the ends of the pump-actuating rods, leading to wells in any direction, being secured to such rings,—was not anticipated, the nearest to an anticipating device being that shown in patent No. 313,907, issued to the same patentee; and, while the eccentric of the later patent is functionally the mechanical equivalent of the crank-mounted disk of the former, the later device embodies patentable improvements upon the earlier. Such patent also held infringed.

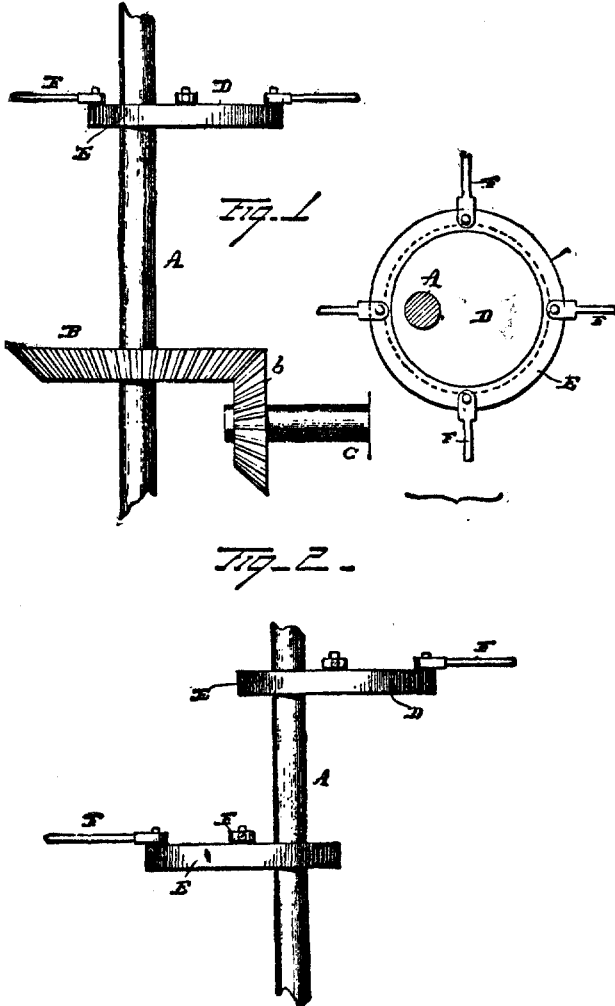
Appeal from the Circuit Court of the United States for the District of Indiana.

Chester Bradford, for appellant.
James T. Kay, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the court below was to restrain the infringement of Letters Patent No. 328,099, dated October 13, 1885, issued to George Allen for a device for converting motion in oil pumping apparatus.

The substantive portions of the Letters Patent and drawings are as follows:



"My invention relates to an improvement in converting motion in oil-pumping apparatus. In Letters Patent No. 313,907, granted me on March 17, 1885, I showed and described an upright rotary shaft provided with a crank and a disk loosely mounted on the wrist-pin of the crank, said disk being adapted to the attachment of pump-actuating rods leading in any desired direction therefrom. In a second application for Letters Patent allowed me on August 10, 1885, I showed and described a modified form of the construction shown in my former patent, in which the pump-actuating rods were loosely secured directly on the wrist-pins of the crank.

"While the above constructions have proved eminently practicable in use, and well adapted to satisfy the needs of a great majority of the cases where a greater or lesser number of wells are to be pumped by a single-actuating shaft, yet there are instances in which it might be desirable to modify the means for attaching the pump-actuating rods to the driving-shaft.

"The object of my present invention is to provide means for attaching the pump-actuating rods to the driving-shaft at one or several points of elevation and in groups, leading in opposite general directions from each of two points of elevation, or in any desired direction from the same point of elevation, as may be found most expedient.

"With these ends in view my invention consists in certain features of construction and combinations of parts, as will be hereinafter described, and pointed out in the claims.

"In the accompanying drawings, Fig. 1 is a view of a portion of the pumping apparatus embodying my invention, showing rods leading in any direction from the same point on the driving-shaft, and Figure 2 is a similar view showing two groups of rods, the groups leading from different points of elevation on the drive-shaft and in generally opposite directions therefrom.

"A represents an upright shaft journaled in suitable bearings in a supporting-frame, and driven by bevel-gear Bb, connecting it with the engine-shaft C.

"To the shaft A are rigidly secured one or more eccentric disks or wheels, D, provided with the eccentric straps or rings E, loosely mounted thereon. To the straps or rings E the ends of the pump-actuating rods F are secured, the rods leading in any direction therefrom, as shown in Figure 1, or one group of rods, F, leading to the right from one of the eccentric disks, and another leading to the left from another of the eccentric disks or wheels, as shown in Figure 2. The latter construction admits of a more perfect balancing of the pumps, as those on the right will be all descending while those on the left are lifting, or vice versa. This may be quite satisfactorily accomplished, however, when but a single eccentric is employed by using a little care in distributing the rods about the ring E.

"Instead of one or two eccentrics, three or more may be used, and the capabilities of the pump be thereby increased in respect to the number of pump-actuating rods having the same or different lengths of stroke.

"Having fully described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. The combination, with an upright shaft and means for rotating it, of an eccentric rigidly secured on the shaft, a strap or ring mounted on the eccentric, and pump-actuating rods attached to the strap or ring, substantially as set forth.

2. The combination, with an upright shaft and means for rotating it, of one or more eccentric disks or wheels secured on the shaft, straps or rings loosely mounted on the eccentrics, and pump-actuating rods secured to the straps or rings, substantially as set forth."

The patent thus issued was only a step in advance of Allen's previous inventions. On March 17th, 1885, he took out Letters Patent No. 313,907, embodying all the features of the patent in suit, except that instead of an eccentric rigidly secured on the shaft, with straps and rings loosely mounted on the eccentric, he used a wheel or disk loosely mounted upon the wrist-pin of a crank se-

cured to the upper end of the shaft. The substantive portion of this previous patent is as follows:

"My invention further consists in a wheel or disk adapted to the attachment of pump-actuating rods leading in different directions, and mounted on the wrist-pin of a crank secured to the end of a vertical shaft.

"My invention further consists in certain features of construction and combinations of parts, as will be hereinafter described, and pointed out in the claims.

"In the accompanying drawings, Figure 1 is a plan view of the wheel or disk, showing pump-rods attached thereto, and Figure 2 is a vertical section through the shaft and wheel or disk.

"A represents a vertical shaft suitably mounted, and driven by bevel-gear a and B, the latter being secured on the engine-shaft b. The upper end of the shaft A is provided with a crank, C, having the wrist-pin c.

"D is a wheel or disk loosely mounted on the wrist-pin c, and provided with a series of radial slots, d, which extend from the upper side of the rim nearly but not quite to the lower side.

"The wheel D consists, preferably, of a hub, d', a rim, D', and a series of spokes, d² connecting the hub and rim, but may be solid between the hub and rim, if found more convenient, my improvement, so far as the wheel or disk is concerned, consisting, essentially, in the series of slots or recesses formed in the upper side of the rim, as described.

"The rods E, which lead from the wheel D to the pumps, and which, when reciprocated, actuate the pumps, are adapted to fit loosely in the slots d, and are provided with enlarged heads e, which prevent the rods from drawing through the slots. The rods are placed in and removed from the slots at pleasure, the only lock against vertical displacement being their weight. They are free to assume different angles in a vertical plane, and are adjusted in the most advantageous positions in a horizontal plane by placing them in their appropriate slots. As the shaft A rotates, the wheel D is caused to describe a circular path in space, and the rods, no matter in what direction they lead, are thereby reciprocated. Moreover, as the wheel D is free to rotate on its axis, the rods E adjust themselves to each new position which they are required to assume during the rotation of the shaft A.

"Instead of providing the ends of the rods with enlarged heads or nuts, as shown at e, they may be provided with yokes, as represented at e', the yokes being adapted to embrace one of the elevated sections between two successive slots.

"The apparatus as thus constructed is particularly adapted to use in positions where a small number of wells are to be operated, and is capable of being set up and run at a moderate expense; but I do not wish to be understood as limiting myself to any restricted use, as it is capable of being operated upon either a grand or limited scale.

"I am aware that it is not new to provide means for connecting pump-rods leading in any desired direction, and do not therefore claim the same, broadly; but,

"Having fully described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. In an apparatus for pumping oil-wells, the combination, with an upright shaft and a crank secured to its upper end, of a wheel or disk loosely mounted on the wrist-pin for attaching pump-actuating rods, substantially as set forth.

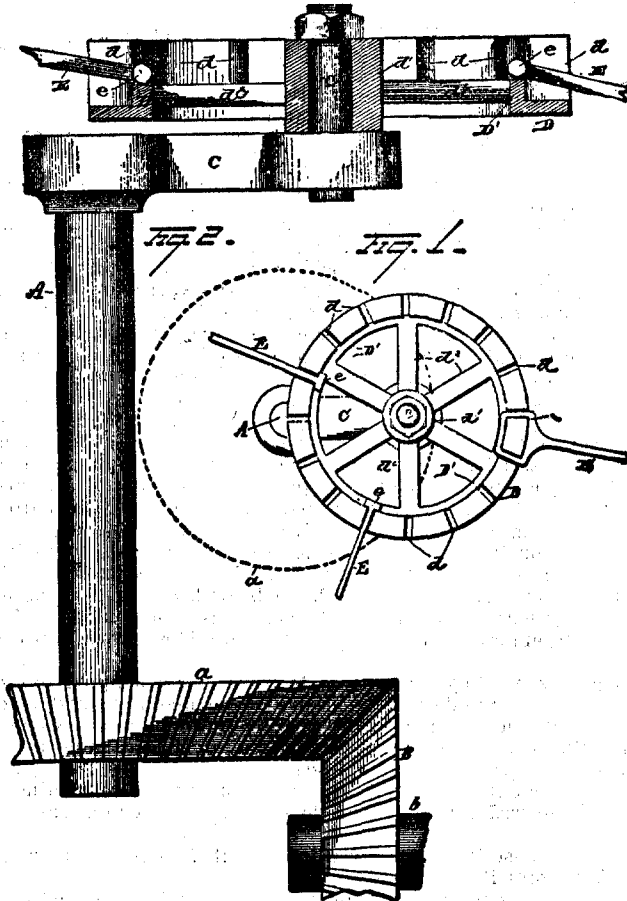
2. In apparatus for pumping oil-wells, the combination, with a crank secured to the upper end of an upright shaft, of a wheel or disk loosely mounted on the wrist-pin, said wheel or disk being adapted to the attachment of pump-actuating rods in any direction, substantially as set forth.

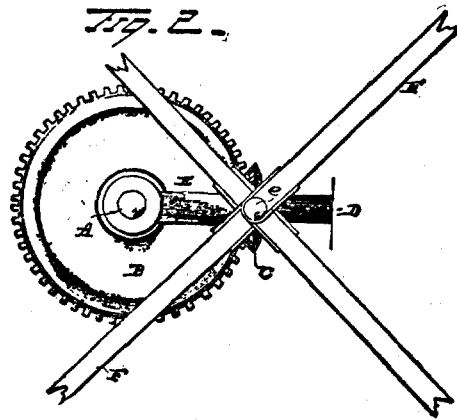
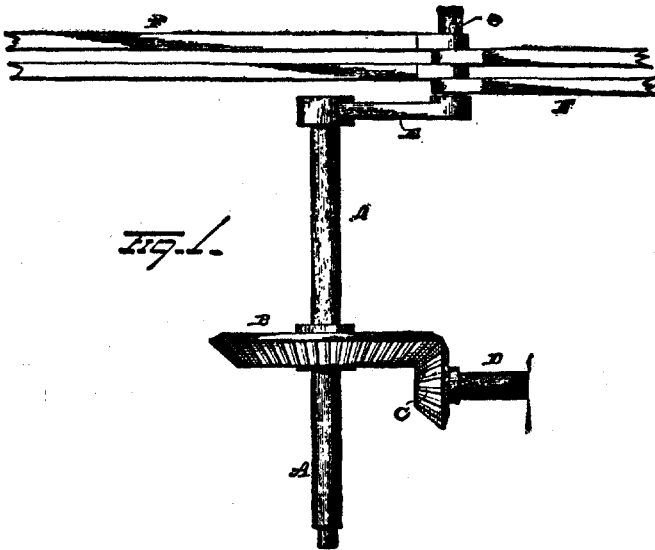
3. In apparatus for pumping oil-wells, the combination, with a crank secured to the upper end of an upright shaft, of a wheel or disk loosely mounted on the wrist-pin and provided with a series of radial slots for the attachment of pump-actuating rods in any desired direction, substantially as set forth.

b. A wheel or disk for attaching pump-actuating rods, having a series of radial slots formed in the upper side of its rim adapted to receive the ends

of pump-actuating rods from any desired direction, substantially as set forth."

Later, on the 8th of September, 1885, Allen took out other Letters Patent, No. 326,008, which modified the former device by dispensing with the wheel or disk, and in its stead pivoting the actuating-rods directly to the wrist-pin, so that the revolution of the crank and pin would reciprocate the rods leading in all directions. The drawing of this patent clearly illustrates its working and is as follows:





Whatever invention is contained in the Letters Patent in suit must be found, therefore, in the substitution of the eccentric, with its strap or ring loosely mounted (as a base upon which to fasten the actuating-rods), for the disk fastening, or the pivotal fastening, previously employed. A correct appreciation of the scope and purpose of this change can only be obtained by a review of the actual conditions confronting the inventor.

The general purpose of oil pumping devices like those of the Allen patents is to convey force from a central power throughout a field of oil wells, so that the pump of each well may be operated from the central power. These fields, so far as they relate to pumping apparatus, present conditions unlike those to which pumping apparatus has otherwise been applied. The wells over a given field of territory, subject to the central power, are frequently numerous; they are not evenly distributed radially about the central power; they are not equidistant from the central power; their surfaces, where the pumps must be applied, are not, owing to the undulations of the ground, upon the same level, and they must be pumped continuously, for if an idle day or two intervene, it may take weeks to bring them back to their normal productivity. Our attention has been called to no other use of pumps where such conditions of inequality exist—conditions that make their reciprocal balancing especially difficult.

The oil pump, too, operates differently from other pumps, and from other arts in which shafts actuated by an eccentric have been employed. In pumps in other fields, and in other arts employing shafts and eccentrics, there is need for power exerting a thrust as well as a pull, but in the oil pump the downward motion is brought about, not by a thrust from the power station, but by the weight of the pump valves, sucker rods, and column of oil resting upon the valves. In the oil field the power is applied solely to raise the pumps.

In the development of Allen's ideas the disk pump, chronologically, came first; then the pump with the pivotal fastenings on the wrist-pin; then the patent under consideration. But in the natural order of evolution, that has given to the patent under consideration its effective features, the pump with the pivotal fastenings at the wrist-pin is primary to the disk pump. We will consider the Allen inventions, therefore, in the latter order.

It is manifest, upon an examination of the drawings of Letters Patent No. 326,008 (the pump with pivotal fastenings at the wrist-pin), that if but two actuating-rods, leading in different directions, were attached to the wrist-pin, the strain upon the wrist-pin, as it moved through the circle, would be, in each of the arcs of the circle, necessarily unequal. The crank is, in effect, the short arm of the lever, its attachment at the shaft being the fulcrum. The power being constant, the rapidity of motion, as the point of strain is approached, will change; or the rapidity of motion being constant, the power must change. In case the rapidity of motion is constant, the strain upon the fulcrum or crank at its connection with the shaft will always be greatest when the crank is most nearly at right angles with a line drawn from the fulcrum to the pump; in other words, there would, on

every revolution of the crank, be two dead points, to overcome which, at a revolution of constant rapidity, the driving force must be adjusted. Between these dead points the driving force would be in excess of the requirements.

Of course the volume of power can not be modified automatically; so that what would occur in the case of two rods thus oppositely adjusted would be constant changes of rapidity of motion between the several points of heaviest strain, growing more rapid as the point of heaviest strain is left, until the point of lightest strain is reached, and then less rapid, until the next point of heaviest strain is reached. The practical results of such unequal distribution of strain would be numerous, the most serious and obvious of which would be the racking of the machine and the waste of power. Changes of strain so abrupt and numerous would, in an apparatus like an oil well, have the effect of rapidly shaking it to pieces. This is accentuated by the fact that the driving shaft is an upright one, and that the crank is located much above the ground, so that recurrences of heavy strain, first upon one side of the shaft, and then upon the other, would tend, in addition to racking the apparatus, to pull it out of place. An equal balancing of pull in all directions tends to throw the whole weight to the base of the upright shaft; but an excessive pull in one direction will throw the strain of the weight transversely to the shaft.

Now, if instead of two actuating-rods, reaching in opposite directions, there were many, reaching in all directions, all attached to a crank, as in patent No. 326,008, the changes of strain would still take place, but would, with the number of rods, be correspondingly subdivided; so that the changes, increasing in number, would decrease in intensity. By an equal distribution of many wells around the central power, the changes of point of strain might be so modified as to be practically eliminated.

But an oil field is not adapted to such an equal distribution of actuating-rods. The wells can not be located with reference to the central power. They can not be distributed radially at equal angles around the power shaft—the fulcrum to the crank. With a fixed crank, and comparatively rigid fastenings, like that used in patent No. 326,008, and an impossibility of an uniform distribution of the wells, with reference to the fulcrum, there can be no adequate counterbalancing of the strains, unless the crank—the short arm of the lever—has some degree of elasticity.

The patent in suit provides practically a short arm to the lever approximately elastic. The loosely mounted ring to which the actuating-rods are attached shifts back and forth, so that there is no inexorable massing of the weights at the dead points. It may be that in practical operation the pull of two or more of the pumps may be found to be approaching, at the same time, the angle of greatest strain, and, if the fastening to the lever were rigid, would be carried en masse beyond that strain; but the susceptibility of the ring to retarded motion, during the period that this unusual weight is to be lifted around the point of heaviest strain, decreasing the motion, decreases the strain; for the force necessary to lift is in the inverse order of rapidity of

motion. A lighter weight following, the ring would swing forward, thus increasing the motion, and compensating for the previous loss of motion. In other words, the loose mounting of the ring gives to the short arm of the lever a play, such as it would not have, if the rods were attached rigidly to the lever. The varying weights are, by this elasticity, or play, distributed, so as to fall more equally throughout the whole circle of the disk's revolution.

The disk, whether it be a wheel revolving upon a wrist-pin of a crank at the wheel's center, or an eccentric, is, with reference to the motive shaft, a mere crank. The strain upon an eccentric is always upon what is called its fat side. The disk in the patent under consideration could, without impairing the motion of the ring, be cut away, so that nothing would remain but the lean side and a long arm, the lean side being a guide way only, the long arm bearing the strain. The loose mounting of a ring upon such an eccentric, or upon a disk wheel mounted upon the wrist-pin of a crank, is, in effect, as if the disk or crank (for mechanically they are the same) were made of an elastic material, bending to increasing weight so that strain is partially overcome by correspondingly decreased motion, and then recovering, by increasing motion, its normal form under diminishing weight.

It is evident that in the balancing of many wells, each one of which contributes a varying weight, and two or more of which may, at times, mass their weights upon a crank or disk of that character, there would be less abruptness of strain than in a rigid crank whose revolutions were inexorably constant. A crank so elastic would adjust itself as nearly as is conceivable to the varying weight, and thus, by automatic counterbalancing, eliminate, partially at least, the changes of strain.

What has been said respecting the elasticity of the patent in suit applies, also, to the invention embodied in Letters Patent No. 313,907 (the disk wheel pump), and differentiates them both from the old style of pull wheel called to our attention. There are in these pull wheels none of the elements of elasticity. They each have advantageous features of their own; but none are adapted to overcome the massing of strain. In wells equally distributed about the central power there could be such adjustment as to balance the strains, but in the actual fields, where such equal distribution is impossible, the pull wheel is inferior to the patent under consideration just to the extent that the disk of the patent in suit yields, by this practical elasticity, to the demands of changing weights.

Our attention has been called, also, to previous devices in allied arts, to show that eccentrics have been used for purposes somewhat similar. The Corliss engine is perhaps the best single illustration of the previous art. An examination of the Corliss patents shows that the eccentric disk has a rigid arm extending to one of the steam cylinders. Connected with this disk, by pivot joints, are a number of arms, corresponding in length to the rigid arm, some of which are connected to the pistons of steam cylinders, and others to the pistons of pump cylinders. In the operation of the engine the steam admitted to the steam cylinders, and pressing at dif-

ferent points upon the crank shaft, through the disk, causes the rotation of the crank shaft, which, in turn, causes the reciprocation of the pistons in the pump cylinders.

But it must be held in mind that in this Corliss contrivance the one arm is rigid. This holds the ring upon the disk to an unchanging revolution. There is no room for the play or elasticity found in the patent in suit; and, therefore, none for the balancing of weights which such elasticity affords. In just the respect that the patent in suit overcomes the difficulties of the oil situation it differs from the Corliss device. We agree with the court below, and with Judge Acheson in the Emery Suit, that a ring thus rigidly held by a pitman is different essentially from a ring loosely mounted, as in the patent in suit.

The Weirick & Lathrope patents brought to our attention by the appellant are not as clear as we would wish. It is admitted that in the operation of one of the pumps manufactured under this patent the piston rod was rigid. While it is insisted in argument of counsel for appellant that none of the rods were necessarily rigid with the eccentric, it is admitted that one of the connecting rods is always so arranged as to stop the swing of the eccentric within certain limits. These limits are, at most, very narrow, and differ from the wide swing of the patent in suit that gives to it its elasticity. The power imparted in the Weirick & Lathrope patents being that of a thrust, we doubt if the machine would be practicable, unless one of the rods was substantially rigid. These patents do not appeal to us, therefore, as anticipations of the patent in suit in the feature of elasticity that gives to the latter its advantageous character.

The other patents brought to our attention can be dismissed with the observation that, compared with the patent in suit, they present the same differences.

The chief difficulty in the case under consideration is to distinguish the Allen disk pump from the Allen eccentric pump. Unquestionably, as we have already pointed out, the eccentric is functionally the mechanical equivalent of a crank. Pare down the fat side of the disk until only a slender arm remains (the lean side of the disk having no function except that of a guide way to the ring), and, barring some incidental differences, the strain would fall, and the ring would move, precisely as if the disk were untouched. It follows that in the controlling matter of counterbalancing the wells by means of an elastic crank, the disk and the eccentric contrivances are substantially identical. As stated by one of the experts for the appellee the eccentric device is, at best, an improvement only upon the disk device. The employment of the eccentric would, in our judgment, be an infringement upon the mechanical feature that gives to the disk device its distinguishing characteristic.

But as an improvement upon Allen's previous invention, may it not be patentable? In the disk patent there can be no bearings of the crank shaft above the crank carrying the disk. The actuating-rods attached to such a disk would, in its revolution

about the crank shaft, come in contact with the portion of the shaft projecting above the crank bearing. In the eccentric device the crank shaft can be prolonged upwards so as to find a bearing in a frame work leading to the ground. It is evident that the strain upon an upright crank shaft, with no bearing above, would be much greater than if the strain fell between two bearings, and the racking of a disk apparatus having no upper bearing would be correspondingly greater.

Then, too, the center of strain of the disk, falling upon the wrist-pin above the crank, is different from the center of strain falling in the center of the crank itself, as in the eccentric. This difference, as the preceding one, affects very appreciably the amount of racking the disk apparatus, compared with an eccentric, would suffer.

Another difference: In the disk apparatus there can be but one crank; in the eccentric there can be many. There might be great advantage in the latter arrangement, both in equalizing the pull of the wells, and in affording space for actuating-rods, whereby the number of wells operated might be increased.

It is thus manifest that the eccentric form of apparatus admits of a more solid frame work, and, to that extent, adds something to the diminution of strain—a result that is the chief objective of the feature of elasticity that constitutes the merit of the disk invention. The eccentric form, in effect, carries forward to a nearer perfection the instrumentalities calculated to bring about the minimum of strain. The improvement found in the eccentric is, therefore, in the direct line of ascent from the feature that constitutes the gist of the disk invention. It makes the disk invention more available in respect to the very thing toward which it was chiefly directed.

That the eccentric form has largely supplanted the disk form is not disputed. Inasmuch as the rim of the eccentric, furnishing a guide way to the ring, is longer than the perimeter of the wrist-pin of the disk device, there is correspondingly more friction, and it was feared when first brought to the attention of the expert that this would prevent an extended use of the eccentric; but experience has shown that the advantages of the eccentric more than counterbalance this disadvantage, and that wherever the disk form had previously been used, the eccentric has taken its place. Counsel for appellee do not deny this fact, but insist that the favor shown toward the eccentric is due to economy rather than to mechanical advantage—that it can be explained by the fact that the eccentric form can be set up as an entirety in the shops, and as such transported to the fields, while the disk form must be built partially in the shops and partially in the fields.

It is not in our power to nicely weigh these considerations. We cannot tell with accuracy how far the favor shown to the eccentric over its predecessors is due to economy of construction; to longevity, through the minimizing of strain; or to superior working facility. We know only that, for one or all of these reasons, it has

found the oil public's favor. The probability is that this favor is due, in some measure, at least, to each of the differences pointed out.

The conception, then, embodied in the patent in suit, consists in further improving the essential objective feature of the disk patent. The eccentric had never before been used for such a purpose. It never before had been made elastic, so as to adjust the varying weights, and thus balance them. The embodiment of this conception in mechanical form necessarily embraced the disk conception, and, to that extent, infringes it; but, though an outgrowth, it goes distinctly beyond the disk apparatus, substantially improving it, as we have already said, in those features that give to the disk apparatus its chief merit and purpose.

Why is not such improvement patentable? Its patentability will exclude no one who chooses from the use of the previous disk apparatus. It is a further step in the direction towards which the disk conception was the first long step; it is a decided and valuable addition to the mechanism used in oil fields, and, in connection with the disk form, for the purposes in view, it has no predecessor in the whole previous uses of eccentrics. This consideration, in our judgment, raises it to the merit of invention.

It is stipulated by the appellant that before the bringing of this suit he made and sold machines in which there was an eccentric, or eccentrics, rigidly secured upon an upright shaft adapted to be rotated, and having a strap or ring mounted on each eccentric having a series of bolt holes around the same adapted to have connecting rods attached thereto; and that in use the connecting rods were pivoted to the straps or rings. This, in practice, is the eccentric apparatus of the patent in suit. Though there is no mention of the loose mounting of the ring, full play of the ring is evidently contemplated, else the ring could have no purpose. It gives to the apparatus the elasticity required for the balancing of the wells. It is a contribution by the appellant of a part of the apparatus, which, set up, operates precisely as the patent in suit. It is contributed with the intention that it should be united or used in connection with the other parts. This constitutes infringement. Rob. Pat. § 905.

The judgment of the circuit court will be affirmed.

ELECTRIC SMELTING & ALUMINUM CO. v. CARBORUNDUM CO.

(Circuit Court of Appeals, Third Circuit. May 28, 1900.)

No. 1.**1. PATENTS—PROCESS—CONSTRUCTION OF CLAIMS.**

The claims of a process patent may be read in the light of the specification or description of the process, not for the purpose of their enlargement, but to determine their real meaning.

2. SAME—INACCURATE USE OF TERMS.

A patent for a method of "smelting or reducing ores or metalliferous compounds herein described," which describes "silicium" as one of the metals, ores or compounds which may be treated by the process, is infringed by the use of such process for the manufacture of carbide of silicon or "carborundum." The fact that silica, or oxide of silicon, which is the substance treated, is not, strictly speaking, an "ore," or silicon a "metal," according to the modern definition, and that their classification as such in the patent is inaccurate, cannot operate to exclude them from its operation, contrary to the plain intention of the patentee.

3. SAME.

In determining whether a patent complies with the requirement of Rev. St. § 4888, by fully and clearly setting forth the invention in the description, so as to enable a person skilled in the art to use the same, the claims may be considered in connection with the specification; and in a process patent it is no objection that the claims are broader than the illustration of the process given in the description.

4. SAME—INFRINGEMENT—ELECTRIC SMELTING PROCESS.

The Cowles patent, No. 319,795, for a process of smelting ores or metalliferous compounds by an electric current, by interposing within the circuit, so as to form a continuous and unbroken part of the same, a body of granular material of high resistance or low conductivity, such as electric light carbon, which, by reason of its resistance, is made incandescent and generates the required heat, was not anticipated, and is valid. As to claims 1, 2, and 4 it is not limited to the method of mixing the granular material with the ore or other material to be treated, but requires only that the two shall be in contact; and such claims are infringed by the Acheson method of manufacturing carbide of silicon or "carborundum," in which the heat required to effect the reduction of the oxide of silicon and the uniting of the silicon and carbon is produced by passing an electric current through a central core of granulated carbon, around which the mixture of silica and carbon is packed.

5. SAME—ELECTRIC SMELTING FURNACE.

The Cowles patent, No. 319,945, for an electric smelting furnace, is not infringed by the form of furnace used in the Acheson method of producing carbide of silicon or "carborundum."

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

C. M. Vorce, for appellant.

George H. Christy and Thomas W. Bakewell, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from the final decree of the circuit court for the Western district of Pennsylvania dismissing a bill charging infringement of letters patent of the United States Nos. 319,795, 319,945 and 335,058. 83 Fed. 492. Pat-

ents Nos. 319,795 and 319,945 were issued June 9, 1885, to Eugene H. Cowles and Alfred H. Cowles, the former patent being for an improvement in "Processes for Smelting Ores by the Electric Current," and the latter for an improvement in "Electric Smelting Furnaces." Patent No. 335,058 was issued January 26, 1886, to Alfred H. Cowles for an improvement in "Electric Furnaces and Method of Operating the Same." The several patents were assigned to and are now owned by the appellant. Since the filing of the bill the charge of infringement has been restricted by the appellant to the two earlier patents, and it is therefore unnecessary to consider patent No. 335,058. The answer sets up the usual defenses. The claims of patent No. 319,795 are as follows:

"(1) The method of generating heat for metallurgical operations herein described, which consists in passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore to be treated by the process being brought into contact with the broken or pulverized resistance material, whereby the heat is generated by the resistance of the broken or pulverized body throughout its mass, and the operation can be performed solely by means of electrical energy.

"(2) The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore in the presence of carbon to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the carbon and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass.

"(3) The method of smelting or reducing ores or metalliferous compounds herein described, which consists in pulverizing the ore and mixing with it pulverized or broken carbon or like material, then introducing the mixed ore and carbon within an electric circuit, of which it forms a continuous part, the said circuit being established through the carbon constituents of the mass, whereby the heat is generated by the electrical resistance of the carbon throughout the mass, and the operation can be performed entirely by means of the carbon reagent and the electric energy.

"(4) The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore in the presence of a reducing agent to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the reducing agent and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass."

The alleged infringement consists of the manufacture by the appellee of silicide of carbon or carbide of silicon or, as it is commonly known, carborundum, in which the constituent elements are carbon and silicon, each molecule containing one atom of carbon united with one atom of silicon. Carborundum is practically as hard as diamond, and is in large and growing demand for abrasive and cutting purposes. In the process of its manufacture a mixture of carbon and oxide of silicon, commonly known as silica or common sand, is prepared and in this mixture a core composed solely of coarse granular carbon is introduced directly between the electrodes, having good electrical connection at its ends with the electrodes. As compared with the mixture of carbon and silica the core pre-

sents less resistance to the passage of the electric current. It furnishes at once a path of higher temperature and of less resistance than the mixture to be treated; the larger portion or, perhaps, for practical purposes, all of the current passing through and along the core. The mixture of carbon and silica with a small percentage of salt and sawdust surrounds the core throughout its length to a thickness as great as or greater than can effectively be operated on by heat transmitted from the core. The mixture with the central core is enclosed on the sides by brick walls loosely built. When an electric current of comparatively high voltage is turned on the core is heated to a very high temperature, probably exceeding 7,000° F., and the core heats the charge mixture to such an extent that the atoms composing the molecules separate from each other. The atoms of the constituent elements of the mixture, having thus become disassociated, unite through chemical affinity and form the crystalline combination or compound known as carborundum. The appellee contends that patent No. 319,795, is restricted to a process for metallurgical purposes, ore being mentioned in each of the claims; that what the appellee treats or reduces is not an ore, nor is the product of its process a metal, and that consequently its operations do not involve a metallurgical process and do not infringe the process patent in suit. This contention cannot be sustained. It appears from the specification that the patentees included silicon among the metals and treated silica as a metalliferous compound. In the description they say:

"We will illustrate and describe a zinc-furnace embodying our invention, from which the application of the same to the reduction or smelting of other kinds of ores will be readily understood, especially of aluminum, silicium, magnesium, boron, and other rare metals, which are not reducible by the smelting processes heretofore known."

It is evident that by the patent silicium or silicon was classed among metals, and sand or silica among ores or metalliferous compounds. Whether silicon or carborundum is strictly a metal is, under the circumstances, an immaterial inquiry. The designation of silicon as a metal is not such a fault as in any manner to control the effect of the description. While it may be an inaccurate use of language it is at most a harmless and immaterial error. Walk. Pat. § 175; Rob. Pat. § 490. The claims should be read in the light of the description, not for the purpose of their enlargement, but to ascertain their real meaning. Thus construed there can be no doubt that the terms "metallurgical," "metalliferous" and "ore" apply as well to silica as to the ores of aluminum, magnesium, boron and other metals. It may further be observed that the evidence shows that silicon has not uncommonly been mentioned by text writers and others as and understood to be a metal. In an earlier edition of Webster's dictionary silicium is referred to as follows: "Silicium. Silicon, which see. The name silicium was given by those who supposed it to be a metal like sodium." Worcester thus refers to it: "Silicium. The name formerly applied to silicon, when it was classed with the metals."

The principal question touching infringement of the process patent in suit relates to the disposition of the resistance material with respect to the material to be treated. The appellee, as before stated, uses a central core of granular carbon as resistance material, surrounded with a mixture of silica and granular carbon. The core becomes incandescent under the action of the electric current and radiates the heat necessary for the formation of carborundum. The appellee contends that on a proper construction of this patent the monopoly does not extend to the use of such a central core, but is limited to the use of resistance material mixed with the material to be treated in such manner that under the action of the electric current heat is generated by the incandescence of the particles of such resistance material scattered throughout the body or mass composed of resistance material and material to be treated; that the distinctive difference between the process of the appellee and that of the appellant is that while in the former there is a diffusion of heat through the material to be treated resulting almost wholly from radiation from the incandescent central core, in the latter the generation of heat is not localized but occurs practically throughout the entire mass of resistance material and material to be treated by reason of the comparatively even distribution through such mass of the particles of resistance material, or that, in other words, in the appellee's process there is a diffusion of heat by radiation and in that of the appellant a diffusion of heat through generation thereof at numberless points throughout the combined mass. The learned judge below, having reached a conclusion in accordance with the contention of the appellee in this connection, held that infringement of the process patent in suit had not been established. Considering silica for the purposes of this suit in the light in which it was viewed by the patentees, namely, as a metalliferous compound, we proceed to examine with some detail the description and claims of the patent. The patentees state:

"The present invention relates to the class of smelting-furnaces which employ an electric current solely as a source of heat. Heretofore it has been attempted to reduce ores and perform metallurgical operations by means of an electric arc, the material to be treated being brought within the field of the arc or passed or fed through it; but numerous experiments have demonstrated that the arc system is not adapted for long and continuous operations on a scale of any considerable magnitude. The difficulties attending the regulation of the arc and the preservation of a constant resistance are very great, and the heat generated, though intense, is localized and difficult to control."

The patentees here distinctly repudiate the electric arc as an instrumentality for the accomplishment of their purpose for the reasons that the heat generated "is localized and difficult to control" and "the arc system is not adapted for long and continuous operations on a scale of any considerable magnitude." An electric arc has no part either in the process of the appellee or in that of the appellant. Both operate through heat resulting from incandescence of the resistance material under the action of an electric current. The patentees proceed:

"The object of this invention is to provide a process by which electricity can be practically employed for metallurgical operations, and for this purpose to

secure a distribution of the intense heat which it is well known electricity is capable of generating over a large area or through a large mass in such a manner that a high temperature can be sustained for a long time and controlled."

Here the patentees propose to provide an electrical process for metallurgical operations which shall secure, in contradistinction to the action of an electric arc, a distribution of the heat produced by electricity "over a large area or through a large mass" in such manner that "a high temperature can be sustained for a long time and controlled." So far nothing is definitely said as to the extent of the area or the size of the mass over or through which the heat was to be distributed, nor whether the heat was to be distributed through radiation from its point or points of generation, or by distributing its points of generation. The language used is just as applicable to the large central core used by the appellee as to the distributed mass of carbon granules which is in fact employed by the appellant. Having thus stated the object of their invention the patentees proceed:

"To this end the invention consists, essentially, in the use for metallurgical purposes of a body of granular material of high resistance or low conductivity interposed within the circuit in such a manner as to form a continuous and unbroken part of the same, which granular body by reason of its resistance is made incandescent and generates all the heat required."

This language is literally applicable to the process of the appellee. The patentees then state the usual method of employing their process as follows:

"The ore or like material to be reduced—as, for example, the hydrated oxide of aluminum, alum, chloride of sodium, oxide of calcium, or sulphate of strontium—is usually mixed with the body of granular resistance material, and is thus brought directly in contact with the heat at the points of generation at the same time the heat is distributed through the mass of granular material, being generated by the resistance of all the granules, and is not localized at one point or along a single line."

It will be observed that the heat is distributed throughout "the mass of granular material," and "is not localized at one point or along a single line" in the mass of such material. The patentees thus state that the usual, and presumably the preferable, method of conducting the process involves a mixture of the ore to be reduced with the resistance material. The statement of the usual method fairly implies the existence of other methods in which the ore and resistance material need not be so mixed. The patentees then describe the character of the granular material adapted for the generation of heat under their process as follows:

"The material best adapted for this purpose is electric-light carbon, as it possesses the necessary amount of electrical resistance, and is capable of enduring any known degree of heat when protected from oxygen without disintegrating or fusing; but crystalline silicon or other equivalent of carbon can be employed for the same purpose. This is pulverized or granulated, the degree of granulation depending upon the size of the furnace. Coarse granulated carbon works better than finely pulverized carbon and gives more even results. The electrical energy is more evenly distributed, and the current cannot so readily form a path of highest temperature and consequently of least resistance through the mass along which the entire current or the bulk of the current can pass; but the scope of this invention is not limited by the degree

of granulation, as that may vary with the conditions of the case, and with a large furnace and a powerful current the size of the carbon particles may pass beyond what is ordinarily understood by the term 'granular' and be, in fact, pieces of carbon of considerable size. Still the resistance body is ordinarily composed of grains or pieces proximately equal in size, in order to secure an even distribution of the electrical energy."

The description points out that the best resistance material for the patented process is electric-light carbon, though "crystalline silicon or other equivalent of carbon" can be used for the same purpose; that coarse granulated carbon is more satisfactory and gives more even results than finely pulverized carbon in that "the electrical energy is more evenly distributed and the current cannot so readily form a path of highest temperature and consequently of least resistance through the mass along which the entire current or the bulk of the current can pass." Now "the entire current or the bulk of the current" passes through the resistance material, whether that material is mixed with the ore or otherwise is in contact with it, and the path referred to is one through the mass of the resistance material or resistance body. An "even distribution of the electrical energy" through the mass of the resistance material is promoted when the latter "is composed of grains or pieces proximately equal in size." The patentees describe a certain mode of conducting the process where the resistance material and material to be treated are mixed, and say:

"It will be observed that the intimate mixture of incandescent carbon and ore affords the most effective utilization of all the heat evolved. None of it is lost by transmission through any intervening bodies or spaces. Moreover, the maximum degree of heat generated by the furnace is within the ore body and the retort and furnace receive only the heat which is transmitted outward from the ore and carbon contained within."

Before advertng to the claims of the process patent it is important to consider the limitations of the invention as disclosed in the description. Does the process require in all cases an intimate mixture or commingling of the resistance material and the material to be treated? Or is such mixture or commingling required only in one form or method of practicing the invention? The learned judge below on consideration of the description and claims held that such mixture or commingling was required in all cases. In reaching this conclusion he held that the words "the ore or like material to be reduced * * * is usually mixed with the body of granular resistance material," meant merely that the ore is usually mixed with a body of granular resistance material in contradistinction, by way of illustration, to a body of "pieces of carbon of considerable size" and "beyond what is ordinarily understood by the term 'granular,'" but not that a mixture of the ore and resistance material could in any case be dispensed with. For several reasons we cannot adopt this view. There is nothing in the description taken as a whole which requires such a construction. To accept it would involve a departure from the natural and customary sense of the language employed. The context will not fairly admit of such construction. The patentees had just stated

that their invention "consists, essentially, in the use for metallurgical purposes of a body of granular material of high resistance or low conductivity interposed within the circuit in such a manner as to form a continuous and unbroken part of the same, which granular body by reason of its resistance is made incandescent and generates all the heat required." Nothing is there said touching the size of the granules of the resistance material or indicating whether they were or were not carbon, or showing how the resistance material was to be placed with respect to the subject to be treated—whether to be mixed with the latter or otherwise brought in contact with it. They then state that the subject to be treated "is usually mixed with the body of granular resistance material," but do not in the sentence containing these words indicate of what nature the granules are. They subsequently refer to electric-light carbon as the best resistance material and state that it can be granulated or pulverized or used in pieces of a size "beyond what is ordinarily understood by the term 'granular.'" The size of the granules, particles or pieces of carbon bears on the evenness of distribution of the electrical energy throughout the body or mass of resistance material, but has no relation to the question whether that body or mass is to be mixed with the subject of treatment or otherwise placed in contact with it. The fact that the "body of granular resistance material" may consist of carbon, broken, granulated or pulverized, or even of "crystalline silicon or other equivalent of carbon," does not differentiate it from the "body of granular material" as referred to in the statement of the essence of the invention or from the "body of granular resistance material" as used in the sentence in question. Careful examination has failed to disclose anything in the description limiting the invention to a process requiring mixture of the resistance material with the material to be treated. Turning now to the language of the claims, it will be found that only one of them, the third, is restricted to such a mixture. That claim requires the introduction of a mixture of pulverized ore and pulverized or broken carbon within the electric circuit "of which it forms a continuous part, the said circuit being established through the carbon constituents of the mass, whereby the heat is generated by the electrical resistance of the carbon throughout the mass." Here there is an express limitation to a mixed body composed of resistance material and material to be treated. And the term "mass" is applied to such mixed body, as is evident from the expressions "the carbon constituents of the mass" and "the carbon throughout the mass." But the other claims are essentially different from the third. Claim 1 requires the passage of an electric current through "a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore to be treated by the process being brought into contact with the broken or pulverized resistance material, whereby the heat is generated by the resistance of the broken or pulverized body throughout its mass." Claim 2 requires the subjection of ore in the presence of carbon to the action of heat generated by passing an electric current through "a body of broken

or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the carbon and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass." Claim 4 requires the subjection of the ore in the presence of a reducing agent to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material forming a continuous part of the electric circuit, "the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the reducing agent and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass." The language of claims 1, 2 and 4 requires only contact between the resistance material and the material to be treated, in contradistinction to an intermixture or commingling of the two. Unless the language of these three claims is to receive an unusual and forced interpretation, the term "mass" as therein employed must be held to refer to the body of resistance material throughout which the heat is generated by the passage of the electric current, and is not restricted to a mixture of resistance material and material to be treated, as mentioned in claim 3. The language is so clear and unambiguous as to require cogent reasons to justify a different construction. Do such reasons exist? It may fairly be assumed that if the patentees intended that all the claims should be restricted to a mixture, they would not, while expressly confining themselves to a mixture in claim 3, have employed language in claims 1, 2 and 4 requiring only contact. On the face of the claims, considered apart from the rest of the specification, it is obvious that the patentees distinguished between contact between the resistance material and the material to be treated and an intermixture of one with the other. The description of the patent strongly tends to confirm the conclusion drawn from the language of the claims. In the description the word "mass" occurs in five places: First, where the patentees in stating the object of their invention refer to the "distribution of the intense heat which it is well known electricity is capable of generating over a large area or through a large mass." Second, where reference is made to the distribution of heat "through the mass of granular material, being generated by the resistance of all the granules." Third, where it is stated that "the current cannot so readily form a path of highest temperature and consequently of least resistance through the mass along which the entire current or the bulk of the current can pass." Fourth, where the statement is made touching the usual or preferable method of practicing the process that "the carbon constituents of the mass become incandescent." Fifth, where it is said that "the degree of heat evolved will be determined by the resistance or conductivity of the mass and the strength of the current employed." With the exception of the fourth instance of the use of the word "mass" in the description, that term clearly is used to designate the body of resistance

material in which the heat is generated by the passage of the electric current, and does not include the material to be treated. In the fourth instance of the employment of that term it is used in connection with the usual or preferable method in which the ore is "mixed with the body of granular resistance material," and includes not only the ore but the resistance material, "the carbon constituents of the mass" becoming incandescent. But it is equally clear that the term is not so employed in any of the claims other than the third, but means only "the body of broken or pulverized resistance material" throughout which the heat is generated. It is thus evident on the face of the whole specification that while claim 3 requires an intermixture of the resistance material and the material to be treated, no one of the other claims requires such intermixture, but only contact between the two. The appellee contends that by reason of proceedings in the patent office, if the patent has any validity, the process must be held to be confined to an intermixture of the ore and resistance material. Can this contention be sustained? In their original application December 24, 1884, the Messrs. Cowles stated in the description, among other things:

"All electric furnaces can be classified under one or two heads, arc furnaces and incandescent furnaces, the heat being generated in the former class by means of an electric arc, and in the latter class from the incandescence of a resistance body. Our invention belongs to this last named class of furnaces, but the incandescent medium, whatever it may be, is used in a pulverized or granular state, instead of a solid form; and herein lies the essential feature of the invention, which consists in the use, in an electric furnace, of granular or pulverized resistance material, through which the electric current passes, causing the same to become incandescent and thus evolving heat. The material to be treated in the furnace may be mixed with the granular resistance medium, or imbedded in it, or otherwise brought in close contact therewith; or it may constitute, in itself, the resistance medium, according to the character of the material and the object sought to be accomplished. In this way the close proximity of the incandescent medium and the material to be treated is secured with the most important and beneficial results."

It will be observed that the patentees originally sought to secure a patent for an incandescent as distinguished from an arc furnace in which the material to be treated, first, might be "mixed" with granular or pulverized resistance material, second, might be "imbedded" in such resistance material, third, might otherwise be brought "in close contact" with such resistance material, and, fourth, might constitute, in itself, the "resistance medium, according to the character of the material and the object sought to be accomplished." After full and prolonged consideration by the patent office of the original application and of various amendments by way of cancellation and addition, and after all apparatus claims had been withdrawn and reserved for a separate application, the application as embodied in the process patent was allowed February 14, 1885. During the proceedings the second and fourth methods above mentioned, involving respectively embedding in the resistance material of the material to be treated, and an electrolytic treatment of the material to be treated in the absence of any other resistance material, were eliminated, but the first and third methods, involving respectively

mixture of or other contact between the resistance material and the material to be treated, were allowed and incorporated in the patent. We find nothing in the proceedings in the patent office on the application for the patent by way of disclaimer or otherwise, to indicate that the word "contact," as used in claims 1, 2 and 4, was intended to be restricted to the form of contact consisting of mixture. It is further contended by the appellee that all of the claims require an intermixture of the resistance material with the material to be treated, for the reason that the description of the patent does not show any method of conducting the process otherwise than by such mixture, and reference is made by the learned judge below to section 4888, Rev. St., providing that before an inventor shall receive a patent for his invention he "shall file in the patent office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same; and in case of a machine he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." The patentees state the object and essence of their invention as follows:

"The object of this invention is to provide a process by which electricity can be practically employed for metallurgical operations, and for this purpose to secure a distribution of the intense heat which it is well known electricity is capable of generating over a large area or through a large mass in such a manner that a high temperature can be sustained for a long time and controlled. To this end the invention consists, essentially, in the use for metallurgical purposes of a body of granular material of high resistance or low conductivity interposed within the circuit in such a manner as to form a continuous and unbroken part of the same, which granular body by reason of its resistance is made incandescent and generates all the heat required."

They then state that the usual method of conducting the process involves an intermixture of the resistance material with the material to be treated, and point out the nature of the resistance material and degree of its granulation or pulverization best suited for the purpose. They further state that "the operation must necessarily be conducted within an air-tight chamber or in a non-oxidizing atmosphere, as otherwise the carbon will be consumed and act as fuel." The patentees having fully described one method of conducting the process it is at least questionable whether that is not sufficient to secure them against invasion of the broad process set forth in the description by a resort to any other methods of practicing it. *Tilghman v. Proctor*, 102 U. S. 707, 728, 732, 26 L. Ed. 279. It is true that contact otherwise than in connection with the usual or preferable method by mixture is not mentioned in the description, and had "contact" as distinguished from "mixture" been omitted from claims 1, 2 and 4 the case possibly would present itself in a very different aspect. But while claim 3 covers the preferable method by

mixture, all the other claims require only contact. If "contact" as well as "mixture" had been mentioned in the description there could have been no doubt that the requirements of the statute were fully complied with. The instruction of the patent clearly would have been sufficient to enable anyone "skilled in the art" to use the process whether by way of mixture or only contact between the resistance material and material to be treated. If claims 1, 2 and 4 are broad enough to include actual contact of any kind between the two materials, the resistance material forming part of the electric circuit may be in contact with the material to be treated whether in the form of a core or several cores, or of strata, or in any other form, to secure the most effective operation of the process under varying conditions involving the nature of the material to be treated, amount of the charge, &c. Now, if claims 1, 2 and 4, requiring only contact, be read with the description, which, while not mentioning contact otherwise than by mixture, is perfectly consistent with the conduct of the process by contact not involving mixture, anyone skilled in the art is just as fully informed of the nature of the process and the modes of conducting it as if contact otherwise than by mixture had been mentioned in the description. On the supposition that one skilled in the art would not have been instructed by the description, considered alone, that the process included not only contact by mixture but contact in other forms, the question in this connection turns on the points whether the several claims should not be read together with the specification, and, if so read, whether the requirements of the statute are not satisfied. It is apparent that reading the claims and description together cannot result in importing anything from the latter into the former either to enlarge or narrow them. The description, considered alone and without reference to the proceedings in the patent office, is broad enough to cover not only contact by way of mixture or otherwise between the resistance material and the material to be treated, but close proximity of the one to the other. Close proximity, however, was disclaimed in the patent office, and is not included in any of the claims. The reading of the specification as a whole then serves not to enlarge or narrow the claims but clearly to indicate the nature of the invention and the extent of the monopoly claimed. The limits of the monopoly are thus disclosed to the public and any part of the invention not included in the claims is abandoned to the public. The public is fully informed of all it has a right to know and the patentees are restricted to the monopoly of their invention or such part thereof as they have clearly disclosed and claimed. The claims are without fault. They, illustrated by the language of the description, are clear and definite. In *The Incandescent Lamp Patent*, 159 U. S. 465, 474, 16 Sup. Ct. 75, 40 L. Ed. 221, the court referring to section 4888, Rev. St., in so far as it requires the invention clearly to be disclosed, said:

"The object of this is to apprise the public of what the patentee claims as his own, the courts of what they are called upon to construe, and competing manufacturers and dealers of exactly what they are bound to avoid."

The patent when construed by a reference to the whole specification, including the description and the claims, fully accomplishes these several ends. If a claim, uncertain when considered apart from the description, can by reference to the latter be rendered so clear as to satisfy the requirement of the statute, that the inventor "shall particularly point out and distinctly claim" his invention, by parity of reasoning a doubtful point in the description, when considered apart from the claims, can by reference to the latter, when in themselves unambiguous, be rendered so clear as to satisfy the other requirement of the statute that the inventor shall fully and clearly set forth his invention in the description. That under such circumstances a description uncertain or indefinite when considered alone, but not inconsistent with the claims, may be rendered certain and sufficient to meet the requirements of the statute by reading the whole specification together has frequently been recognized and is, we think, a sound rule of law. *Battin v. Taggart*, 17 How. 74, 85, 15 L. Ed. 37; *The Corn-Planter Patent*, 23 Wall. 181, 224, 23 L. Ed. 161; *Carver v. Manufacturing Co.*, 2 Story, 430, 446; *Howes v. Nutes*, 4 Cliff. 173, 174, Fed. Cas. No. 6,790; *Ryan v. Goodwin*, 3 Sumn. 514, 520, Fed. Cas. No. 12,186; *Myers v. Frame*, 8 Blatchf. 446, 457, Fed. Cas. No. 9,991; *Parker v. Stiles*, 5 McLean, 44, 56, Fed. Cas. No. 10,749; *Lowell v. Lewis*, 1 Mason, 182, 188, Fed. Cas. No. 8,568; 2 Rob. Pat. § 489.

In *The Corn-Planter Patent*, *supra*, Mr. Justice Bradley, delivering the opinion of the court, said:

"If the patentee by his specification, including the summary claim at its close, points out and distinguishes what he claims as his own invention, it is all that is required."

Reference is made by both parties to certain interference proceedings claimed to sustain their respective positions on the question whether all the claims of the process patent in suit require a mixture or commingling of the resistance material with the material to be treated. No alleged interference, on the merits of which the patent office finally passed and to which the Messrs. Cowles were parties, was declared until after the issuing of the process patent in suit, and cannot of itself control the scope, construction or validity of the claims in question. 2 Rob. Pat. § 588. These interference proceedings can at most only serve to disclose the understanding of the patent office and of the parties to such interference at the time as to the validity and scope of those claims. They are not conclusive in any sense upon the rights of the appellant. An interference was declared November 5, 1886, between an application by Camille A. Faure for "Smelting or Reducing Substances by Means of Electricity," filed May 10, 1886, the patent of Bradley & Crocker, of February 2, 1886, No. 335,499, for "Process of Heating and Reducing Ores by Electricity," the patent of Cowles & Cowles, of August 18, 1885, No. 324,658, for "Electric Process of Smelting Ore for the Production of Alloys, Bronzes, and Metallic Compounds," and the process patent in suit. The issue in interference was thus stated:

"The improved pyro-electric process for metallurgical operations, which consists in placing the material or mixture to be treated in contact with an electric conductor and causing an electric current to flow through said conductor and the material or mixture, whereby they are highly heated and the desired operation effected."

This interference was dissolved at the instance of the Messrs. Cowles on the ground of the non-patentability of the subject-matter as set forth in the issue. The issue clearly was too broad. It did not define the nature of the electric conductor. It was broad enough to cover a solid or compact conductor as well as one consisting of a discrete or granulated body, but it did not specifically refer to the production of heat by the passage of an electric current through a discrete mass of resistance material from granule to granule. The issue in view of the prior art did not constitute the subject of a valid claim. The fact of the dissolution of the interference at the instance of the Messrs. Cowles tends to support the contention of the appellant that the use of a granular resistance body and not a solid or compact body as the electric conductor is an essential feature of its process. Nor did the action of the Messrs. Cowles operate to preclude them from insisting upon the scope and validity of their patent as covering patentable features included in the issue. Subsequently two interferences were declared between the above mentioned application by Faure and the process patent in suit; and in each case judgment of priority of invention was rendered in favor of the Messrs. Cowles September 9, 1889. The interference proceedings were protracted and somewhat complicated, and it is unnecessary and would be profitless to discuss them in detail. We have, however, carefully and fully considered them and find in them no evidence that the patent office regarded the process patent in suit, in contravention of its plain terms, as confined to a process involving an intimate mixture of resistance material with the material to be treated. The evidence, indeed, points the other way. In view of the language of the claims of the patent, the description read in connection with the claims, the proceedings in the patent office on the application for that patent, and the interference proceedings involving it, we hold that the patent is not restricted in claims 1, 2 and 4 to a mixture of the resistance material with the material to be treated, but so far as those claims are concerned contact merely between the two is required.

The granting of the process patent in suit carries with it the presumption of its validity. The answer sets up numerous prior patents, publications and other alleged anticipatory matter, which the appellee contends discloses the subject-matter of the several claims; and the appellee further contends that, even if the claims cover or include any patentable subject-matter, they must in view of the prior art be restricted to only one form of contact between the resistance material and the material to be treated, namely, an intermixture or commingling of the two. We think that neither of these contentions can be sustained. Probably the most relevant patent referred to by the appellee is No. 236,478, granted January 11, 1881, to Ball & Guest for

an "Improvement in Electrical Carbonizing Apparatus." The invention is thus stated:

"Our invention relates to an apparatus for carbonizing arcs of paper or other materials or articles by the direct application of an electric current to such materials or articles while confined in a case or muffle of non-conducting material."

It is true that in the process disclosed in the Ball & Guest patent an electric current passed through a discrete body of resistance material consisting of pulverized carbon in contact with the paper or other material to be carbonized whereby heat was generated sufficient to conduct the desired operation. But it is admitted by counsel for the appellee that this process is different from the process of the patent in suit in that the former "treats a different material and obtains a different product." It does not suggest a process for reducing ores and highly refractory compounds on any considerable scale, or, indeed, the generation or application of heat for metallurgical purposes at all. The two patents do not relate to the same art nor has the doctrine of analogous use any application as between the processes described therein. *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. The Ball & Guest patent was cited in the patent office against the application of the Messrs. Cowles, but was decided not to negative their right to a monopoly in the subject-matter of their claims as finally allowed. There can be no doubt on the evidence that prior to the process patent in suit metallurgical operations had been performed through the instrumentality of the electric arc, electrical conductors consisting of wires or rods of metal or of other solid or concrete bodies, or by electrolysis. But on careful examination we have failed to find in any patent, publication or other matter alleged as an anticipation or as showing the prior art, a practical process for metallurgical or analogous operations involving the use of a discrete body of conductive but resistant material rendered incandescent by the passage of an electric current and mixed or otherwise in contact with the material to be treated. This is the broad, underlying idea of the process patent in suit, and is well covered by its claims. The Messrs. Cowles were the first to invent and use this process and the patent must be sustained. It is a meritorious one and its claims are entitled to considerable liberality of construction.

We now take up the question of infringement. In the description it is stated:

"The operation must necessarily be conducted within an air-tight chamber or in a non-oxidizing atmosphere, as otherwise the carbon will be consumed and act as fuel. The carbon acts as a deoxidizing agent for the ore or metalliferous material treated, and to this extent it is consumed, but otherwise than from this cause it remains unimpaired."

The appellee contends that this alleged requirement must be read into the claims and that such limitation of the claims excludes infringement. Assuming that the employment of an "air-tight chamber" or a "non-oxidizing atmosphere" is an essential element of the patented process and is not specified merely by way of recommenda-

tion of the most economical and profitable mode for conducting the process, the question arises whether the defendant's process in the production of carborundum is not carried on in a non-oxidizing atmosphere. Such an atmosphere is one which is necessarily present in the interior of a large mass of highly heated carbon. The appellee in its process maintains a non-oxidizing atmosphere in and about the zone of reduction. The atmosphere, with respect to its non-oxidizing quality, is practically the same in each case within the sphere of the operation carried on. As has been stated, silicon—a metalloid—must be treated as a metal within the scope and terms of the process patent in suit, and the reduction of oxide of silicon is therefore to be considered, for the purposes of this suit, a metallurgical operation. No liberality of construction is required to show that the defendant's process infringes some, if not all, of the claims of the patent in suit according to their literal import. Claim 1 is as follows:

"(1) The method of generating heat for metallurgical operations herein described, which consists in passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore to be treated by the process being brought into contact with the broken or pulverized resistance material, whereby the heat is generated by the resistance of the broken or pulverized body throughout its mass, and the operation can be performed solely by means of electrical energy."

The appellee passes an electric current through a body of pulverized resistance material, namely, the carbon core, which forms a continuous part of the electric circuit; the ore, namely, oxide of silicon, to be treated by the process is brought into contact with the pulverized resistance material, namely the carbon core, whereby heat necessary to produce the desired effect in the ore is generated by the resistance of the pulverized body, namely, the carbon core, throughout its mass, and the operation can be performed solely by means of electrical energy.

Claim 2 is as follows:

"(2) The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore in the presence of carbon to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the carbon and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass."

The appellee subjects the ore, namely, oxide of silicon, in the presence of carbon in the charge mixture, to the action of heat generated by passing an electric current through a body of pulverized resistance material, namely, the carbon core, which forms a continuous part of the electric circuit, the ore, namely, that part of the charge to be acted on, being in contact with the pulverized resistance material, namely, the carbon core, whereby the ore, namely, oxide of silicon, is reduced by the combined action of the carbon in the charge and the heat generated by the resistance of the pulverized body, namely, the carbon core throughout its mass.

Claim 4 is as follows:

"(4) The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore in the presence of a re-

ducing agent to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the reducing agent and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass."

The appellee subjects the ore, namely, oxide of silicon, in the presence of a reducing agent, namely, carbon in the charge mixture, to the action of heat generated by passing an electric current through a body of pulverized resistance material, namely, the carbon core, which forms a continuous part of the electric circuit, the ore being in contact with the pulverized resistance material, namely, the carbon core, whereby the ore is reduced by the combined action of the reducing agent and of the heat generated by the resistance of the carbon core throughout its mass. In the view we take of this case it is unnecessary to decide the question, much debated by counsel, whether the appellee's process infringes claim 3 of the process patent in suit either literally or substantially. We have no doubt on the evidence that carborundum can be and has been produced under the process covered by any one of the claims of the process patent in suit, although not so efficiently or profitably under the method of claim 3. So long ago as 1884 the Messrs. Cowles produced it under their process with and without the use of a prepared or pre-formed central core of resistance material. It is true they did not manufacture it for commercial purposes and, failing to appreciate its importance, though aware of its abrasive qualities, applied their process to other branches of metallurgy. The appellee manufactures carborundum under a process described in patent No. 492,767, granted to Edward G. Acheson February 28, 1893, and a reissue patent No. 11,473, granted to him February 26, 1895, for an "Improvement in the Production of Artificial Crystalline Carbonaceous Materials." In the description of the reissue, as well as in that of the original patent, Acheson states:

"I have found by experience that as a carbonaceous material, ordinary coke produced from bituminous coal, or gas coke carbon, natural or artificial, give good results, and the more nearly pure it is, the more satisfactory are the products. This carbonaceous material is reduced to a proper state of subdivision and mixed with a proper proportion of silica, silicate or alumina or equivalent, and preferably with a flux such as common salt, when the whole mass is properly sub-divided and mingled thoroughly together. I then subject the mixture to a high degree of heat and preferably make use of what may be termed an electrical furnace. Any suitable furnace may be used which is capable of withstanding the proper degree of heat and the mixture is placed in the furnace in such a manner as to allow the current of electricity to be passed through the mass of material. Owing to the relatively high resistance of the mass when first introduced into the furnace, I find it sometimes desirable to facilitate the passage of the current through the mass by introducing conducting material, preferably by forming a core of such conducting material through the mass," &c.

In the description of the reissue patent he also adds:

"As between working the process with a core and without, the former, that is, working with a core, is believed to be the best."

Here is the clearest recognition by Acheson that carborundum may be produced with or without the use of a core of resistance material. And Acheson confirms this point by his testimony. It is true that the

appellee in practice has adopted a central core as the best method of conducting its process, and that the appellant has adopted a mixture without a central core as the best method of conducting the process of the patent in suit. But the use of the central core of resistance material is within the process of the appellant under claims 1, 2 and 4. These claims require merely contact in contradistinction to a mixture between the resistance material and material to be treated, and it is immaterial whether, under those claims, the body of resistance material assumes the form of a central core or any other shape, so long as it is in contact with the material to be treated, is discrete, granular or pulverized in its composition, is rendered incandescent through the passage of an electric current through its mass or over its area, and thereby affords the heat to effect the desired end. It has been urged that the object of the process patent in suit is reduction, while that of the appellee is composition. But the first and essential step of the process of the appellee involves reduction. The oxide of silicon is necessarily reduced before atoms of silicon can unite with atoms of carbon and form carborundum. The manufacture of carborundum as carried on by the appellee necessarily includes the practice of the broad process of the appellant; and infringement of the patent in suit is not avoided by the fact that after the reduction of the oxide of silicon, the atoms of that metalloid unite with those of carbon to form carborundum. Much has been said on the subject of electrolysis. The appellee claims that its process is not electrolytic, while the process covered by claim 3 of the process patent in suit is. We think that while there may be some electrolytic action in the latter, it is merely incidental to the process and does not in any manner constitute its distinguishing feature, which is the transmission of heat to the material to be treated from the granular or pulverized resistance material rendered incandescent by the passage of the electric current. But whether the process as conducted under claim 3 does or does not involve electrolysis to a limited degree becomes a wholly immaterial inquiry in view of the fact that claims 1, 2 and 4 cover methods of process to which electrolytic action can no more be attributed than it can to the appellee's process. We shall not further pursue this branch of the case. We are satisfied that the appellee has infringed claims 1, 2 and 4 of the process patent in suit.

The apparatus patent in suit, No. 319,945, contains seven claims. The charge of infringement with respect to this patent must in view of notice by the counsel for the appellant, during the taking of the evidence, that reliance was placed on claims 1 and 2, and not on the remaining claims, be treated as confined to those two claims. They are as follows:

"(1) In an electric smelting or reducing apparatus a chamber or casing having its longest dimension in a horizontal direction, and adapted to contain a charge of ore and electrical resistance material previously pulverized and mixed together, the oppositely-located electrodes in conductive relation to the charge, but otherwise insulated from one another, and an exit for the escape of the gases and vapors evolved from the charge during the process of reduction, substantially as herein set forth.

"(2) In an electric smelting or reducing apparatus the smelting chamber formed of side and bottom walls of closely-packed pulverized or granular mate-

rial and the permeable top wall formed of a layer of granular non-heat-conducting material, and the electrodes oppositely located at the ends of the core or smelting-chamber, substantially as herein set forth."

We do not find any anticipation of the apparatus patent or anything to affect its validity. The question is solely one of infringement of claims 1 and 2. While the process of producing carborundum as practiced by the appellee infringes claims 1, 2 and 4 of the process patent in suit, we do not think that the appellee has infringed either the first or the second claim of the apparatus patent in suit. These two claims, read in the light of the specification, evidently relate to apparatus adapted to the carrying on of the appellant's process in the usual and preferable manner, namely, where the resistance material and material to be treated are intermingled and not otherwise in contact. We therefore hold that the appellee has infringed claims 1, 2 and 4 of the process patent in suit, but has not infringed either claim 1 or claim 2 of the apparatus patent in suit.

The decree of the Circuit Court is reversed with directions to enter a decree for the complainant in accordance with this opinion but without costs, heretofore incurred, to either party.

TRENT v. RISDON IRON & LOCOMOTIVE WORKS.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 554.

1. PATENTS—INFRINGEMENT—ORE CRUSHERS.

The Schierholz patent, No. 538,884, for an ore crusher (claim 4), covers a novel combination of mechanical devices, all of which, however, were old in the art; the principal features of the combination being a fixed, vertical central shaft, about which the mechanism which drives the crushing rollers revolves, and having upon its upper end journal boxes; a horizontal shaft turnable in such journal boxes, and carrying a pinion wheel, by means of which the power is transmitted through a gear wheel which turns loosely upon the central shaft, and a flexible connection intermediate between such gear wheel and the crushing rollers, by which they are driven. Such claim is not infringed by the machine known as the "Bradley Mill," which lacks several of the features of such combination, and uses instead devices shown in the prior Yeaton patent. But the machine known as the Bingham or Trent mill embodies all the essential features of such claim, and infringes.

2. SAME—CONTRIBUTORY INFRINGEMENT.

A member of a firm which made the plans for, and superintended the construction and erection of, an infringing ore-crushing mill, receiving therefor a commission on its cost, is liable as a contributory infringer.

Appeal from the Circuit Court of the United States for the Northern District of California.

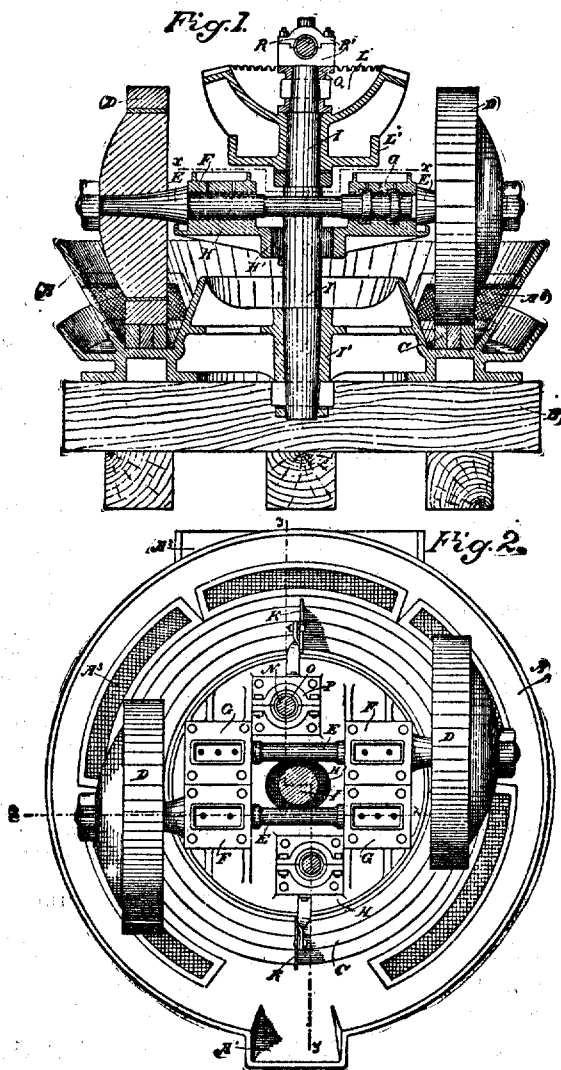
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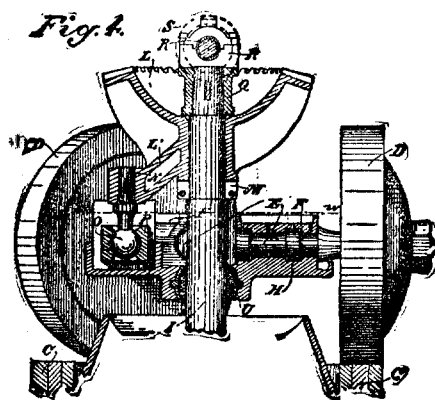
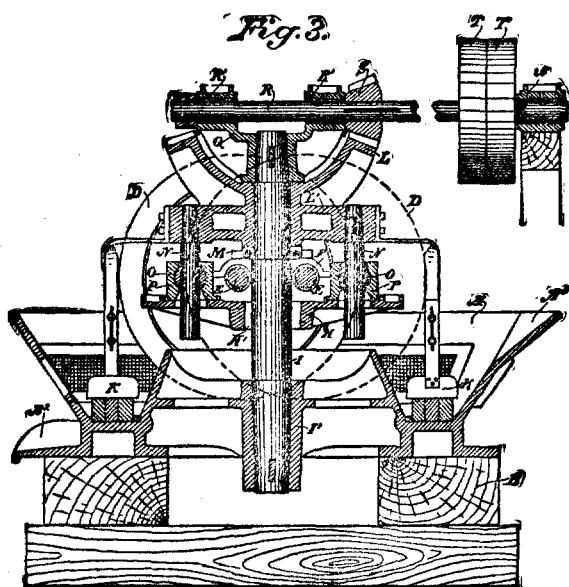
N. A. Acker and William F. Booth, for appellant.

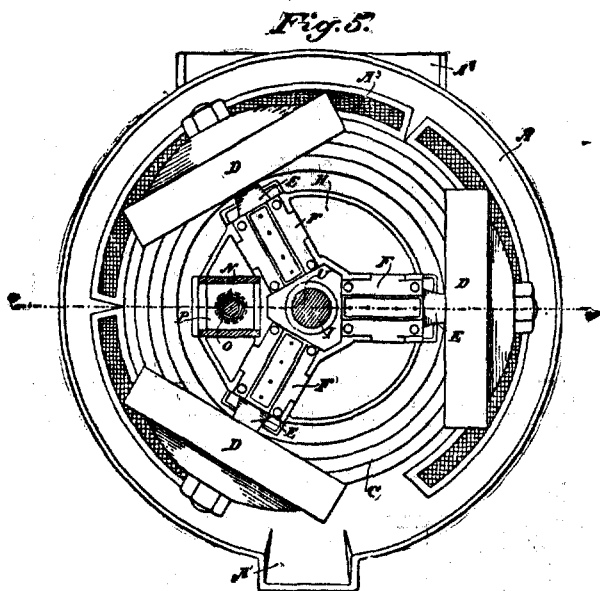
M. A. Wheaton and I. M. Kalloch, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellee, as the assignee of letters patent No. 538,884, issued on May 7, 1895, to August H. Schierholz, of San Francisco, for improvement in ore crushers, brought suit against the appellant, alleging infringement of said letters patent. The circuit court entered an interlocutory decree adjudging that the letters patent were valid, and that the appellant had infringed the same, and enjoining and restraining him from further infringement. From that decree this appeal is taken. The following are the drawings of the crusher:







The improvement which is covered by the appellee's letters patent consists of a circular vessel called an "annular pan," A, having in its bottom dies, C, which form a circular track upon which the heavy rollers, D, travel to crush the ore. The rollers have shafts or axles, E, which are journaled in bearings, F and G, which bearings are on a circular plate or table, H. The table, H, in rotating, carries the rollers. A shaft, I, rises from the center of the bottom of the pan, in which it is immovably fixed, and passes through the hole in the table, H, which hole is made considerably larger than the shaft, in order to permit the table, H, to tilt, and to let the rollers ride over inequalities in the mass of ore which they crush. To the top of the central fixed shaft is fastened securely a support flange, Q, which carries boxes, R¹, in which a horizontal shaft, R, is journaled; said shaft being rotated by pulleys. Upon the horizontal shaft a pinion, S, is fixed, which meshes with the gear wheel, L, which is mounted on the central shaft, I, just below the support flange, Q. The gear wheel is made to rotate on the shaft, I. It has a base extension, L¹, called a "frame" or "carrier," to which are secured two stout pins, N, which extend downwardly into ball sockets, O, P, fixed to the table, H, and in which ball sockets the pins slip up and down. By rotating the gear wheel, its base frame, L¹, carries the pins around, and these rotate the table, H, which carries the rollers. In passing over inequalities in the surface of the ore, the table, H, will tilt without affecting the driving mechanism. The patentee, in his specification, says:

"My invention consists of the novel means for driving the rolls, and allowing for irregularities of movement caused by the ore over which the rolls pass, without interfering with the vertical shaft or its gears and connections."

Claim 4 of the patent is the only one that is in issue. It reads as follows:

"In a rotary crusher, having an annular pan and dies, and rollers propelled and traveling upon the dies, a fixed, vertical central shaft, journal boxes fixed and supported thereon, a horizontal shaft turnable in said boxes, and carrying a pinion through which power is transmitted, a gear wheel turning loosely upon the fixed shaft and engaging the pinion, and mechanism intermediate between the gear and the crushing rollers, by which they are driven."

In order to determine what is covered by this claim, it becomes necessary to consider the state of the prior art. On February 7, 1882, W. E. Harris received letters patent No. 253,476, for an ore-grinding mill. It is a low, compact form of mill, in which the driving mechanism and the crushing mechanism for the ore are supported by a common frame. The machine has a lower stationary pan, above which revolves a grinding pan, which is secured to a central shaft. To the upper portion of the shaft is keyed a bevel-gear wheel, which meshes with a pinion mounted on a horizontal shaft in journal boxes which are secured to the upper portion of the frame. The central shaft revolves; its lower end resting upon a vertical screw which rises from the center of the pan, whereby a vertical adjustment of the revolving shaft is obtainable. We find in this patent a self-contained type of ore crusher, a vertical central revolving shaft with a gear wheel thereon, a horizontal shaft turnable in journal boxes, and carrying a pinion through which power is transmitted, and mechanism intermediate between the gear and the crushing device for propelling the same. On April 1, 1884, letters patent issued to J. C. Wiswell (No. 296,096) for an improved ore crusher. The Wiswell mill has the annular pan, and the crushing rollers which travel therein. Each roller is mounted upon an axle, and the axles have their outer bearings in a horizontal rotating table. The outer end of each axle is flexibly held in its bearings by means of a spring which is placed below the table, and forms an elastic connection between each crushing roller and the table, and permits each roller to rise and fall without imparting its vertical motion to the table, or to the driving mechanism of the mill. The carriage is mounted upon a central shaft, which is driven by a gear wheel mounted upon its upper end, and meshing with a pinion mounted upon a horizontal shaft, which is turnably secured in bearings supported by a horizontal beam. We next come to the J. H. Yeaton patent, No. 455,677, of date July 7, 1891. This invention contains the circular pan having an annular die upon which travel the crushing rollers. From the center of the pan rises a short, fixed central shaft, which supports a rotating shaft or spindle upon the upper end of which is secured a gear wheel, which meshes with, and is driven by, a pinion mounted upon a horizontal shaft turnably secured in bearing boxes. Upon the rotating spindle, near its lower end, is splined a sleeve, and to this sleeve the inner end of each journal, which carries the crushing rollers, is movably or slidably secured, whereby a flexible connection between the driving mechanism and the crushing rollers is obtained; and each crushing roller is permitted to rise and fall over inequalities of the surface of the ores without affecting the other rollers, or imparting its vertical motion to the

driving mechanism. The appellee's assignor, A. H. Schierholz, was himself the patentee of two improvements in ore crushers, which are among the inventions which constitute the prior art. On September 15, 1891, he secured letters patent No. 459,657. The invention was described as an improvement upon the Bryan ore crusher, and it consists in so connecting the crushing rollers of the Bryan mill "as to prevent binding thereof when thrown upward by unusually large pieces of ore, which has heretofore been the objection to crushers of this class." It contains the circular pan, in the center of which is securely keyed a shaft which rises as high as the axles of the rollers. Upon the shaft, and near its top, is a sleeve or ring which has its outer surface convex, and upon which move laterally extending arms which hold the axles of the grinding rollers. The contact of these arms with the convex outer surface of the sleeve is by a concave surface which turns upon the same for the purpose of permitting the vertical movement of the rollers to accommodate itself to inequalities of the surface of the material to be crushed. Above the rollers is a driving pan or wheel placed horizontally, which is provided with a downwardly extending wall securing it to the laterally extending arms which carry the axles of the rollers. The pan or drive wheel is rotated by a power belt. In the Bryan ore crusher there was a rigid connection between the crushing rollers and the horizontal table which carried the same. Its defect was a tendency to bind upon the fixed central shaft when the rollers were thrown upward. It was this defect that Schierholz attempted to remedy in his first patent. On December 17, 1895, he secured letters patent No. 551,560, for an improved ore crusher, upon an application which he had made in 1893 for an invention which was prior in time to the invention covered by the letters patent in controversy in this suit. It was an ore crusher having an annular pan, a central rotating shaft, a gear wheel secured thereon at the upper end, a horizontal shaft with a pinion meshing with the gear, a horizontal table fitted so loosely around the central shaft as to permit it to tilt and lower automatically without touching the central shaft, journals secured in the table, and crushing rollers mounted thereon and carried by the rotation of the table. To propel the table a hub was secured upon the central shaft, provided with laterally extending arms, the outer ends of which worked in vertical guide ways which extended upwardly from the horizontal table. From this review of the condition of the prior art, it will be seen that the appellee's invention, as represented in claim 4, consists in a novel arrangement of mechanical devices, all of which had been used before in ore crushers.

It is contended that the appellant has infringed the patent in controversy by constructing two types of quartz mills,—one which is known in the record as the "Bradley Mill," and another which is designated the Bingham or Trent mill. The Bradley mill, in common with all the mills of this class, has the pan and the circular die upon which the rollers travel. From the center of the pan rises a shaft which has no rotary motion, but which is capable of vertical adjustment by a screw upon which it rests at its base. The shaft extends as high as the top of the rollers. Around it revolves a table having boxes in

which the axles of the rollers are mounted in such a manner that each roller can move vertically in its axle bearing, and rise and tilt without disturbing the horizontal table. The table is secured to the lower end of a rotating spindle or shaft which rests upon and revolves upon the top of the nonrotating shaft. Upon the upper end of the rotating spindle is secured a gear wheel, with which meshes a pinion on a horizontal shaft, which has journal boxes or bearings in overhead beams of the frame of the mill. The Bradley mill, although it has a nonrotating shaft, has not the "fixed, vertical central shaft" of the appellee's invention. It has not a fixed, vertical central shaft extending from the base of the mill to the top or to the gear wheel, nor has it a fixed, vertical central shaft on which journal boxes for the horizontal shaft are fixed or supported. It has not a gear wheel turning loosely upon a fixed central shaft. It lacks these features of the appellee's fourth claim. It resembles the Yeaton invention more than it does that of the appellee. It is, indeed, substantially the Yeaton mill, so far as the features covered by the appellee's fourth claim are concerned. The Yeaton patent anticipates it in every essential point which is involved in the present suit. In both mills the journal boxes for the horizontal shaft are supported, not upon the fixed central shaft, but upon the overhead beams of the mill. The differences between them are—First, in the length of the fixed central shafts (a difference in form only); and, second, in the mechanism intermediate between the gear and the crushing rollers by which the latter are driven (a difference which is unimportant, whether the appellee's claim for mechanism intermediate between the gear and the crushing rollers by which they are driven be given a broad construction or a narrow one). Conceding it a broad construction, so that it shall be said to cover any form of intermediate mechanism between the gear wheel and the crushing rollers by which the latter are driven, then, if it be true, as contended by the appellee, that every element of the appellee's fourth claim is found in the Bradley mill, it follows that every element is likewise found in the Yeaton mill, and that the whole of the appellee's invention is anticipated by the Yeaton patent. If, on the other hand, the appellee's claim for intermediate mechanism be given a narrow construction, and the claim is confined to the particular form of intermediate mechanism which is described in the letters patent, it is equally clear that the Bradley mill avoids infringement, for the reason that its intermediate mechanism is wholly different from that of the appellee.

We think, however, that the Trent or Bingham mill infringes claim 4 of the appellee's patent. It has, in common with the patent sued upon, a central, nonrotating shaft, journal boxes fixed and supported thereon, a horizontal shaft turning in said boxes, a gear wheel turning loosely on the central shaft, and flexible mechanism intermediate between the gear wheel and the crushing rollers, by which they are driven. It is said that it differs from the ore crusher of the appellee in the fact that its central shaft is not firmly fixed in its place, but rests upon a screw at its base, whereby it may receive vertical adjustment, and in the further fact that the elastic connection permitting the rollers to ride over inequalities in the surface of the ore to be

crushed is located between the rollers and the table which carries the same, whereas in the appellee's patent the elastic connection is between the table and the gear wheel. These differences do not, we think, affect the question of infringement. The central shaft is not the less a fixed central shaft from the fact that it rests upon a screw whereby it may be adjusted. For all the purposes of the fourth claim of the appellee's patent, it is a fixed shaft,—as much so as it would be if it were keyed to the base of the pan. Nor do we perceive any reason why the element of the claim which covers "mechanism intermediate between the gear and the crushing rollers, by which they are driven," should be construed narrowly, or otherwise than according to its terms. When so construed, it must be held to cover the form of such intermediate mechanism which is found in the Bingham mill. All the other elements of the claim are precise and definite, and it may be conceded that, in view of the prior art, none of them can be so extended as to include more than their terms, strictly construed, imply. But, while all the elements of the appellant's patent may be found singly in the ore crushers which preceded it, the appellee's invention was in its combination a distinct departure in the art. It was a low, self-contained type of mill, of which all the operative parts were fixed upon or revolved about a fixed vertical central shaft. Schierholz was the first to combine with such a fixed central shaft journal boxes fixed to the upper part thereof for the horizontal shaft, a gear wheel revolving loosely thereabout, and mechanism intermediate between such gear wheel and the crushing rollers, in connection with a mortar and annular dies; and we think his assignee is therefore entitled to claim, in combination with the other elements, any intermediate mechanism flexibly connecting the gear wheel with the crushing rollers so as to drive the same. The evidence discloses the construction of but one mill of the type known as the "Bingham Mill." The appellant denies that his connection with the erection thereof was such as to render him liable for the infringement. He asserts that he acted solely in the capacity of architect and contractor for and on behalf of the owner, J. C. Hodge, of Houghton, Mich., and that Hodge made the castings for the mill at his own foundry in Michigan. The testimony shows that the appellant was a member of the firm of L. C. Trent & Co., and that his firm furnished the plans for the mill, which was erected at the North Last Chance Mine, at Bingham, Utah, and furnished the plans for the castings, which were made by Hodge, and placed the machinery in the mill and fitted it up for operation. It is shown, also, that the firm received as compensation for such services a percentage upon the cost of the material and labor supplied. Hodge testified that, before accepting the plans and specifications from the appellant, he demanded, and the appellant promised him, protection against any suit for infringement. This is denied by the appellant. Taking, however, all the testimony into consideration, we find no reason for questioning the correctness of the conclusion which the circuit court reached upon this branch of the case, holding that the appellant was "an active contributor to the infringement." We think the decree was erroneous in adjudging that appellant had infringed the appellee's patent by constructing the Bradley mills, and in requiring

him to account for the gains, profits, and advantages which he had received therefrom. The cause is remanded to the circuit court, that the decree may be modified in accordance with these views.

'ATLAS GLASS CO. v. SIMONDS MFG. CO. et al.'

(Circuit Court of Appeals, Third Circuit. June 11, 1900.)

No. 12.

1. PATENTS—TERM—LIMITATION BY FOREIGN PATENT.

To constitute a "foreign patent," within the meaning of Rev. St. § 4887, which will limit the term of a subsequent American patent, it is not essential that the foreign grant shall be the equivalent of a patent granted by the United States, either as to the length of term, or the breadth of the exclusive rights secured to the grantee; but it is sufficient if such exclusive privilege as amounts to a substantial monopoly is granted by sovereign authority for a definite term, in accordance with the law or practice of the country.

2. SAME—DANISH PATENTS.

Prior to the enactment of patent legislation in Denmark, in 1894, a monopoly in an invention, or "eneret," was secured through royal letters patent granted by grace of the king, through the ministry of the interior, on petition therefor; and such patent gave to the grantee a monopoly to "make and allow to make" the thing patented, for a stated term, on condition that he carried out his invention within a year, and continued to employ it. *Held*, that such a grant was a "foreign patent," within the meaning of Rev. St. § 4887, and its term limited that of a subsequent patent granted by the United States for the same invention.

3. SAME—EXPIRATION—MOLDS AND MACHINERY FOR MAKING GLASS BOTTLES.

The Windmill patent, No. 416,389, for a mold for glass bottles, etc., and the Rylands patent, No. 416,376, for machinery for the manufacture of glass bottles by the use of molds of the Windmill type, both expired by limitation in 1896, by reason of the expiration of Danish patents granted for the same inventions in 1889 for a term of seven years.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Thomas W. Bakewell and W. L. Pierce, for appellant.

James I. Kay and James N. Cooke, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This suit was brought for the infringement of patents for mechanisms for pressing and blowing glassware. It was originally brought against the Simonds Manufacturing Company and Biddle Arthurs, president, and John J. Power, under the following patents: No. 416,389, to Windmill, December 3, 1889, for molds for glass bottles, etc.; No. 416,376, to Rylands, December 3, 1889, for machinery for manufacture of bottles; No. 531,609, to Blue, December 25, 1894, for molds for the manufacture of glassware; No. 567,071, to Blue, September 1, 1896, for machines for manufacturing glass bottles. During the taking of the opening testimony, complainant and appellant announced that he would not ask relief under either of the patents to C. E. Blue, Nos. 531,609 and 567,071, so that the suit is limited to the Windmill and the Rylands patents, of which complainant duly became assignee.

After the suit was begun, it became necessary to bring into the case, as defendants, the Swayzee Glass Company, of Indiana, and the S. M. Bassett Glass Company and the Gilchrist Jar Company, both of New Jersey, with whom the machines built by the Simonds Manufacturing Company had been in successful use for nearly a year. The usual defenses were set up in the answers, original and supplemental, and also the following special defenses: That the said letters patent No. 416,389, granted to said Dan Rylands, assignee of Richard Windmill, and the said letters patent No. 416,376, granted to Dan Rylands, expired by limitation, under the provisions of the Revised Statutes of the United States (section 4887), prior to the bringing of the suit, for the reason that the inventions described and covered thereby were fully described in Danish letters patent granted to said Dan Rylands (No. 1,858) on October 1, 1889, for "Maskiner til forming af Glasflasker ved presning og pusing," for the term of seven years, and No. 1,895, on November 1, 1889, for "Maskiner til Fabrikation af Flasker," for the term of seven years, both of which patents have expired by limitation. It is also asserted in said supplemental answer that the said Rylands and Windmill patents, the only patents in question in this suit, have expired by limitation under the provisions of the said section of the said statutes of the United States, by reason of the expiration of a Spanish patent granted to said Rylands April 5, 1889. The court below found that claims 3 to 7 of the Windmill patent were good, and that defendant's machine would have infringed the same, and also that claim 11 of the Rylands patent was good, and would have been infringed in the same way, but held that claim 1 of the Rylands patent was not infringed. The court, however, decided that both patents had lapsed in 1896, by reason of the expiration of two prior seven-year patents (enerets) granted in Denmark in 1889. In the view taken by this court of the ground upon which the bill was dismissed in the court below, it will be unnecessary to consider any of the assignments of error except the ones in which it is asserted that the court erred in holding that the Windmill and Ryland patents were in any wise affected by the Danish enerets to Rylands of October 1 and November 1, 1889.

Section 25 of the act of congress of July 8, 1870, as embodied in section 4887, Rev. St., is as follows:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The earliest legislation on the subject of foreign patents is found in section 8 of the act of 1836, where, for the first time, it was provided that nothing in the patent act then enacted should be—

"Construed to deprive an original and true inventor of the right to a patent for his invention, by reason of having previously taken out letters therefor in

a foreign country, the same having been published any time within six months next preceding the filing of his specifications and drawings."

By section 6 of the act of 1839 two other conditions were made, as follows:

"Provided that the same shall not have been introduced into public and common use in the United States, prior to the application for such patent; and provided, also, that in all cases, every such patent shall be limited to the term of fourteen years from the date of publication of such foreign letters patent."

This was the state of the law when the act of 1870 was passed, the twenty-fifth section of which became section 4887, Rev. St., as above quoted. It will be observed that this section, while it extended the right of a foreign inventor and patentee, as it existed under the acts of 1836 and 1839, in regard to the limitation by a two-years public use, on the other hand, changed, in the interest of the American public, the term for which such foreign patentee could obtain a patent in the United States from 14 years from the date of the foreign patent to a period to be measured by the shortest term of the foreign patents previously obtained. This limitation of the term of the monopoly of an American patent, where the patentee has previously obtained a foreign patent, is obviously in the interest of those from whom tribute is exacted by such monopoly; and this purpose to do justice to the American public, by giving them the same privilege as is accorded to the people of the foreign country in which the patent is first granted, challenges the consideration of the court. Certified and legalized copies of these two Danish patents or enerets were offered in evidence, and no objection can be raised to the sufficiency of the proof of their being what they purported to be. Translations of the patents were also offered, and appear in the record. The first one, granted October 1, 1889, is as follows:

"We, Christian the Ninth," etc., "make known that we, in accordance with the application and request for the same, most submissively made, along with the circumstances brought out on the occasion, most graciously have allowed and granted, and herewith allow and grant, that Dan Rylands, of Barnsley, in England, may, for a period of 7 years, to reckon from this day, have the exclusive right everywhere in Denmark, with exception of the Faroes, Iceland, and colonies, to make and allow to make machines for molding glass bottles by pressing and blowing, indicated by him in the description hereto appended, with two drawings belonging thereto, of which the counterpart is furnished to our minister of the interior on condition that he, within two years, to be reckoned from the date of this, our allowance, here in the kingdom, has brought the invention named to execution and later combines [continues?] with it. Meanwhile this exclusive right will be lost, in so far as it shall be proved that any one else previously here in the kingdom has made or allowed to be made machines of the properties in question. Forbidding all and every one to make hindrance against what has been prescribed.

"Given at Fredensborg, October 1st, 1889.

Christian, R.

"Allowance of exclusive right for Dan Rylands, of Barnsley, in England, for machines for molding glass bottles by pressing and blowing."

Then follows what corresponds to the specifications and claim of an American patent, under the heading, "Description of Improvements in Machines for Molding Glass Bottles by Both Pressing and Blowing." The other patent or eneret, granted November 1, 1889, is in the same form, and need not be reproduced.

There is no question as to the identity of the inventions for which these grants were made with those of the so-called Rylands and Windmill American patents, which are the patents in suit. Complainant's contention is that these enerets were merely exclusive manufacturing licenses, and not patents, within the meaning of section 4887, and that therefore they cannot limit the term for which the American patents were granted. The meaning of the words "patent" and "patented," as used in section 4887, is not difficult to ascertain. The word "patent," originally a qualifying adjective applied to the "open letters" by which a sovereign grants an estate or privilege, has come to mean, in connection with the so-called patent laws of the United States, as well as in common parlance, the exclusive privilege itself granted by the sovereign authority to an inventor with respect to his invention. What the nature and extent of the exclusive privilege thus granted by the constitution and laws of the United States may be depends upon the terms of the act of congress providing for and regulating the same; and, when this section 4887 speaks of an invention which has been previously patented in a foreign country, it obviously means an invention with respect to which the inventor has received from the sovereign authority of such foreign country such exclusive privilege as its laws provide for or sanction. It would be doing violence to both the language and the purpose of the act of congress in question if we were to so construe these words (as we have been asked to construe them) as that the exclusive privilege granted by the letters patent of the sovereign of a foreign country must be coextensive with the privilege which is granted under the laws of the United States for the time being. The true meaning and purpose of the act of congress, as expressed in the language used, are accomplished by applying the word "patented" to the having received the grant of an exclusive privilege from a foreign sovereign, if such privilege amounts to a substantial monopoly. The contention of appellant is that inasmuch as, under our present patent laws, the exclusive privilege granted to an inventor is to "make, use, and vend" his invention, the words "patented in a foreign country" can only refer to an exclusive privilege to this full extent, and are therefore not applicable to the privilege granted by the Danish patent or eneret, which is only "to make and allow to make" the thing invented. In our opinion, this contention is not tenable. The Danish word "eneret," according to the Danish expert and patent solicitor produced as a witness by complainant, means "monopoly." There can be no question that the exclusive privilege to make and permit others to make is a substantial monopoly, and within the meaning of the language employed in section 4887. The fact, even if it be a fact, that under the Danish law the exclusive right to make and allow others to make the patented article does not forbid the sale and use of such an article imported from another country, would not so qualify the substantial value and effect of the monopoly granted by the Danish sovereignty as to make inapplicable the statement in the words of our statute that such invention was patented in a foreign country. The patent laws of the different countries vary so much in the ex-

tent of the grant provided for, and the limitations placed upon it, that to sustain complainant's proposition would lead to holding that few, if any, of the foreign patents could be included in the terms of section 4887. The words "previously patented in a foreign country" must then be taken to mean "patented according to the laws and usages of such foreign country," provided a substantial monopoly is thereby granted. None of the cases cited by the complainant, all of which have been examined, sustain its contention in this respect. Even the recent case of *Société Anonyme pour la Transmission de la Force par L'Electricité v. General Electric Co.* (C. C.) 97 Fed. 604, so much relied upon by complainant, does not, on the precise point determined upon the facts of the case, justify such an interpretation of the meaning of the act in question. It is true, the learned judge in that case said, "A patent implies a grant from the sovereign power, securing to the inventor, for a limited time, the exclusive right to make, use, and vend the invention." If he meant by this that there could be no patent in a foreign country, within the meaning of section 4887, that was not covered by the precise language of this definition, we must hold, not only that the statement was obiter dictum, but inaccurate. We are inclined to think, however, that the learned judge, in using the words "make, use, and vend," had in mind merely the statutory terms of the grant contained in an American patent, which were sufficient for his then purpose, inasmuch as he decided that in the case before him the Swiss government had granted no patent at all, because the condition required by the Swiss law had not been complied with, and the instrument claimed to be a patent was merely a temporary protection, with a promise that a definitive patent would be granted when the condition prescribed was fulfilled. The conclusion arrived at by the court upon the facts stated was correct, and the reasoning of the court upon those facts was clear and convincing. The question now before this court was not raised in that case, and we do not understand that it was attempted to be decided.

That there was no patent law, in the sense of a legislative enactment, in Denmark, until 1894, does not affect the situation. Prior to the enactment of the law of that year, patents or *enerets* were granted and issued by the king, in exercise of the royal prerogative, and the term for which they were granted was determined according to what seemed the exigency of each case. Nevertheless such patents were issued by virtue of the recognized lawful authority vested in the reigning monarch, and were acts of sovereignty as completely as were legislative enactments. How the sovereign authority of a country shall speak in a given case depends upon the constitution and settled scheme of government of that country. In Great Britain, as probably in other monarchical countries, patents for inventions have always been the subject of royal grants. The Danish patent act of 1894 changed the method of procedure and of granting an *eneret* or patent, although under this act the extent of the monopoly is about the same as it was according to custom and usage under the royal grants.

In view of the very clear and convincing discussion of this question by the learned judge of the court below, which we here refer to and adopt, it is not necessary to further elaborate the reasons for the conclusion arrived at. The decree of the court below dismissing the complainant's bill is affirmed.

THE MARY A. BIRD.

(District Court, D. New Jersey. May 14, 1900.)

1. COLLISION—STEAM AND SAILING VESSELS—DUTY OF TUG WITH TOW.

The fact that a steam vessel is incumbered with a tow does not relieve her from the duty imposed by the navigation rules of keeping out of the way of a sailing vessel, but rather requires additional care upon her part; and so strict is this rule that she can only escape liability for a collision by showing that it was inevitable, or caused by the culpable negligence of the sailing vessel.

2. SAME—FAULT—VESSELS CROSSING.

A tug with a tow sighted a schooner approaching on a crossing course, when the vessel were 200 yards apart, but took no steps to avoid collision, except to give danger signals to the schooner, which kept her course, and came in collision with the tug. *Held*, that the tug was in fault for the collision, it not being shown that she could not have kept out of the way if she had made proper effort to do so.

In Admiralty. Libel for collision.

McGee, Bedle & Bedle, for libellant.

James J. Macklin, for claimant.

KIRKPATRICK, District Judge. The libel in this case is filed to recover damages for injuries sustained by the libellant's steam tug Emma Kate Ross, which, in the morning of October 8, 1896, came in collision with the schooner Mary A. Bird. The steam tug had in tow two empty scows; the one attached to the tug by a hawser about 75 fathoms in length, and the other further astern by about 5 fathoms. They were proceeding from the dumping grounds to New York. The schooner Mary A. Bird was light, and was bound from New York to Rockaway. The night was clear starlight, and the sea was calm. The tide was ebb, or on the first of the flood, and the wind fresh from the west-northwest. The collision occurred between the iron pier of Coney Island and Norton's Point. The tug was struck forward of the pilot house, about abreast of the kitchen. It appears from the testimony of the mate of the schooner, who had her in charge, that he sighted the tow when about one mile distant, and that from that time until the vessels collided he held his course. The lookout on the tug testifies that he saw the schooner when about 200 yards away, and that when he went to report her to the pilot of the tug he became aware that the pilot had seen the schooner, because he blew two sharp whistles, intended, as he supposed, to be a warning of danger to the schooner. The pilot says he first saw the schooner when about 70 feet away, and that he then blew two sharp whistles, to notify her of her danger, and to require her to take precautions to avoid it. The pilot of the tug says that the schooner, on

hearing the warning whistles, momentarily luffed, and then almost immediately changed to her original course. He, in the meantime, did nothing except again blow his danger whistle. He did not change his course, nor stop his engines and back, nor even slow his speed, any of which would have tended to avert the disaster. The engineer of the tug says that he got no signal to change the speed of the boat until after the blowing of the second danger signal, and that at no time was the boat stopped. It seems to me that the pilot of the tug entirely misapprehended and failed to perform his duty. The excuses he gives for his conduct are entirely unsatisfactory. He says first that he considered it the duty of the schooner to keep out of the way of the tug. It needs no citation of authority to show that in this he was clearly mistaken. Article 15 of the regulations for preventing collisions at sea is too clear to be misunderstood. The duty of steamers to keep out of the way of sailing vessels, imposed by this rule, is not modified because they are incumbered with tows. *New York & B. Transp. Co. v. Philadelphia Steam Nav. Co.*, 22 How. 461, 16 L. Ed. 397. The fact that they are so incumbered imposes upon them the burden of additional care. To facilitate the steamship in the discharge of her duty, the sailing vessel must not embarrass her by changing her course; she must keep on, that the steamer may know how to properly exercise the necessary precautions to avoid collision. So strict is this rule of duty that a steamer can only escape responsibility for collision with a sailing vessel by showing that it was inevitable, or caused by the culpable negligence of the sailing vessel. *The Carroll*, 8 Wall. 304, 19 L. Ed. 392. The burden of proof in such cases is on the steamship to show the prudence of its own conduct and the negligence of the other. *The New Orleans*, 18 Fed. Cas. 105. The pilot further urges that he could not turn from his course, because he feared he would go aground with the tug on account of the narrowness of the channel. The testimony on this point does not sustain this contention. The pilot himself says that at the point where the collision occurred the channel was not 50 feet wide. The captain of the *Ross*, however, says it was 150 feet wide, while the testimony of the claimants fixes it at 200 fathoms. The *Ross* was 30 feet wide. We may properly infer that the width of the channel was at least as great as that fixed by the captain of the *Ross*, in which case there was plenty of room for the *Ross*, without danger of going aground, to have changed her course sufficiently to have avoided the schooner. Even were it not so, the duty of the tug was to have stopped and backed, so as to give the schooner a free course. The only excuse offered for not so doing is that the wheel might thereby have become entangled in the towline. This is entirely unsatisfactory. There was plenty of time, after the schooner was sighted, to have sent a man to the stern, and hauled in the line. There is no proof of fault on the part of the schooner. I am satisfied from the evidence that by the exercise of proper precautions on the part of the tug the collision could have been avoided. The libel should be dismissed, with costs.

GREEN et al. v. COMPAGNIA GENERALE ITALIANA DI NAVIGAZIONE.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 125.

COLLISION—STEAMER AND SAILING VESSEL—INSUFFICIENT LOOKOUT.

Evidence considered, and *held* to sustain a finding that the failure of a steamer to keep a vigilant lookout was a contributory cause of a collision between the steamer and a bark, the lights of which were not made out by the lookout until very shortly before the collision.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal by the respondents from a decree of the district court, Southern district of New York (82 Fed. 490), dividing the damages resulting from a collision between the steamship *Orione* and whaling bark *Swallow*, which happened about half an hour after midnight, March 31, 1895, some 250 miles off the coast of Brazil.

Lorenzo Ullo, for appellant.

Eugene P. Carver, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The case in this court differs from that submitted below, in that there are some propositions no longer in dispute. The libellant has not appealed, and therefore it must be assumed that the bark was herself in fault; that, from "the uncertainty and contradictions in the testimony in the libellant's behalf," it appears that there was "obvious negligence" in her navigation. It will not be necessary to repeat the detailed statements of the district court as to her probable movements. She was taken aback, the wind being light and baffling, and, after a greater or less amount of "sagging" and "drifting back," got back to her course again. It will be necessary only to inquire whether there was sufficient evidence to warrant the further finding that the steamer "kept a negligent lookout," and therefore failed to see the *Swallow's* lights earlier, and thereby secure time sufficient to maneuver so as to avoid her. Here, again, we are helped by the concession that the lights were not seen as soon as it might be expected they would have been. The entry in the log of the *Orione*, written within 24 hours after the collision, contains this statement:

"The undersigned believes that the sailing vessel put up the side lights a few minutes before the collision, because, if he had the side lights, that could have been seen before, because the night was somewhat clear, so as to be able to distinguish the side lights at a far greater distance, inasmuch as hardly two minutes passed from the time of seeing the side lights to the collision."

The second mate, Zicavo, was in charge of the navigation of the steamer. He testified that he saw the *Swallow's* red light almost at the time the lookout signaled it. He estimates the distance at 800 to 1,000 meters, and the time from sighting to collision at two to three minutes. The steamer was making about 14 knots. Renzetti, the lookout, who sighted and signaled the light, makes the time to collision three to four minutes; Podesta, on the lookout bridge, "only a

few minutes." For reasons which will be indicated hereafter, we think the lowest of these estimates is nearest right, although probably an overestimate; and it is quite apparent that it might be expected the bark's light would be sighted much sooner, and when the vessels were much further apart. There is strong confirmation of the theory that the light was not seen till the vessels were close together in the conduct of *Zicavo*. It was a red light which the lookout reported, and which he saw. To port to such a light was proper navigation; careful watch meanwhile being kept in order to see if further change of helm or speed was needed. *Zicavo* at once ordered the helm hard a-port. (Really, the order was, "Hard a-starboard;" but the steamer was Italian, so the equivalent in the glossary of our own navigation is substituted in the text.) Evidently he was surprised, startled, finding himself unexpectedly confronted with a red light near at hand, as if suddenly flung up out of the darkness. Now, this effect of a sudden presentation of a red light to the eyes of the watchers on the *Orione* could have been brought about by one or another of three causes only: First. Before the moment of its presentation there might have been no red light at all. This was the theory adopted when the entry was made in the log, but it cannot be accepted here, in view of positive evidence from the bark that both her lights had been set and burning, when there is no evidence, direct or circumstantial, other than the steamer's belated observation of the light, to sustain such theory. Second. It might be that the light was there, but that something obscured it from view. This is the appellant's theory. There is no suggestion of any obscuration by sails, but it is contended that the result of the *Swallow's* being taken aback was that before she could get back to her course she had swung so far around that the sidelight screens, cutting off their respective lights at two points abaft the beam, would render them invisible to any observer located on the steamer, and that such obscuration continued for some time. The evidence from the *Swallow* as to these movements is most confused and somewhat contradictory. Nevertheless the positive and reiterated statement of Rodette, the boat steerer, that he saw the steamer's lights two points abaft the lee beam,—aft of the main rigging,—lends strong support to the theory that the bark was at some time in the position described. But, if she were, that circumstance does not decide the question as to the vigilance of the steamer's lookout. If the bark were swung completely around, presenting her stern to the *Orione*, she could get back on her course, as she undoubtedly did before collision, only in one of two ways,—either by luffing or by wearing. The evidence will not sustain the two propositions, that she wore and that the steamer's lookout was vigilant, because such a maneuver would have presented her green light to the steamer for some time before the red light became visible, and the steamer's evidence is positive that no green light was seen before the red suddenly appeared. If appellant's theory as to change of position be accepted, it must be taken that she came back to her course by luffing. Of this suggestion the district judge said:

"In such case the bark's red light must have been visible from five to ten minutes before collision, and the bark's change of condition, though constant

and deceptive, must have been comparatively very slow, and could not have been sufficient to prevent the steamer from avoiding her, had timely notice been taken by the bark, and had the steamer hard a-ported even a minute before collision."

When we take into consideration the course and character of the wind, the slow speed of the bark even when on her course ($3\frac{1}{2}$ to 4 knots only), the long arc through which she had to swing her bows in order to get from a position where the steamer bore 2 points abaft her port beam to one where she showed her green light to the steamer, as she did just before collision, and the fact that, during the long effort to get back through the teeth of the wind to her starboard tack, she was showing her red light to the steamer, we fully concur in the conclusion of the district judge, and cannot understand how the steamer could possibly come in contact with the bark thus maneuvering, if, seeing her red light nearly half a mile away, she at once hard a-ported, and kept on under a hard a-port wheel at a speed of 14 knots an hour. The only other possible explanation of the sudden appearance of the red light is the failure to keep a vigilant lookout, and we therefore concur with the district judge in the finding that the steamer's negligence in that regard contributed to bring about the collision. The decree is affirmed, with interest and costs.

THE EXCELSIOR.

THE ROBERT GRAHAM DUN.

(District Court, E. D. New York. June 2, 1900.)

1. COLLISION—STEAMER AND SAILING VESSEL—FAILURE TO EXHIBIT FLARE-UP LIGHT.

The navigation rules do not make it obligatory on a vessel to use a flare-up light unless the circumstances are such that prudence would require it; and a schooner cannot be held in fault for a collision with a steamer in the night, because of her failure to exhibit such light, where her other lights were burning brightly, and no necessity appeared therefor until after the time she was discovered by the steamer.

2. SAME—VIOLATION OF RULES BY STEAMER—ATTEMPTING TO CROSS AHEAD OF SCHOONER.

On a dark but clear night a collision occurred between a steamship and a schooner, which approached each other on nearly parallel courses. The schooner saw the lights of the steamer when 5 or 6 miles distant, and from that time until very shortly before the collision her red light was visible, bearing about a point and a half on the schooner's port bow. The schooner's lights were burning, and, according to a preponderance of the evidence, were in good condition and not obscured, and her red light was seen and announced by the lookout on the steamer; and the first officer, on looking, made out the sails of the schooner nearly ahead, and about 1,800 feet distant. He at once ordered the helm hard a-starboard, and continued at full speed, and the collision followed a minute later. The schooner held her course. *Held*, that she was not in fault for failing to exhibit a flare-up light, but that the collision was due to the fault of the steamer, in failing to sooner discover the schooner, and, on discovering her, in attempting to cross her course, in direct violation of navigation rule 22.

Hobbs & Gifford and J. Parker Kirlin, for libellant Cole and the schooner Robert Graham Dun.

Maxwell Evarts and Robert D. Benedict, for the steamship Excelsior.

THOMAS, District Judge. These actions involve cross libels filed to recover damages sustained by the schooner Robert Graham Dun and by the steamer Excelsior in a collision off the New Jersey coast about 1:30 a. m. of August 3, 1899. The schooner was a wooden vessel, about 160 feet in length, 34 feet 10 inches in beam, and was bound from Savannah to New York, with a cargo of lumber. The Excelsior was an iron steamship, 370 feet in length, and 46 feet in beam, and was bound with a cargo from New York to New Orleans. Her draft was 18 feet 11 inches forward, and 21 feet 11 inches aft. The wind was light from S. W. to S. W. by S. The schooner was sailing wing and wing, at the rate of about $3\frac{1}{2}$ or 4 knots per hour, upon a course of N. E. by N. The steamer was making about 12 knots per hour, upon a course of S. by W. $\frac{3}{4}$ W. Those on the schooner regarded the steamer's course as about S. S. W., while those on the steamer took the schooner's course to be about N. E. The night was dark, but clear and favorable for seeing lights. On the deck of the schooner were the master and three men. Two men were forward,—one on the lookout and another standing by. One was at the wheel, and the captain was near him. It is claimed by the schooner that the masthead light of the steamer was sighted, bearing about a point and a half on the port bow, at an estimated distance of about 5 or 6 miles. Thereafter a red light was seen for some minutes on the steamer, bearing in the same direction. Then the green light appeared, and all of the steamer's lights were seen for a brief time, bearing in the same general direction. Then the red light disappeared, and very soon thereafter the bows of the steamer and of the schooner collided, at an angle of about 12 points between the steamer's starboard side and the schooner's port side, and of about 4 points between the courses on which they had been heading previous to the maneuver of the steamer, which, it is alleged by her, was intended to prevent the accident. The schooner kept on an unchanged course. The first officer was at the starboard quarter window in the pilot house, and the quartermaster was also in the pilot house, at the wheel. The lookout was forward in the bow of the ship. At about 1:30 a. m. the lookout reported, "A red light right ahead," repeating this report three times in quick succession. Thereupon the mate took his night glass and looked first off to the starboard side of the steamer, then swept his glass forward, and saw first the sails of the schooner. He was standing on the starboard side of the house, and he saw the schooner's mast close to the right of the steamer's stem. This officer judged that the schooner was then about 1,800 feet away, and he ordered his helm hard a-starboard. He stated that after he had opened the schooner out about 2 points or more on his starboard bow, and about 60 seconds before the collision, he saw her red light, then about 1,200 feet off; that he continued under a hard a-starboard helm at full speed. He claimed that he sighted the schooner about

80 seconds before the collision. He states that the steamer steers well and quickly, and swings 6 points in 82 seconds; that, as she was trimmed and laden that night, she would swing 4 points, or from S. S. W. to S. S. E., in from 40 to 50 seconds; and, although he did not look at the compass, he estimates that she swung between 3 and 4 points on the starboard helm.

The evidence of those on board the schooner shows that she had the usual lights, and that they were suitable. This evidence is confirmed by the general evidence on the part of the steamer, although she offered some evidence to the effect that such lights were dim. The lookout of the steamer, whose intoxication at the time of trial impaired his value as a witness, reported the red light three times, as he says, although he seemed to suggest that the light intermitted. The chief officer of the steamer then attempted to locate the vessel ahead, and did so by sails, but did not discover the lights until the steamer had opened out 2 points. It is urged that, although the light existed, the failure of the first officer to see the same was due to the interposition of the staysail, which intercepted his view when the vessels were in their earlier relation. But the schooner was sailing wing and wing, with a light wind, and it is inconceivable that the staysail was other than amidships, as the sea was not sufficiently disturbed to alter its usually expected location. Moreover, the evidence is quite complete that the staysail was so mechanically detained that it could not conceal the lights, and it is not believed that it did. The steamer charges that the fault of the schooner was (1) dim or obscured light; (2) omission to exhibit a flare-up light. The conclusion that the schooner's light was neither dim nor obscured must be followed by a finding that it is not chargeable with fault for omission to exhibit the flare-up light. The rule permits the use of a flare-up light, but does not make it obligatory upon the schooner, unless perchance the circumstances were such that prudence would require it. It is true that those on the schooner saw the vessel for a long time before the collision, and when the wheel of the steamer was put hard a-starboard those on the schooner saw the steamer swing to port, and continue to swing to port until the accident happened. But the steamer did not begin to swing to port, nor to deviate from her former course, until after the steamer had discovered the schooner. Therefore there was no occasion for exhibiting a flare-up light after the steamer's helm was put hard a-starboard, and her course lay directly across the course of the schooner; and there was no occasion for a flare-up light previous thereto, because there was no previous appearance of probable collision. The first officer of the steamer states that he saw the schooner when the vessels were 1,800 feet apart, and that he made the deviation which has been stated. At the rate of 12 miles an hour, the steamer would travel 1,320 feet in $1\frac{1}{4}$ minutes, and the schooner, at the rate of 4 miles an hour, would travel during the same time 430 feet; making a total separation of 1,750 feet, or, approximately, the 1,800 feet which separated the vessels when the first officer first saw the schooner, according to the estimate given by him. Hence it was only during the space of about $1\frac{1}{4}$ minutes that those on the schooner could have

known or could have appreciated that the steamer was attempting to cross the course of the schooner. Preceding that time there was no occasion for exhibiting the flare-up light, inasmuch as those on the schooner saw the red light of the steamer, and those on the steamer saw the red light of the schooner; and there was no occasion for the flare-up light thereafter, as the schooner was then discovered by the steamer. Therefore it is concluded that the schooner was not at fault on either of the grounds alleged by the steamer. That the steamer was in fault is obvious. In the first place, showing her own red light to the apparent red light of the schooner, the steamer starboarded and attempted to go across the schooner's course. Article 22 provides:

"Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

It was the duty of the steamer to keep out of the way of the schooner, and the way selected by her for complying with this obligation was to attempt to cross ahead of the schooner, in palpable violation of the rule. In order to do this, the steamer was swung at least 3 points to port from her previous course. The chief officer excused this maneuver by the statement that when he saw the schooner she was on his starboard rather than his port side. The first officer says that when he first saw the schooner her foremast was about 3 feet to the right of the stem, and that he was then standing 8 feet on the starboard side of the amidships, in the pilot house. It is pointed out by the learned advocate for the schooner that a line drawn from the point where the first officer was standing, and passed 3 feet to the right of the stem, and carried 1,800 feet, would have passed well over on to the Excelsior's port bow. However this may be, if the vessels presented to each other their red lights, and the schooner's foremast was in the line stated, and some 1,800 feet away, there was no excuse whatever for heading the steamer across the schooner's course. Such starboarding inevitably tended towards collision. The schooner shows, and the fact appears to be, that the schooner was on the port side of the steamer, with about 1 point between their courses; the course of the former being about S. S. W., and that of the latter N. E. by N., with an interval of 1,800 feet. If the steamer could swing nearly 4 points to port, it could have swung sufficiently to starboard, it is apprehended, to escape the collision. But, if the officer of the steamer had doubt of his ability to escape the collision by porting, then there was apparent reason for observing article 23, which provides:

"Every steam vessel which is directed by these rules to keep out of the way of another vessel, shall on approaching her, if necessary, slacken her speed or stop or reverse."

It is urged in behalf of the steamer that there was no necessity for stopping or reversing. It may be that there was no such necessity, but such necessity did exist if the only alternative was the desperate one of attempting the impracticable maneuver of crossing the schooner's bow. But, if the steamer was in a situation so peril-

ous to herself and to the schooner that she had no recourse save the attempt to cross the schooner's bow, the final question arises, by whose fault had the steamer been brought into that situation? For a long distance away the steamer's lights had been observed by those on the schooner, and no reasonable excuse is offered for the failure of those on the steamer to discover the lights of the schooner until the vessels were near together. The lights were there, they were burning, and it is believed that they were not obscured. The court is impressed by the evidence and by the demeanor of the witnesses for the steamer that suitable care in keeping a lookout was not maintained. It was noticeable in this case, as it has been in many others, that the person selected for the lookout on large steamers is frequently unsuitable; and the lookout of the steamer in the present case, if his appearance at the trial was illustrative, was palpably an incompetent and improper person. The position is one requiring great fidelity, attention, and care, and no prudent person would commit a trust of so responsible a nature to the man who was presented to the court as the lookout. The first officer, as he appeared to the court, merits the commendation of an honest-appearing witness; and it may be that, in the discharge of many of the duties that would fall to such a man, he would be an entirely competent person. But his knowledge of the rules governing the suitable action of vessels under such circumstances was noticeably of a limited range, and his excuse for starboarding and attempting to cross the bows of the schooner, upon the plea that it would have been necessary for him to have changed his course 12 points had he attempted to go to starboard, indicates such deficiency in seamanship that the conclusion is necessarily reached that for some reason he had been inattentive to the trust which had been reposed in him, and had failed to timely discover the situation which he should have discovered, and that, when he found his vessel in a dilemma arising from such inattention, he adopted a maneuver that was quite violative of the applicable rules.

It is concluded that the schooner was justified in holding her course,—indeed, she is not accused for doing so; that her lights were suitable and were not obscured; that they could have been discovered seasonably if there had been proper lookout on the steamer; that the schooner was under no obligation to exhibit the flare-up lights, and that no emergency requiring that act arose until after she was discovered by the steamer; that when the vessels came into close proximity the steamer improperly attempted to cross the bows of the schooner, when the allowable and safer maneuver to starboard was practicable. It follows that the libel filed against the schooner should be dismissed, with costs, and that there should be a decree against the steamship *Excelsior*, in favor of the owners of the schooner, for the damages sustained by the schooner, together with the costs of the action.

HOWARD v. GOLD REEFS OF GEORGIA, Limited.

(Circuit Court, N. D. Georgia. March 20, 1900.)

No. 1,522.

1. REMOVAL OF CAUSES—PETITION—NECESSITY OF VERIFICATION.

A petition for removal need not be verified, if made in good faith, and no objection was made in the state court, and a verification is unnecessary where all the facts shown by the petition which might be controverted appear otherwise in the record.

2. SAME—ALLEGATION OF NONRESIDENCE—FOREIGN CORPORATION.

Where the pleadings of the plaintiff show the defendant to be a foreign corporation, the fact that it is a nonresident of the state is presumed under the law, and need not be alleged in a petition for removal.

3. SAME.

The facts that the name of a corporation indicates that it is a corporation of a particular state, and that it owns property, carries on business, and maintains an office in such state, do not overcome the presumption that it is a nonresident of such state, and entitled as such to remove a suit against it by a citizen of the state, where the plaintiff's pleadings show that it was incorporated in a foreign country.

On Motion to Remand to State Court.

J. J. Kemsey, J. W. Underwood, and H. H. Dean, for plaintiff.
S. C. Dunlap and H. H. Perry, for defendant.

PARDEE, Circuit Judge. This is an action originally brought in the superior court of White county, Ga., to recover damages for personal injuries. The declaration shows that the Gold Reefs of Georgia, Limited, is an alien corporation, incorporated under and by virtue of the laws of Great Britain; that its principal office is in London, England; that said corporation owns property in White county, Ga., is operating same, and has in White county a branch office and a representative, who has the entire management, charge, and control of the acts, doings, and business of said corporation in White county. Defendant company removed the case to this court, the petition showing diverse citizenship. Plaintiff moves to remand the case because (1) the petition for removal is not sworn to; (2) it is not averred that the defendant is a nonresident of the state of Georgia; (3) defendant is a resident of the state of Georgia.

1. A petition for removal need not be verified, if made in good faith, and no objection was made in the state court. See Removal Cases, 100 U. S. 471, 25 L. Ed. 593. No verification was needed in this particular case, because all the facts shown in the petition otherwise appeared in the record, except citizenship of the plaintiff in Georgia, and that is not disputed.

2. The defendant, being a foreign corporation, is presumed, under the law, to be a resident only of the state or country where it was created. See *Shaw v. Mining Co.*, 145 U. S. 450, 12 Sup. Ct. 935, 36 L. Ed. 768, and cases there cited. Nonresidence being presumed, and nothing appearing in the record to dispute the same, it need not be alleged in the petition for removal. See *Shattuck v. Insurance Co.*, 7 C. C. A. 386, 58 Fed. 609.

3. It is argued that the defendant company is a resident of Georgia,

notwithstanding the presumption to the contrary, because its name so indicates, it owns and operates property, has a branch office and agents and representatives, all in White county, state of Georgia. This is in conflict with the decisions of the supreme court above cited. Counsel relies on *St. Clair v. Cox*, 106 U. S. 355, 1 Sup. Ct. 354, 27 L. Ed. 222, and *Insurance Co. v. Woodworth*, 111 U. S. 146, 4 Sup. Ct. 364, 28 L. Ed. 379. These cases go no further than to declare that a corporation doing business in a state other than where created may be sued in the courts of the latter state, when its laws so provide. In fact, *Insurance Co. v. Woodworth*, supra, was a removed case, and the propriety of its removal was maintained. That a corporation may be a citizen of two or more states does not affect the present question. In *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 677, 14 Sup. Ct. 535, 38 L. Ed. 313, the law is clearly stated, to wit:

"A railroad corporation created by the laws of one state may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, as in *Railroad Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780; *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; and *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196.—or by virtue of a license, permission, or authority granted by the laws of the latter state to act in that state under its charter from the former state. *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Pennsylvania R. Co. v. St. Louis, A. & T. C. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Goodlett v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230; *Marye v. Railroad Co.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94. In the first alternative, it cannot remove into the circuit court of the United States a suit brought against it in a court of the latter state by a citizen of that state, because it is a citizen of the same state with him. *Memphis & C. R. Co. v. Alabama*, above cited. In the second alternative, it can remove such suit, because it is a citizen of a different state from the plaintiff. *Railroad Co. v. Koontz*, above cited."

There does not appear to be any difference between railroad corporations and other corporations in the matter of residence, domicile, inhabitation, or citizenship. The motion to remand is denied.

PFEIFFER et al. v. WILDE et al.

(Circuit Court, E. D. Pennsylvania. June 15, 1900.)

No. 31.

UNFAIR COMPETITION—SIMILARITY OF PACKAGES—RIGHT TO PRELIMINARY INJUNCTION.

The fact that a plaintiff was the first to put up a particular kind of merchandise in boxes does not give him any exclusive right to their use for that purpose, and he is not entitled to a preliminary injunction against the use of similar boxes by another manufacturer, unless it is clearly shown that the similarity is such as is likely to mislead and impose upon ordinary purchasers, exercising such care only as is commonly used in purchasing such articles, so as to constitute unfair competition.¹

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

In Equity. Suit for infringement of trade-mark and unfair competition. On motion for preliminary injunction.

Fred. J. Geiger, Edward Brooks, Jr., and Hector T. Fenton, for complainants.

E. H. Fairbanks, for respondents.

DALLAS, Circuit Judge. In suits to restrain infringement of trade-mark and unfair competition in trade, the decisions of the courts in other cases are not generally very helpful. The principles of law involved in such suits are well settled, and the only difficulty usually is to properly apply those principles to the particular facts, and these, of course, are never precisely the same in any two cases. But the question presented by the present controversy arises upon facts so nearly identical with those of a case decided by the circuit court of appeals for this circuit, less than two years ago, that I feel constrained to accept the decision then made as now controlling. I refer to *Van Camp Packing Co. v. Cruikshanks Bros. Co.*, 33 C. C. A. 280, 90 Fed. 814. I participated in that judgment, but, speaking for myself only, I may say that I regarded it as being very close to the line. Yet that judgment is binding upon this court, and, as I have said, seems to me to be determinative of the motion under consideration. The essential resemblance of that case to this one appears even more clearly when the record as well as the report of the former is examined. I substantially quote a portion of the court's opinion in *Van Camp Packing Co. v. Cruikshanks Bros. Co.* when I say of the present case that the defendants' use of boxes similar to the plaintiffs', without more, could not be complained of. It is a common way of packing various articles of merchandise, and, even if the plaintiffs were the first to apply it to packing "coffee-essence," they have not thereby obtained a monopoly of its use for that purpose. The boxes and their markings are readily distinguishable from the plaintiffs' by intelligent persons, and, with care, ordinary purchasers would probably distinguish them. The question, however, is, do they bear such similarity as is likely to impose on ordinary purchasers, exercising such care only as is commonly used in purchasing such articles? This question cannot be answered with certainty or safety from the evidence before me. There is no proof that any one has been so misled. In this state of uncertainty, a preliminary injunction should not be awarded. To justify a preliminary injunction, the plaintiffs' case must be clear in all respects. See, also, *Lare v. Harper & Bros.*, 30 C. C. A. 373, 86 Fed. 481. In *Centaur Co. v. Hughes Bros. Mfg. Co.*, 34 C. C. A. 127, 91 Fed. 901, the court below refused a preliminary injunction, and the judgment reversing its decree was that of a divided court. *Franck v. Chicory Co.* (C. C.) 95 Fed. 818, was not decided upon a motion for a preliminary injunction, but on final hearing, and it was "manifest from the undisputed testimony that the defendants entered the field with the imitation which was both calculated to and did deceive purchasers," etc. The plaintiffs' motion for a preliminary injunction is denied.

STEMMLER v. McNEILL et al.

(Circuit Court, E. D. North Carolina. June 13, 1900.)

1. QUIETING TITLE—PARTIES.

In a suit to quiet title to a tract of land claimed by complainant under one title, all persons claiming an interest in the land or any part thereof adversely to such title may be joined as defendants, and it is not essential that they should claim through a common source of title.

2. JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY—SUIT TO QUIET TITLE.

To give a federal court jurisdiction of a suit to quiet title to a tract of land, in which a number of persons are joined as defendants, between whom no privity of title exists, and each of whom claims title to a separate part of the tract, the value of the property in controversy between each defendant and the complainant must exceed \$2,000.¹

In Equity. Suit to quiet title. Heard on application for preliminary injunction, and on objection by defendants to jurisdiction.

Guthrie & Guthrie, for complainant,

Seawell & Burns and Black & Adams, for defendants.

SIMONTON, Circuit Judge. This is a bill filed by T. W. Stemmler to remove a cloud upon his title. He alleges that he is the owner in fee simple and in possession of a tract of land in North Carolina of 233 acres, acquired by and held by him under one title and in one body. The bill makes A. H. McNeill, George W. McNeill, H. B. Shields, W. G. Carter, and K. H. Worthy defendants, and charges that they are setting up claims of title to a large portion of said land, if not all of it. "The exact or definite parts thereof claimed by defendants, and the exact location of their several pretended claims, your orator is not informed. The defendants, each and all of them, have disputed your orator's ownership of the aforesaid tract, and by their claims have cast a cloud upon the title thereof," besides threatening forcible entry thereon. The prayer of the bill includes a prayer for an injunction. A rule to show cause having been issued, all of them respond. Carter disclaims. The others show, for cause: (1) That the land in controversy is not of the value of \$2,000, and so the case is not within the jurisdiction of this court. (2) That there is no privity whatever between the defendants, each of whom claims a separate tract of land, derived from a distinct source of title, held under separate grantors, in no wise connected with each other, not deriving title from a common source. (3) Each several part so claimed is much less than two thousand dollars in value. (4) All deny that complainant has any title.

1. Value of land claimed by complainant: Affidavits on this point have been submitted by all the parties. The conclusion of fact by evidence from affidavits is never quite satisfactory. It appears, however, from the preponderance of evidence thus furnished in this case, that the land claimed by complainant was actually more than \$2,000 in value at the time of filing the bill.

¹ Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75, and *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

2. It would seem to be in accordance with the practice in equity, which requires all persons in interest to be made parties, to include all persons who claim title in any portion of this land. The *Encyclopædia of Pleading and Practice* (volume 17, p. 323), lays down this rule, and adds that it is not necessary that there should be privity or connection between the defendants. But it is admitted that many of the cases quoted to sustain this doctrine lay stress upon the fact that all the defendants claim title from a common source. This is especially the fact in the case of *Fisher v. Hepburn*, 48 N. Y. 41, and is the ground for the decision.

3. The next objection presents a more serious question. It is the rule of the federal courts that, if there be several co-plaintiffs, each plaintiff must be competent to sue, and, if there be several defendants, each defendant must be liable to be sued, or jurisdiction cannot be entertained. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Clearwater v. Meredith*, 21 How. 489, 16 L. Ed. 201; *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635. So, in this case, if each defendant has a separate and distinct claim of title to a parcel of the land, which is below \$2,000 in value, he could not sue for it in the circuit court, and it would appear that he could not be sued for it in that court. In *Walter v. Railroad Co.*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206, the railroad company had been assessed for taxation at a rate supposed to be exorbitant. It instituted proceedings in the circuit court of the United States, praying an injunction against the sheriffs of several counties, prohibiting them from levying the tax. The aggregate of the taxes exceeded \$5,000, but they were assessed in several counties, and in no one county did the tax amount to \$2,000. The supreme court held that the circuit court was without jurisdiction. After elaborate discussion, the court concludes:

"In short, the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendants to the same plaintiff."

The whole subject is elaborately discussed in *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083, and the same conclusion is reached. There can be no doubt that when the result of a suit, if successful, would be a separate decree against each defendant, the value of the dispute between such defendant and the plaintiff must exceed \$2,000. In *Clay v. Field*, 138 U. S. 479, 11 Sup. Ct. 425, 34 L. Ed. 1049, the authorities are quoted, and this principle is laid down:

"If several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separate as between themselves, the amount of this joint claim or liability will be the test of jurisdiction. But when the interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights and liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving jurisdiction. Each must stand or fall by itself alone."

The objection is well taken. The restraining order heretofore issued is dissolved, and the case is retained for such further proceedings as the parties may think proper.

UNION NAT. BANK OF CHICAGO v. McKEY.

(Circuit Court of Appeals, Seventh Circuit. June 21, 1900.)

No. 610.

EQUITY—MISTAKE—PAYMENT OF FUND BY LIENHOLDER TO TRUSTEE IN BANKRUPTCY.

Where a bank, holding the note of a bankrupt and funds on deposit sufficient to satisfy the same, pays the entire fund over to the trustee in bankruptcy, through oversight, without first satisfying the note, it is entitled to recover the amount of the note from the trustee in a court of equity, without first offering to satisfy the note or bringing it into court for cancellation.

Petition for Revision of Decision of the District Court of the United States for the Northern Division of the Northern District of Illinois.

This matter was heard at the October session, 1899. The court is asked to revise in matter of law the decision of the district court for the Northern district of Illinois, Northern division, denying the petition of the Union National Bank of Chicago for an order upon the trustee of the estate of Buchanan & Reens, bankrupts, to repay the bank \$1,000, alleged to have been paid by the bank to the trustee through mistake. The facts are not in dispute and in substance are these: On November 3, 1898, the Bank of Commerce of Chicago transferred to the Union National Bank its deposits and bills receivable, including the deposit of Buchanan & Reens, amounting to \$1,400, and a note of that firm for \$1,000, payable on January 16, 1899. By November 7, 1899, when, upon their voluntary petition then filed, Buchanan & Reens were adjudged bankrupts, the deposit had been increased to \$2,583.95, and on or about the 19th of the month McKey, who had been appointed trustee of the bankrupt estate, drew out of the bank the entire sum deposited; the bank by oversight neglecting to avail itself of the right to deduct the present value of the note which it held against the bankrupts. This the referee, to whom the petition was referred, found to have been "an accident," due in a measure to the negligence of the president of the bank, but, under the unusual circumstances, not of a character so culpable as to bar the claim. The contrary opinion of the district court, a copy of which is set out in the petition presented here, concludes as follows:

"The evidence shows that, at the time the president of the Union National Bank O. K'd the check payable to the trustee, the fact of the possession by the bank of the \$1,000 note had escaped his mind. In legal effect the petition of the bank seeks the re-establishment of a lien. There seems to be no doubt that the money was paid to the trustee by oversight. While the question of what constitutes a mistake of fact sufficient to be relieved against in equity arises in this suit, yet in the mind of the court the decision of that question is not necessary herein. None of the authorities cited by the parties draw the line between the right to recover moneys paid by mistake and the right to have a lien restored. Neither do they distinguish between cases of ordinary liability, all the parties being solvent, and the cases where a preferment is at issue, and the rights of third parties have attached. While in some particulars a trustee may be said to represent the bankrupt, yet he is the trustee and representative of the creditors also, and his receipt of moneys belonging to the bankrupt estate vests in each creditor an interest therein. The money received on the check in question was mingled with other moneys in the hands of the trustee. The identical funds cannot be designated. The rights of the bank were based upon possession. Would not the order asked require the court to create a new lien? In order to comply with the prayer of the petition, the court would have to declare a lien upon the identical funds alleged to have been in the possession of the Union National Bank, but upon other moneys. This the court cannot do. The petitioner must prorate with the other creditors."

Eli B. Filsenthal and Herman Frank, for petitioner.
James A. Fullenwider, for respondent.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

PER CURIAM. The decision below was contrary to the principles enunciated by this court in the case of Oil Co. v. Hawkins, 46 U. S. App. 115, 20 C. C. A. 468, 74 Fed. 395. It was not necessary that the bank should have offered to surrender the note in its possession to the trustee, or should have brought it into court for cancellation. The clerk will certify to the district court direction to set aside the orders sustaining exceptions to the report of the referee and dismissing the petition, and to enter an order granting the relief prayed for. There shall be no recovery of costs in either court.

LITTLE FALLS ELECTRIC & WATER CO. v. CITY OF LITTLE FALLS
et al.

(Circuit Court, D. Minnesota, Fourth Division. June 16, 1900.)

1. MUNICIPAL CORPORATIONS—CONTRACTS FOR WATER AND LIGHTS.

Contracts by the authorities of a municipality for water and lights to be furnished to the municipality and its inhabitants are not made in the exercise of the governmental powers of the municipality, but of its proprietary or business powers, and are governed by the rules applicable to contracts made by individuals or business corporations. Such a contract, when fairly made, without fraud or imposition on the part of the other party, or misconduct or bad faith on the part of the officers acting on behalf of the municipality, and which was not unreasonable in its terms when made, cannot be repudiated by the municipality after the other party has expended money in the building of works in reliance thereon, and so long as such party complies with its provisions.

2. SAME—VALIDITY OF CONTRACTS—LENGTH OF TERM.

Thirty years is not such an unreasonable length of time for the running of a contract for supplying a city or village with water as will entitle the municipality to avoid it on that ground, where it involves the erection and maintenance of an expensive plant by the other party.

3. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACTS—CITY ORDINANCES.

A city council, having power to contract for the supplying of water and lights to the city and its inhabitants, may also grant such franchises for the use of the streets as are necessary or convenient for the construction and maintenance of the necessary works and appliances for furnishing such supplies; and such a grant, when accepted and acted upon by the grantee, constitutes a contract protected by the constitution of the United States from impairment by state legislation. Ordinances or resolutions passed by the city council under its delegated legislative powers, attempting to annul the contract and repeal the grant, are within the constitutional prohibition, and invalid.

4. MUNICIPAL CORPORATIONS—CONSTRUCTION OF WATER OR LIGHT PLANTS—INJUNCTION.

Water or light companies having contracts with a city and grants of franchises, neither of which are exclusive, are not entitled to an injunction to restrain the city from constructing plants of its own for supplying water or lights for municipal purposes only, where it does not appear

that the operation of such plants will necessarily interfere with the contract rights of such companies.

In Equity. Suit to enjoin the enforcement of ordinances passed by defendant city alleged to impair the obligation of contracts between the city and complainant, and for the enforcement of such contracts. On final hearing.

C. A. Lindbergh and Davis, Kellogg & Severance, for complainant.
Calhoun & Bennett, for defendants.

LOCHREN, District Judge. Final hearing in this suit was had on March 27, 1900, upon the bill, answer, and the evidence taken in the cause. From the admissions in the answer, and from the evidence presented at the hearing, it appears that all the allegations of matters of fact contained in the bill are true as therein set forth. It was conceded by the defendants' counsel on the hearing that all the works and appliances constructed by the complainant, and constituting its water plant and electric lighting plant at the city of Little Falls, were efficient, and fully complied with all of the provisions, stipulations, and conditions of the contracts between the complainant and the defendant city under which these plants were erected and established, and that complainant has at all times performed its contracts and obligations as alleged in the complaint. Since the commencement of this suit the common council of said city has, by ordinance, granted to the complainant the right to continue and maintain its water main upon the bridge across the Mississippi river; so that the matters alleged in subdivision 8 of the bill need no longer be considered, excepting in so far as that paragraph may state matter of equitable jurisdiction existing at the time the suit was begun. As to the allegations of conspiracy and confederation to injure the credit of the complainant, and destroy the value of its property, an inspection of the ordinances and resolutions of the common council, commencing with the ordinance passed over the mayor's veto, April 4, 1896, assuming to abrogate and take away all the franchises and contract rights of the complainant, while refusing to pay for water and light received and used, shows a settled and persistent purpose, by unlawful means, to disable the complainant from carrying on its business, destroy its credit and the value of its property, and to coerce the complainant to sell its water and light plants to the city for the inadequate price offered. The acts of the defendant city and its officials admit of no other explanation.

The contracts under which the water and light plants were constructed and operated appear to be valid, and should be enforced. The village council, and subsequently that of the city, was authorized and empowered to contract for the construction of such plants, and for the supply of water and light for public uses, and had the right to grant the use of streets for such purposes. This is conceded, but it is claimed on the part of the defendants that the contracts were invalid because made for an unreasonable length of time, at rates to be paid which were unreasonably high. Contracts on the part of a municipality for the supply to the municipality and to its citizens of water and light are not made in the exercise of the governmental

powers vested in the municipal council, but of its proprietary or business powers. It is acting for the private benefit of itself and its inhabitants, and its contracts of that character are governed by the same rules that govern contracts of private individuals and corporations. *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 186, 76 Fed. 271, 34 L. R. A. 518, and cases cited.

There is in this case no allegation or pretense of any actual deception or fraud on the part of the complainant or its grantors in obtaining the franchises and contracts from the village or the city, or of misconduct or unfaithfulness on the part of the village or city councils in granting such franchises and entering into such contracts. It is charged that a larger number of lights and of hydrants than were necessary were contracted for; but that was a matter for the judgment and discretion of the councils who made the contracts, and the evidence shows that all have been used by the city, and the number of each has been voluntarily increased from time to time by subsequent councils. The defendants also claim that the rates to be paid by the city for water and lights are unreasonably high. This, again, was matter of contract and agreement. It does not appear that at the time these contracts were made any one else was willing to construct and operate such works at that place upon better terms, or to furnish water or lights at lower rates; and compared with rates obtained in other cities, as shown by the evidence, the rates in this instance, though liberal, do not appear to be unreasonable. The most serious contention of the defendants is that these contracts were invalid, as attempting to bind the city for an unreasonable length of time; and the holding of our state supreme court in *Flynn v. Water Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106, is relied upon as sustaining this contention in respect to the very contract for water supply now under consideration. That case does not hold that the municipality could not make such a contract for a term of 30 years, if favorable and reasonable in other respects, but that a contract for such a length of time, requiring the city to pay for between 35 and 40 per cent. more hydrants than its needs required, at 100 per cent. more than their value, as admitted by the demurrer in that case, was unreasonable and void. On reargument even this statement of the law is obscured and buried under a mass of superlatives. There is no doubt that such a contract as the demurrer admitted in that case would be void, as showing on its face that the council had either been grossly imposed upon or had acted in bad faith; and the length of time during which the city was to be bound by such admittedly outrageous stipulations, even if for 20 or 15 years, would be a very important element in the fraud. No authority is cited tending to sustain the proposition that 30 years is an unreasonable length of time for a contract to supply a city with water, and from the evidence adduced and cases cited on the hearing in this case it appears to be not an unusual length of time. Considerable investments of capital seek long terms. Thirty years is not an unusual length of time for the running of municipal bonds, where, after the periodical payment of interest, the whole capital invested is returned in cash at the maturity of the bonds. The capital invested in a water or light

plant is subject to hazards from the elements and other dangers, and is permanently expended, and no prudent person would make such an investment except upon a contract for a fairly long term of years. In the light of all the evidence in the case, it cannot be said that these contracts were unreasonable in respect to the time they were to run, or that they were not in every other respect honestly, intelligently, and fairly entered into, and as favorable for the city of Little Falls as that city could have obtained at the time they were made and entered into.

It follows from the foregoing that the ordinance a copy of which, marked "Exhibit A," is attached to the complainant's bill, as amended by the ordinance a copy of which, marked "Exhibit B," is also attached to said bill, both of which were duly accepted by W. M. Fuller and S. Stoll, named therein, were and are legal and valid, and vested in the said W. M. Fuller and S. Stoll, and their assigns, the rights, privileges, and franchises therein granted and set forth, and together with the resolution, a copy of which, marked "Exhibit F," is attached to said bill, constituted a valid and binding contract between the said city of Little Falls and said Fuller and Stoll, and their assigns, which rights, privileges, franchises, and contract rights were duly transferred to and vested in the complainant by the said Fuller and Stoll by the instrument a copy of which, marked "Exhibit D," is attached to said bill. As the complainant, within the time provided for in said ordinances, constructed, completed, and had in use the system of waterworks, in all things as specified in said ordinances, and to the satisfaction and acceptance of the council of said city, and has ever since complied in all things with said ordinances and said contracts, and all subsequent resolutions of said council set forth in said bill respecting additional hydrants and water service, the said city is obligated to pay therefor at the rates provided for by said ordinances and contracts, and the mutual obligations of the complainant and of said city will continue to the end of the term of 30 years fixed by said ordinances.

Similar conclusions follow in all respects from the facts shown in regard to complainant's electric light plant, and the franchises, contracts, construction, maintenance, and furnishing of light to the city, and the continuing obligations resting upon the complainant and said city during the term of 20 years provided for in the contract between them of August 21, 1890, a copy of which, marked "Exhibit U," is attached to said bill.

An ordinance passed by a municipal council, within the scope of its powers, has the force of law. 1 Dill. Mun. Corp. § 308. The common council of Little Falls, having the power to contract for the supply of water and light to the city and its inhabitants, could lawfully grant by ordinance such franchises in respect to the occupation and use of its streets and public grounds as are necessary or convenient for the construction, maintenance, and use of the works, appliances, and instrumentalities by which such supplies must be furnished. In *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 19 Sup. Ct. 81, 43 L. Ed. 345, the court, after referring to several decided cases, adds:

"It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes."

And such grant of franchise, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. *New Orleans Gaslight Co. v. Louisiana L. & H. P. & Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

State legislation includes, of course, legislation by municipal bodies created by the state with powers of legislation for local purposes. In the case last above cited (at page 10, 172 U. S., page 81, 19 Sup. Ct., and page 346, 43 L. Ed.), the court says:

"We know of no case in which it has been held that an ordinance alleged to impair a prior contract with a gas or water company did not create a case under the constitution and laws of the United States."

It follows, therefore, that the ordinance (Exhibit J, attached to the bill) passed by the common council of Little Falls, April 4, 1896, over the veto of the mayor, purporting to repeal the prior ordinances (Exhibit A and Exhibit B) which granted the franchises under which the water plant was constructed, as well as the resolution (Exhibit W, attached to the bill) passed by the same common council on the 3d day of February, 1896, purporting to annul, set aside, and cancel the contract (Exhibit U) between said city and the complainant of August 2, 1890, whereby said city contracted to use and pay for 22 arc lights, at the rate of \$96 per year for each for the term of 28 years from that date, were acts of a legislative character, relating to matter within the general scope of the authority of the common council, but having the effect, if valid, to impair and destroy the franchises and contracts under which the complainant had constructed, maintained, and was and is operating its water plant and electric light plant, and performing its contracts with said city. Hence the said ordinance (Exhibit J) and the said resolution (Exhibit W) are both invalid, being in contravention of that clause of section 10, art. 1, Const. U. S., which forbids any state from passing any law impairing the obligation of contracts. They injuriously affect the complainant by casting a cloud upon its franchises and right to occupy and use the streets and public grounds of the city, and upon the validity and continued existence of its contracts with the city for the supply to it of water and light, and thus tend seriously to depreciate the value of complainant's property, impair its credit, and embarrass its business.

As to the showing to the effect that the city of Little Falls is taking steps to construct a plant for the supply of water and electric light, it appears that the complainant's franchises are not exclusive, and that there was not, as in the *Walla Walla Case*, above cited, any contract on the part of the city that it would not, during the term

for which the franchises were granted, erect, maintain, or become interested in other like works. The bill also alleges that private consumers of water will not make connections with the proposed plant of the city, so that the case does not come within the holding in the recent case of *Southwest Missouri Light Co. v. City of Joplin* (C. C.) 101 Fed. 23. There seems to be no sufficient reason for enjoining the city from constructing and operating a water plant and electric light plant to supply itself, over and above the water and light which it has contracted to receive from, and pay for to, the complainant, as such construction of a new plant would not release or affect its contracts with complainant.

Unless counsel for the respective parties shall stipulate as to the amount owing and unpaid at the time of the commencement of this suit from the defendant city to the complainant, for light and water furnished by complainant to said city under said contracts, the case may be referred to a special master to compute such amount from the evidence already taken in this case and the admissions in the pleadings, taking any further evidence he may deem necessary. And decree may be entered adjudging and decreeing that the complainant's franchises and its contracts with the city of Little Falls (which may be particularly described therein) are valid and subsisting, and that said ordinance passed April 4, 1896 (Exhibit J), and said resolution passed February 3, 1896 (Exhibit W), are invalid and of no force, and that the complainant recover of the defendant the city of Little Falls the amount of money owing and unpaid by said city to said complainant, as the same shall be fixed by stipulation or by report of special master as above provided for, together with the costs and disbursements of this suit.

TOMPKINS v. CRAIG.

SAME v. ESHELMAN.

(Circuit Court, E. D. Pennsylvania. July 10, 1900.)

No. 44.

On rehearing. Denied.

For former opinion, see 102 Fed. 69.

McPHERSON, District Judge. A reargument of this motion is asked for on the ground that *Telegraph Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986, was not brought to the attention of the court; that case deciding, it is said, that such a suit as the present is founded, not upon a record of another tribunal, but upon the original contract of subscription. In a sense, it is true that the liability now sought to be enforced is based upon the contract of subscription; for, if no such contract had been made, the order of the Iowa court would be without validity. But it is also true that the contract of itself gave no right of action. The contract was conditional. The defendant's obligation to pay a given assessment could only arise after the happening of certain contingencies, namely, in-

solvency of the corporation, ascertainment of the need for an assessment, and an order of court levying the charge upon each stockholder. The plaintiff's right to sue depends, therefore, not only upon the defendant's contract, but also upon the judicial action taken by the Iowa court; and of this action the record of that court is the indispensable evidence. This being so, I remain of the opinion that it is quite as correct to say that the suit is founded upon the record, as to say that it is founded upon the contract; and accordingly I continue to believe that the defendant is entitled to have the whole record set out, in order that this court may determine whether a complete right to sue ever existed, and also whether such right apparently continues to exist.

The motion for a reargument is refused.

NORTH CHICAGO ST. RY. CO. v. BURNHAM et al.

(Circuit Court of Appeals, Seventh Circuit. June 21, 1900.)

No. 586.

1. TRIAL—JOINDER OF ISSUE—WAIVER.

By going to trial after the filing of additional counts to plaintiff's declaration, and introducing evidence thereunder, defendant waives all right to object that issue was not joined on such counts.

2. PLEADING—AMENDMENTS—PRACTICE IN FEDERAL COURTS.

Rev. St. Ill. c. 7, § 1, authorizing amendments to pleadings, either in form or substance, for the furtherance of justice, at any time before judgment, will not be followed by the federal courts to the extent of permitting amendments which involve the formation of new issues after verdict.

3. APPEAL—ASSIGNMENT OF ERRORS—FORM.

Under Cir. Ct. App. Rule 11 (31 C. C. A. cxlvi., 90 Fed. cxlvi.), requiring appellant, in his assignment of errors, to set out separately and particularly each error asserted and intended to be urged, and providing that errors not so assigned will be disregarded, an assignment of error alleging that the court erred in sustaining, and in not overruling, plaintiff's demurrer "to the pleas filed by defendant to the additional counts," will not be reviewed, where the demurrer is in effect a separate demurrer to each plea, and it is not pretended that the ruling in respect to several of the pleas is wrong.

4. PLEADING—AMENDMENTS—LIMITATIONS—CAUSES OF ACTION—IDENTITY.

Where several pleas setting up the statute of limitations are filed to different counts in an amendment to a declaration in assumpsit, on the theory that the additional counts are on causes of action not embraced in the original declaration, it should be averred in each plea that the promise alleged in the count to which the plea is addressed was not made within five years before the filing of that count; and, unless the fact is sufficiently apparent on comparison of the new count with the original declaration, it should be alleged that the undertaking alleged in the count is not the same as that originally declared upon.

5. SALES—ACTION FOR PRICE—CONTRACT—EVIDENCE.

In an action by a manufacturer for the price of a motor made from a model under a contract that the price should be the actual cost of construction, at the regular rate charged by plaintiffs for similar work, a letter addressed by plaintiffs to defendant, saying that they had completed their accounts for the cost of the motor, that the same amounted to \$5,165, and that invoice was inclosed accordingly, the receipt of which was acknowledged by defendant without questioning the correctness of the

statement of the cost of construction, is competent evidence of the price of the motor.

6. SAME—MANUFACTURED ARTICLE—DEFECTIVE CONSTRUCTION—DAMAGES.

Under a seller's contract to build a motor from a model furnished him, without warranty that it shall be adapted to the work for which it is intended, if the motor does not conform in all respects to the model, but is accepted by the vendee, the latter can recover as damages only the cost of making the changes of construction necessary to meet the requirements of the contract.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

George A. Carpenter, for plaintiff in error.

Charles S. Holt, for defendants in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge. This cause was heard at the October session, 1899. The action was brought by the defendants in error, composing the firm of Burnham, Williams & Co., of Pennsylvania, to recover of the North Chicago Street-Railway Company the price of a steam tramway motor alleged to have been manufactured by the complainants for the defendants, and delivered on or about the 31st day of October, 1892. The original declaration contained a special count and common counts in assumpsit, on which issue was joined by the plea of non assumpsit. For a fuller statement, see the decisions of this court reported in *Burnham v. Railway Co.*, 59 U. S. App. 274, 30 C. C. A. 594, 87 Fed. 168, and *Id.*, 60 U. S. App. 225, 32 C. C. A. 64, 88 Fed. 627. A third trial of the case was had on December 14, 1898, which resulted in a verdict and judgment for the complainants for the sum of \$6,175, the amount of their demand and interest, less \$300. Numerous errors have been assigned, but it is insisted only that the court's charge was erroneous in respect to the measure of damages, that there was no evidence adduced tending to prove the contract price, and that the court erred in sustaining the demurrer to the pleas filed by the plaintiff in error to the additional counts of the declaration.

The pleas to which the demurrer was sustained have a peculiar and anomalous position in the record. The trial was had on December 14, 1898, and the verdict was returned on that day, but an entry made on the next day shows an order, by agreement, "that the verdict published herein on the 14th inst. be considered as sealed, opened, and read as of this date." It is said in the briefs that the additional counts of the declaration were filed after the jury was charged, but it does not so appear by the record. The first entry, of December 14th, the day of the trial, shows the filing by leave of court of "additional counts to the declaration," which are set out at large. A second and distinct entry shows the impaneling of the jury, the hearing of the evidence, a motion by each party for a peremptory instruction overruled, leave to the plaintiffs to file additional counts, objection and exception by the defendant, the retirement of the jury after instruction, the return of the verdict into open court, and the entry by the defendant for a motion for a new trial. The bill of exceptions shows that leave to file

additional counts was asked and granted during the course of the court's charge to the jury, in response to an objection by counsel for plaintiff in error that the recovery could be only for what the machine had been proved to be worth, and not, as the court had instructed, for the contract price less the cost of putting it in proper shape; but neither by the docket entry nor by the bill of exceptions does it appear that additional counts were filed in pursuance of the leave so shown to have been asked and granted. By going to trial and adducing evidence, the parties waived all right to object that issue had not been joined on the additional counts filed before the commencement of the trial. There was, in effect, an agreement to proceed as if issue had been joined by a plea of non assumpsit. The motion for a new trial was overruled on January 23, 1899, "with leave to the plaintiff to move for a rule on the defendant to plead to the amended declaration before the entry of judgment," and on the ensuing 25th the defendant was ruled to so plead within three days. On the next day the pleas were filed; the first being non assumpsit; the third, fifth, and seventh being denials of particular allegations of the several additional counts; and the second, fourth, and sixth each setting up the statute of limitations,—the essential averment being that "the defendant did not at any time within five years next before the commencement of this suit undertake or promise in manner and form," etc. The statute of Illinois (Rev. St. c. 7, § 1) authorizes "amendments in any process, pleading or proceeding," in an action, "either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment"; but that statute, if designed to go so far, will hardly be followed by the federal courts to the extent of ordering or permitting, after verdict, amendments which involve the formation of new issues. The demurrer which was sustained was addressed to the pleas, "and to each and all of them," except the first,—“to the second, fourth, and sixth,” on the ground of insufficiency to bar the action, and “to the third, fifth, and seventh,” on the ground “that said pleas, and each of them, are equivalent to the general issue, and are otherwise insufficient in law.” It was, in effect, a separate demurrer to each plea, and the ruling thereon was, therefore, a decision in respect to each that it was insufficient, or was equivalent to a general denial; but the assignment of error, instead of challenging the ruling upon each plea, or even in respect to each of the two distinct classes of pleas, contains only the specifications that the court erred in sustaining, and in not overruling, the demurrer of the plaintiffs “to the pleas filed by the defendant to the additional counts.” This is a plain failure to comply with the requirement of our rule 11 (31 C. C. A. cxlvi., 90 Fed. cxlvi.), that the assignment of error “shall specify separately and particularly each error asserted and intended to be urged.” In respect to the third, fifth, and seventh pleas, it is not pretended that the ruling on the demurrer was wrong; and it follows that a specification of error cannot be good which treats the ruling as a unit, presenting one question, when technically it involves six and really two distinct questions.

It is further to be observed that the pleas which set up the statute of limitations do not present the question which, according to the briefs and the argument at the hearing, they were designed to present;

that is to say, whether the additional counts are for causes of action not embraced in the original declaration. To raise that question it should have been averred in each plea that the promise alleged in the count to which the plea was addressed was not made within five years before the filing of that count; and, unless the fact is sufficiently apparent upon comparison of the new count with the original declaration, it should also have been averred that the promise or undertaking alleged in the count is not the same as any of the promises or undertakings originally declared upon. The evidence is in the record, and shows beyond controversy that the statute had not run when the suit was brought. Without regard, however, to any question of pleading or defect in the assignment of errors, the court is of opinion, on the merits, that the additional counts presented no cause of action which was not provable under the original declaration.

There was competent evidence of the price of the motor. The contract was that the price should be the actual cost of construction, at the regular rate charged by the complainants for similar work; the total being estimated, as nearly as could be, at about \$5,000. The agreed statement of facts shows a letter of November 23, 1892, from the complainants to the president of the defendant, in which they said:

"We have now completed our accounts for the cost of the motor, duplicate of the Carels Belgian motor, as per our letter of March 11, 1892; same amounting to \$5,165.00. We inclose invoice accordingly, and shall be pleased to receive settlement in due course."

The receipt of that letter was acknowledged by the vice president of the company, and no question of the correctness of the statement of the cost of construction appears ever to have been made. The agreed statement of facts does not say that the invoice mentioned in the letter of November 23d was in fact inclosed, and was received by the defendant, but the inference that it was is manifestly reasonable; and even if the letter had contained no reference to an invoice, but only the statement of the entire cost according to the contract, it would have been competent evidence of the fact, in the absence of evidence of further inquiry or question about it on the part of the defendant. It is not necessary to say, and we do not say, that the letter, by reason of being undisputed or unchallenged in respect to the cost, became conclusive proof, like an account stated. It is enough for the present purpose that under the circumstances it was competent evidence upon the point.

The court instructed to the effect that if the motor did not in all respects conform to the model according to which it was to be constructed, but had been accepted by the defendant, the recovery should be for the contract price, less the cost of putting the machine in proper shape. There was no warranty by the manufacturers that the motor should be adapted to the work or be efficient; and it necessarily follows that damages for a failure to construct in strict conformity to the model should not, and in conceivable cases could not, be estimated on the basis of difference of value. As constructed, or if constructed in strict conformity to the contract, the motor might be of no substantial value, and the defendant nevertheless bound to pay the cost of construction according to the contract. On any supposi-

tion, however, it is evident that the actual damage suffered by the plaintiff in error could not exceed the cost of making the changes of construction necessary to meet the requirements of the contract, and on that basis, therefore, the measure of recoupment should be determined. *Benjamin v. Hillard*, 23 How. 149, 167, 16 L. Ed. 518; *Railroad Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513; *Marsh v. McPherson*, 105 U. S. 709, 26 L. Ed. 1139; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; *Manufacturing Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1030; *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. 271; *Keeler v. Herr*, 157 Ill. 57, 60, 41 N. E. 750.

The judgment of the circuit court is affirmed.

TEXAS & P. RY. CO. v. WINELAND.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1900.)

No. 890.

1. RAILROADS—NEGLIGENCE—INJURY TO EMPLOYE—DEFECTIVE APPLIANCES—EVIDENCE.

There being evidence that the derailment of the train, by reason of which plaintiff was injured, was caused by the breaking of the flanges on the wheels of the locomotive truck, and that the wheels, which were of cast iron, with chilled tires, were not made of reasonably safe material, had become worn, and had not been properly inspected, the question whether the wheels were of reasonably safe material and had been properly inspected was properly left to the jury.

2. TRIAL—INSTRUCTIONS.

Where the court instructs the jury that it is incumbent upon plaintiff to establish by proof the charges of negligence alleged in his petition, before he will be entitled to recover, and a more specific charge as to the burden of proof is not requested, defendant cannot complain that the jury were not instructed to find in its favor if plaintiff failed to prove by a preponderance of the testimony that defendant did not exercise due care.

3. SAME—CONSTRUCTION.

In determining whether the trial court erred in instructing the jury, the entire charge on the point involved must be considered, and generally the charge must be taken as a whole.

In Error to the Circuit Court of the United States for the Western District of Texas.

T. J. Freeman, for plaintiff in error.

T. A. Falvey and Walter Davis, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. John Wineland, defendant in error, instituted this suit in the circuit court of the United States for the Western district of Texas, at El Paso, against the Texas & Pacific Railway Company, plaintiff in error, as defendant, and on October 9, 1899, filed his second amended original petition, in which he alleged, substantially: That the cause of action was one arising under the laws of the United States. That plaintiff in error was, about the 13th day of March, 1899, operating a line of railway through El Paso county, Tex. That on said date, and prior thereto, defendant in error was and

had been in the employ of plaintiff in error as brakeman of one of its freight trains; and while in the discharge of his duties as such brakeman, and using due care on his part, while riding on one of the freight trains of plaintiff in error the engine and car upon which he was riding was, through the negligence of plaintiff in error derailed and capsized, and he was permanently injured thereby in all parts of his body,—his head cut and bruised, his teeth knocked out, and one of his legs broken. That his leg is permanently deformed, so that he is a cripple for life. That said injuries were caused by the negligence of plaintiff in error and its employes: First, in having engine wheels in use on the said engine which were defective by reason of wear, use, defective and unsuitable material, and bad workmanship, and by reason of said defects and insufficiencies the flanges of said engine wheels broke, and caused and contributed to said derailment; second, in the negligence of its employes, the engineer and conductor of said train, in running the same upon a curve in the roadbed at a reckless and dangerous rate of speed. And that defendant in error was, at the time he received said injuries, 28 years of age, sound, and skilled as a brakeman, and earning \$1,500 a year,—and claims \$15,000 damages. Plaintiff in error answered in its first amended original answer, filed October 9, 1899: First, a general denial; second, plea that its engines and machinery, and especially the wheels of said engine, were in good condition and repair, and safe for operating said engine over its track; that the engine and train were operated with care, and the derailment and wreck were an unavoidable accident, against which it could not have guarded by the use of proper care on its part. There are other matters of negligence charged in the petition, and defenses set up in the answer, which are not stated here, as no question arises under them in this record. The cause was tried, and resulted in a judgment on October 11, 1899, in favor of the defendant in error for \$5,000.

The errors assigned in this court are as follows:

"First. The trial court erred in refusing to give to the jury special instruction requested by defendant, as follows: 'You will find for the defendant,'—because the only evidence as to the cause of the derailment of the train, in which plaintiff was injured, was that the train was running at a proper and safe rate of speed when derailed by jumping the right-hand rail, and that after the derailment it was found that the flanges of the right side wheels of the front truck of the locomotive were broken off from a portion of each wheel, and the evidence further established that said truck wheels were of a kind reasonably safe for the purpose they were used, and were in a safe condition at the time of the derailment, and therefore the evidence adduced on the trial wholly failed to show that defendant was guilty of any negligence in furnishing and using said wheels.

"Second. The trial court erred in the following paragraphs of the general charge given to the jury:

"It follows from what has been said that if the defendant used reasonable care and prudence in the selection of its car wheels, and observed the same care and caution in maintaining them in proper order and condition, then you are instructed that the defendant would not be liable to the plaintiff in damages, although one of the wheels broke, and injuries were thereby inflicted upon him. Unavoidable accidents often occur in the management and operation of railway trains, without negligence upon the part of the railway company. And if you find, upon consideration of all the testimony in this case, that the injuries claimed by the plaintiff were the result of unavoidable accident, and not due to any want of care on the part of the defendant in supply-

ing the plaintiff with proper appliances, then on this branch of the case your verdict should be in favor of the defendant.

"If you conclude that the rate of speed was not excessive, and that in running the train the engineer and conductor exercised reasonable care and prudence in looking after the safety of the men, in reference to the speed of the train, then upon this branch of the case your verdict should be in favor of the defendant,"—because said paragraphs contain the only proposition in the charge upon which the jury was permitted to find in favor of the defendant, and required the jury to find affirmatively from the evidence that the defendant was not guilty of negligence, instead of directing the jury to find in favor of the defendant if the plaintiff failed to prove by a preponderance of the testimony that defendant did not exercise due care, as elsewhere explained in the charge, in the particulars set out in said paragraphs and their context."

The first assignment of error is not well taken. The evidence offered in the case is fully recited in the bill of exceptions, and we have given it full consideration. That the breaking of the flanges on the wheels of the locomotive truck caused the injuries to the plaintiff below seems indisputable. A presumption that they were defective for the uses to which they were put necessarily arises. There was evidence tending to show that the said wheels which were of cast iron, with chilled tires, were not made of reasonably safe material for use on the trucks of a freight locomotive; and there was further evidence tending to show that the flanges on the said truck wheels from use had become worn (this was in fact undisputed), and had not been recently thoroughly and properly inspected. Under this state of evidence, the questions whether the wheels were of reasonably safe material and had been duly and properly inspected were beyond the province of the judge to decide as matters of law, and were properly left to the jury.

The contention under the second assignment of error is that the effect of the instructions excepted to was to relieve the plaintiff below of the burden of proof, and put it upon the defendant. The entire charge of the trial judge is contained in the bill of exceptions, and it seems to be fair and correct in all respects. The jury were expressly instructed that, "as the plaintiff charges negligence against the defendant, it is incumbent upon him to establish by proof the negligence as alleged, before he will be entitled to recover." If this was not sufficiently clear as to the proposition that the burden of proof was on the plaintiff, the defendant below might well have requested a still more specific charge. The parts of the charges complained of are conclusions immediately following and in connection with the instructions given to the jury on the several questions respectively arising in the case, to which no exception was taken, and should be taken and considered in connection therewith, and, when so taken, we are clear that no error can be predicated thereon. For instance:

"The plaintiff, therefore, in this case, did not, by virtue of his contract of employment, assume any risk incident to the use of a defective wheel, of which defect he was ignorant, unless the imperfections and defects were obvious and open to observation, in which case he would be presumed to know them; and it was the duty of the defendant, in employing the plaintiff as a brakeman, to use reasonable care and prudence in the selection of such engine-truck wheels as would be reasonably safe and properly adapted to the use for which they were intended, and it was its further duty to maintain such wheels and other appliances in a reasonably safe condition. As has been before said, it was not the duty of the defendant to supply the plaintiff with the best and safest or newest appliances for the purpose of securing his safety, but it was

its duty to use all reasonable care and prudence for the safety of plaintiff and others in its service, by providing them with machinery reasonably safe and suitable for the use of the latter. It follows from what has been said that if the defendant used reasonable care and prudence in the selection of its car wheels, and observed the same care and caution in maintaining them in proper order and condition, then you are instructed that the defendant would not be liable to plaintiff in damages, although one of the wheels broke, and injuries were thereby inflicted upon him. Unavoidable accidents often occur in the management and operation of railway trains, without negligence upon the part of the railway company. And if you find, upon consideration of all the testimony in this case, that the injuries claimed by the plaintiff were the result of unavoidable accident, and not due to any want of care on the part of the defendant in supplying the plaintiff with proper appliances, then on this branch of the case your verdict should be in favor of the defendant."

Again:

"Of course, if the plaintiff failed to exercise reasonable and proper care of himself, and the injuries were sustained by him in consequence of such want of care, then he could not recover, notwithstanding the engineer and conductor might have been negligent in running the train. See Gen. Laws Tex., 25th Leg., 1897, p. 14. Was the rate of speed at which the train was running at the time of the accident a reasonable and proper rate? In determining that question, you will look to the manner in which the train was loaded, to the condition of the machinery and appliances, to the condition of the track at the place of the accident,—whether straight or curved, whether up or down grade,—to the duty which the defendant owed to the public with reference to the prompt delivery of freight, and to the duty which it owed to the plaintiff, and generally to all the facts and circumstances in evidence; and from a consideration of them all you will determine whether the train was running at a reasonably safe rate of speed at the time of its derailment. If you conclude that the rate of speed was not excessive, and that in running the train the engineer and conductor exercised reasonable care and prudence in looking after the safety of the men, in reference to the speed of the train, then upon this branch of the case your verdict should be in favor of the defendant."

The rule is well settled that, in considering a charge to the jury, detached portions cannot be singled out, and error predicated thereon. In determining whether the trial court erred in instructing the jury, the entire charge on the point involved must be considered, and generally the charge must be taken as a whole. The judgment of the circuit court is affirmed.

In re MARX et al.

(District Court, D. Kentucky. June 23, 1900.)

1. BANKRUPTCY—DISCHARGE—BOOKS OF ACCOUNT—FRAUDULENT BOOKKEEPING.

Under Bankr. Act 1898, § 14, providing that a bankrupt shall not be entitled to a discharge if, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, he has failed to keep books of account from which his true condition may be ascertained, a discharge will not be denied upon such ground where it appears that most of the bookkeeping in question was done before the bankrupt law was enacted, and it is not shown that it was in contemplation of bankruptcy.

2. SAME—FALSE OATHS IN EXAMINATION OF BANKRUPT.

Knowingly and fraudulently making false oaths by a bankrupt in an examination under Bankr. Act 1898, § 7, requiring the bankrupt to submit to an examination concerning the conduct of his business and the cause of his bankruptcy, but providing that no testimony given by him on such examination shall be offered in evidence against him in any criminal proceeding, is not a ground for denying the bankrupt a discharge under sections 14 and 29 of the act, punishing the making of a false oath in, or

in relation to, any proceeding in bankruptcy, and providing that a bankrupt shall not be entitled to a discharge if he has committed an offense punishable by imprisonment as therein provided.

Kohn, Baird & Spindle, for bankrupts.
D. I. Heyman, for objecting creditors.

EVANS, District Judge. Upon the petition of certain of their creditors, this firm and its members were adjudged to be bankrupts. Afterwards, at the meetings of their creditors, they submitted to examination pursuant to section 7 of the bankrupt act. Their petitions for discharge were afterwards met with objections from the creditors, who specified reasons for opposing that relief. Those reasons, for the purposes of this case, may be said to embrace two general grounds of objection, namely: First, under section 14, that the bankrupts, with fraudulent intent to conceal their true financial condition, and in contemplation of bankruptcy, failed to keep books of account or records from which their true condition might be ascertained; and, second, under section 14, coupled with section 29, that the bankrupts had committed offenses punishable under the act, by knowingly and fraudulently making certain false oaths in the examinations referred to. Relative to each of these grounds of objection, it may be stated that no testimony was offered by either party after the specifications were filed on February 26, 1900, when the case was referred to the referee to ascertain and report the facts. The only evidence offered or considered by the referee on the reference, or by the court on this hearing, was what was contained in the examinations of the bankrupts themselves, and those of Moses F. Marks, John J. Saunders, and Thomas E. Turner, all of which were had, for some purpose, before the specifications of objections to the discharge were filed. It is contended by the bankrupts that this previously taken evidence is not competent to be considered upon the issues raised by the petitions for discharge, and the specified objections thereto. This might possibly raise a serious and doubtful question, but, in the view the court takes of the case, it is not necessary to pass on it, although it may be that what we shall say upon section 7 of the act may be decisive of the question, as to parts of that testimony.

Section 14 of the act provides that the discharge shall be granted unless, among other things, the bankrupt, "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained." It appears to be essential that the failure to keep books by the bankrupt shall not only be with the fraudulent intent to conceal his true financial condition, but also that it shall be done "in contemplation of bankruptcy." There was a phrase similar to the last one in a former bankrupt law, and the supreme court, in *Buckingham v. McLean*, 13 How. 167, 14 L. Ed. 190, held that it did not mean insolvency, merely, but that it meant bankruptcy itself. Keeping this decision in view, it is impossible, upon the evidence in this case, to hold that the first ground of objection to the discharge of these bankrupts is sustained. Whatever the intent, if any, in badly keeping their books, it does not appear

to have been in contemplation of any bankruptcy, or act of bankruptcy, upon their part. Indeed, most of it was done before the bankrupt law was enacted. Books were in fact kept, but by an inexperienced person in their employ, and did not show the "true financial condition" of the firm, if by that phrase is meant the exact state of its accounts and its assets, though they did plainly enough show that the firm was insolvent, if that only was meant by this language of the statute. There might be doubts raised as to whether the phrase "true financial condition" meant one or the other of those things, but we need not attempt to solve them.

Coming now to the second ground of objection to the discharge: Respecting this it will be seen that section 14, read in connection with clause 2 of section 29b, provides that a bankrupt shall be granted his discharge unless he has "committed an offense punishable," etc., by making a false oath in, or in relation to, the bankrupt proceedings. If the oaths alleged to have been false had been made in these proceedings in any other way than while the bankrupts were submitting to examination under the provisions of section 7 of the act, the legal questions would be clear enough, and we should have only to inquire whether the alleged false oaths were so made knowingly and fraudulently. Does the fact that these oaths were made while the bankrupts were being thus examined make the case different? While the bankrupts were compelled to undergo that examination, and while they did not, as they probably might have done, object to answering any incriminating questions, still the statute is express "that no testimony given by him shall be offered in evidence against him in any criminal proceeding." As will be seen from reading section 7, this refers to the testimony given by him when submitting to the required examination. As this makes it manifest that congress did not intend that this examination should be a trap set for the bankrupts, nor a basis for criminal proceedings against them, however useful for acquiring information as to assets, it seems to me that sound principles of construction require that this provision shall be read in as an exception to the general language of section 29b, cl. 2, of the act, so as to limit the operation of the provision to oaths made in or in relation to any proceeding in bankruptcy, except the examinations of the bankrupt allowed by section 7 of the act. Section 14 requires that the discharge shall be granted unless the bankrupt has "committed an offense punishable by imprisonment as herein provided," and the only offense charged to have been committed which is thus punishable is the alleged making of false oaths in the examinations before the referee. Inasmuch as what the bankrupts then swore cannot be introduced as testimony against them, it is, in legal contemplation, impossible for them to be punished for having committed the offense. If it is legally impossible for them to be convicted of an offense punishable under the act, it cannot be said or held that they have committed an offense punishable under its provisions. It being impossible to convict them, or to read against them what they have thus sworn, how can the charge be proved, that they have committed an offense punishable under the act? The true interpretation of all these provisions of the statute, when construed in *pari materia*, and giving effect to the evident policy of congress, must be that what is sworn by the bankrupt

at such examinations shall not be used as evidence against him personally at all, when attempting, either under an indictment or in opposing a discharge, to prove a criminal act on his part, and consequently that he is not punishable under the act for saying anything at such examinations, whether true or false. Otherwise, the protection tendered the bankrupt by section 7 would be unavailing, illusory, and of little, if any, value. It would certainly trench upon this exemption, and impair its value, to hold, somewhat contradictorily, that while the bankrupt could not possibly nor in fact be punished for so swearing, yet that what he had thus done was "punishable under the act." It therefore appears to be unnecessary to inquire whether what was sworn to was knowingly or fraudulently false.

Much in this record might otherwise lead us to conclude that these were not the sort of persons the act was intended to benefit; but, in view of what seems to be the law, and without attempting to say whether the facts alleged in the second ground of objection specified are proved or not, and without passing upon the questions raised by counsel, the court is of opinion that the discharges cannot be lawfully refused. It may be remarked, however, that the referee found that none of the specified grounds of objection to the discharges were sustained by the proof, except one as to one of the bankrupts. That one specification had reference alone to an alleged false oath in the examination referred to, and about a matter which may or may not have been important, according to developments that could only come from further proof, which is wanting. Let discharges be granted.

HAWK v. HAWK et al.

(District Court, W. D. Arkansas, Texarkana Division. June 7, 1900.)

1. WIFE'S INTEREST IN PERSONAL PROPERTY OF HUSBAND—DIVORCE—BANKRUPTCY.

Under Sand. & H. Dig. § 2517, providing that a wife who is granted a divorce from her husband "shall be entitled to one-third of the husband's personal property absolutely," a wife who has commenced an action for divorce against the husband has no such claim upon the latter's personal property before decree as will entitle her to enjoin the distribution of one-third of the proceeds of such property, in the hands of the husband's trustee in bankruptcy.

2. SAME—PROVABLE CLAIM.

Under Sand. & H. Dig. § 2517, providing that a wife who is granted a divorce from her husband "shall be entitled to one-third of the husband's personal property absolutely," the interest of a wife in the personal property of the husband after commencement of an action for divorce, but before decree, is not such a claim as is provable against the husband's estate in bankruptcy, under the bankruptcy law of 1898.

In Bankruptcy. Action by Jennie M. Hawk against Hale E. Hawk and John M. Cook, as trustee in bankruptcy, to enjoin the distribution of a fund in the hands of the trustee in bankruptcy. Dismissed.

A petition in this case was filed by Jennie M. Hawk, the wife of the defendant Hale E. Hawk, and John M. Cook as trustee in bankruptcy, on the 22d of May, 1900. It is a petition for a temporary restraining order against John M. Cook, trustee in bankruptcy of Hale E. Hawk, directing said trustee to

withhold from distribution one-third of all the personalty or its proceeds, and one-third of the real estate or its proceeds, belonging to the estate of the said bankrupt; and her petition rests upon the following admitted facts: The plaintiff was married to the defendant Hale E. Hawk on October 8, 1895. At her marriage he was entirely without means, and she had several thousands of dollars in property, which after her marriage she turned over to him, and which he used as his property. Part of it was invested in real estate in his name, and the remainder of it invested in a sawmill and other properties connected therewith, and stood in his own name at the time he contracted the debts now probated against his estate in bankruptcy. The plaintiff lived with her husband, who is a white man, until the year 1900, when he became enamored of a colored woman and drove his wife from the house, took up with the colored woman, furnishing her a home, and lived with her. Ascertaining in the latter part of April that she was about to file a petition for divorce, to prevent her from getting any portion of the estate under the statutes of Arkansas hereafter quoted he filed his petition in bankruptcy on the 27th of April, 1900, and was immediately adjudicated a bankrupt. On the following day the plaintiff filed her petition for divorce in one of the circuit courts of the state, and on the 5th of May following she filed in the same court her petition for alimony and attorney's fees; and alimony had been granted her, to the extent of \$18 per month, and \$50 attorney's fees, and \$20 for expense of taking depositions. That the defendant has filed his schedule of exempt property before the referee to the extent of \$500, and the same is now pending for hearing. That a sale of the property of the said bankrupt has been made, the money collected, and May 31, 1900, designated by the said referee as the date of payment of the first dividend out of said bankrupt's estate. That the creditors who have probated their claims are numerous, and they aggregate several thousand dollars more than the assets of the bankrupt's estate. She alleges that she will obtain her divorce in October, 1900, but that, if the trustee is not in the meantime restrained from distributing the estate, he would pay out under the orders of the referee all of the proceeds thereof. She then pleads the statute of Arkansas regulating the distribution of property where the wife obtains a divorce, and prays for a restraining order against the trustee, and such other relief as she may be entitled to. Section 2517 of Sandels & Hill's Digest of the Statutes of Arkansas is as follows: "In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one third of the husband's personal property absolutely, and one third part of all the lands whereof the husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property both real and personal, to which such wife is entitled; and when it appears from the evidence in the case, to the satisfaction of the court, that such real estate is not susceptible of the division herein provided for without great prejudice to the parties interested, the court shall order a sale of said real estate to be made by a commissioner to be appointed by the court for that purpose, at public auction to the highest bidder upon the terms and conditions, and at the time and place fixed by the court; and the proceeds of every such sale after deducting the costs and expenses of the same, including the fee allowed said commissioner by said court for his services, shall be paid into said court and by the court divided among the parties in proportion to their respective rights in the premises. The proceedings for enforcing these orders may be by petition of either party specifying the property the other has failed to restore or deliver, upon which the court may proceed to hear and determine the same in a summary manner after ten days' notice to the opposite party. And such order, judgment or decree shall be a bar to all claim of dower in and to any of the lands or personalty of the hus-

band then owned or thereafter acquired on the part of his said wife divorced by the decree of the court."

Green & McRae and T. E. Webber, for petitioner.

Arnold & Williams, for trustee.

ROGERS, District Judge (after stating the facts). It is plain from the language of the petition that it is based and proceeds upon the theory that the personal property, the proceeds of the sale of which are now in the hands of the trustee in bankruptcy, and the distribution of which proceeds it is the object of the petitioner to enjoin, was the property of the bankrupt before and at the time of his adjudication, and that it was personal property. It does not require authority to show that the bankrupt at any time prior to his adjudication in bankruptcy might have disposed of this personal property without the consent of his wife, and, so far as she is concerned, for any purposes that he might have seen fit. When he was adjudicated a bankrupt by operation of law, the same title which he held at the date of his adjudication was, upon his appointment and qualification, vested in his trustee. Bankr. Law 1898, § 70. The petition does not represent that the relief which the petitioner desires rests upon a claim which she has against her husband's estate. She does not claim by the petition that she has a debt against him, or that she has a claim against him based upon any contract, implied or otherwise, or that she is entitled to a judgment because of any tort or trespass or other thing for which she might recover a judgment at law against him. She bases her petition solely upon the provisions of the statute of Arkansas above quoted. By the very terms of that statute, "the wife so granted a divorce against the husband shall be entitled to one third of the husband's personal property absolutely," etc. This one-third interest in the personal property of the husband is to be vested by the decree of the court in the wife when the divorce is granted. Prior to the time such decree is entered, the wife has no debt or claim to the property under this statute. It is not a debt, or a claim, or anything that can be reduced to a judgment, prior to the decree of divorce; nor is it contended by the counsel for the petitioner that it is a claim or debt which the wife has against the husband. On the contrary, the supreme court of Arkansas, in *Beene v. Beene*, 64 Ark. 522, 43 S. W. 969, in construing the statute referred to, have said that:

"The legislature seems to have enacted that statute for the purpose of putting an end to all after controversies as to dower rights, and to settle the matter when a divorce is granted dissolving the marital bond. Hence the allowance to the divorced wife, who is entitled at all, is exactly or substantially the same as would be her dower interest in case of the death of her husband; that is to say, one-third for life of all the real estate of which he had been seised of an estate of inheritance at any time during the marriage, except such as she has relinquished in due form."

But a wife has no dower rights in the personal property of her husband until after his death; nor has a wife any rights, under this statute, until the decree of divorce is rendered in her favor. She, therefore, is not a creditor, within the meaning of the bankrupt law, or otherwise; nor does she acquire any rights under the statute above

referred to until after her divorce. But if it were contended that she were a creditor, or that the claim which the statute confers is in the nature of a debt, the contention could not be maintained. By the very terms of the bankrupt law, the word "creditor" "shall include any one who owns a demand or claim provable in bankruptcy." Bankr. Law 1898, § 1, cl. 9. "Debt shall include any debt, demand or claim provable in bankruptcy." Id. § 1, cl. 11. "Any person who owns debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." Id. § 4. It is clear that the claim set up in this petition, if it may be called a claim at all, is not one provable in bankruptcy. The precise question presented in this case is necessarily novel, but there are some cases under the old bankrupt law which tend to throw light upon the subject,—among others, the following cases: *In re Garrett*, Fed. Cas. No. 5,252; *In re Cotton*, Fed. Cas. No. 3,269.

In the case of *In re Foye*, Fed. Cas. No. 5,021, Judge Lowell held that:

"The costs of an attachment laid by the wife of the bankrupt in a libel for divorce are not provable in the bankruptcy, and are not an equitable charge against the assets of the assignee."

In *Beers v. Hanlin*, 3 Am. Bankr. Rep. 745, 99 Fed. 695, District Judge Bellinger held that:

"An unliquidated claim is not a provable debt in bankruptcy, and when arising out of a tort must be reduced to a judgment, or, pursuant to the application to the court, be liquidated as the court may direct, in order to be approved. Where, therefore, the only alleged creditor is one who had an unliquidated claim for tort, unreduced to judgment at the time of an alleged preferential transfer, she is not a 'creditor' who can insist that such transfer is an act of bankruptcy."

In that case the editor of the *American Bankruptcy Reports*, in a footnote, states that the claimant seems to have no standing in court from any point of view; and so it seems to me in this case that the petitioner, having no claim provable in bankruptcy, never having had any right in the personal property, the proceeds of which is in controversy, at any time, which she could assert as against her husband before his bankruptcy; or against his trustee, in whom it was vested after his bankruptcy, can have no standing either in the bankrupt court or in a court of equity, from any point of view.

As to whether or not the bankrupt in this case, when discharged, will be relieved from any decree which the state court may render in the divorce case, this court is not called upon to determine; and what sort of a decree the state court may render with reference to the bankrupt's real estate now vested in his trustee this court does not undertake to decide. The only question it decides at this time is that, assuming all the facts stated in the petition to be true, the petitioner has no standing in this court from any point of view.

In re HAMILTON et al.

(District Court, W. D. Arkansas, Texarkana Division. June 15, 1900.)

1. FIRE INSURANCE—PLEDGE OF POLICY—BANKRUPTCY—ASSIGNMENT OF POLICY TO RECEIVER—TITLE TO INSURANCE.

After a policy of fire insurance, providing that the same should be void in case of any change in the interest, title, or possession of the subject of the insurance, had been pledged to a bank as collateral security for a debt due from the insured, the latter was adjudged a bankrupt, the property insured placed in the hands of a receiver, and the policy assigned to the receiver, with the consent of the insurance company. Thereupon the bank, which had paid the premium, presented its bill therefor to the receiver, who paid the same without notice that the policy had been pledged. *Held*, that the assignment of the policy to the receiver, with the consent of the company, operated as a new and substantive contract, by which the rights of the bank as pledgee were terminated, and upon a loss accruing the receiver was entitled to the insurance as against the bank.

2. SAME—BANKRUPTCY—RECEIVER HAS INSURABLE INTEREST.

A receiver of the property of one adjudged a bankrupt, under the bankrupt law, has an insurable interest in the property so held.

3. SAME—CLAIM FOR PREMIUM—PREFERENCE.

One who has paid the premium upon a policy of fire insurance held by him under a pledge, and which is afterwards assigned to the receiver of the insured in bankruptcy, is not entitled to a preference for the payment of such claim, and the payment thereof by the receiver is unauthorized.

In Bankruptcy.

The facts in this case are as follows:

Hamilton, McMillion & Co. were a firm of merchants at Prescott, Ark. On the 15th of October, 1899, a petition in bankruptcy was filed against the firm, and on November 13th following it was adjudicated a bankrupt. On filing the petition in bankruptcy, proper steps were taken, and the assets of the firm were put into the hands of one White, as receiver. While the property was in the hands of the receiver, and before the adjudication in bankruptcy, the property was burned. The firm of Hamilton, McMillion & Co., during the years 1896, 1897, 1898, and 1899, became indebted to the Nevada County Bank for borrowed money to the extent of about \$5,500, and the sums were evidenced by various notes, the last of which was dated April 24, 1899. On the 7th of September, 1898, Hamilton, McMillion & Co. took out a fire insurance policy for \$2,000 with the National Fire Insurance Company of Hartford, Conn., and it was recited in the policy that the loss, if any, under the policy, "payable to the Nevada County Bank, as its interest may appear." This policy expired on the 7th of September, 1899, and it was renewed in the same company, and the same "loss-payable clause" inserted. Both of these insurance policies contain this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if * * * any change other than by the death of an insured takes place in the interest, title, or possession of the subject of insurance, * * * whether by legal process or judgment, or by voluntary act of the insured, or otherwise, or if this policy be assigned before a loss." Indorsed on the policy, dated the 11th of November, 1899, is the following:

"The interest of Hamilton, McMillion & Co., as owner of property covered by this policy, is hereby assigned to W. R. White, receiver, subject to the consent of the National Fire Insurance Company of Hartford.

"Dated November 11, 1899. Hamilton, McMillion & Company."

And also as follows:

"The National Fire Insurance Company of Hartford consents that the interest of Hamilton, McMillion & Company, as owners of the property covered by this policy, be assigned to W. R. White, receiver.

"Dated November 11, 1899.

O. B. Gordon, Agent."

The renewed policy, containing the above indorsements, was in force when the fire occurred and when the money was paid. After the fire, White, who was the receiver, was made the trustee in bankruptcy of Hamilton, McMillion & Co. The premium on the last-named insurance policy was paid by the bank, who now claims that the policy, which expired on the 7th of September, 1898, had been pledged to it at the time it was issued, and that the policy issued on the 7th of September, 1898, was but a renewal of that, and was also pledged to it under the original agreement with Hamilton, McMillion & Co. to secure their indebtedness to the bank, and that it held the same at the time the fire took place as such pledge. It also appears that, before Hamilton, McMillion & Co. were adjudicated bankrupts, the bank presented its claim for the premium on the last policy to the receiver, who paid the same; that when the indorsements heretofore set out on said policy were made, and when the premium was paid to the bank, White, as receiver, had no notice whatever of the existence of such pledge. After the fire the bank and White, both as trustee and as receiver, united, and brought suit against the insurance company, alleging that the policy had been pledged to the bank, agreeing at the same time that the question as to whether or not the money belonged to the bank or belonged to the trustee should be reserved for the bankruptcy court, and that the allegation in relation to the pledge of the policy to the bank should not estop either party from claiming the money in the bankruptcy court, or in any way prejudice the claim of either thereto. The Nevada County Bank now intervenes for the money so recovered, and bases its claim upon the ground that the insurance policy at the time it was issued was pledged to it to secure its indebtedness by Hamilton, McMillion & Co., the bankrupt. Any other facts in the case necessary to its determination will appear in the opinion.

C. C. Hamby, for trustee.

W. V. Tompkins, for bank.

ROGERS, District Judge (after stating the facts as above). It is not contended that the "loss-payable clause" contained in the policy gave the bank any right to the money. The contention, if made, could not be upheld, because the bank had no insurable interest in the property covered by the policy. In *re Lumber Co.* (D. C.) 92 Fed. 586; *Insurance Co. v. Chase*, 5 Wall. 512, 18 L. Ed. 524. The contention of the bank is that the insurance policy was pledged to it to secure its indebtedness. The testimony on this point is in irreconcilable conflict. The referee in bankruptcy found that the policy had not been pledged. It may be doubted whether the weight of the testimony sustains the finding, but this much must be said: The referee took this testimony, and it is altogether probable he is personally acquainted with the parties testifying, and therefore better situated to test their credibility than the court. His findings of fact, therefore, should not be disturbed, unless the court is clearly satisfied that the same are erroneous. I do not think it necessary, however, for the court to decide that question at all, and I express no opinion in regard thereto. By the very terms of the policy itself it is provided "that the entire policy shall be void if any change other than by the death of the insured takes place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by the voluntary act of the insured or otherwise, or if the policy be assigned before a loss." The subject of insurance in this case did change hands before the loss. If, therefore, the loss had occurred after the subject of insurance changed hands, and before the assignment of the policy to the receiver, neither the bank nor

the insured could have recovered anything against the company. The pledge of the policy, therefore (if there was a pledge at all), became no pledge, because there was no living policy the very moment the property passed from the possession of the insured into the hands of the receiver. Moreover, before a loss, this policy was assigned by the insured to the receiver.

May, Ins. § 276a, states:

"If partnership property is put into the hands of a receiver before loss, the transfer is an alienation that voids the policy. The same is true of an assignment in bankruptcy."

"The assignment of a policy as collateral security voids a policy which stipulates against an assignment in whole, or of any interest in it, under penalty of forfeiture." *Id.* § 380.

If, therefore, the insured in this case had assigned this policy to the receiver without the assent of the insurers, the policy itself would have been absolutely void, and no recovery could have been had at all, either by the pledgee or the assignee. But in this case it appears that the assignment by the insured to the receiver was with the consent and approval of the insurers. Hamilton, McMillion & Co., as owners of the property covered by the policy, assigned the interest of that firm to W. R. White, receiver, subject to the consent of the National Fire Insurance Company of Hartford, and at the same time the National Fire Insurance Company of Hartford consented that the interest of Hamilton, McMillion & Co. as owners of the property covered by the policy be assigned to White as receiver.

May, Ins. § 276, states:

"If the original insured, by the consent of the insurers, assigns the policy, and the assignees agree that the insurers pay all assessments which shall thereafter be made upon the policy, and that the property insured shall remain subject to the same lien as before, the legal effect of the transaction is to create a new, substantive, and distinct contract with the assignees. It is substantially the same as if the policy had been issued to them."

That is precisely what was done in this case. True, there were no assessments to be made. The bank had taken out the policy and paid the premium. The policy, by the written consent of the insured and the insurers, was assigned to the receiver, and the receiver paid the bank the premium which it had advanced. This became a new and substantive contract between the insurance company and the receiver. If, therefore, the insurance policy, as it originally stood, had been pledged to the bank, it no longer remained a pledge after the new contract was entered into, because the policy no longer was a contract between the original parties thereto, but a new and substantive contract between the insurance company and the receiver. The receiver, of course, without the authority of the court, would have no authority to pledge the insurance policy to the bank or to any other person, and he could not, of course, have the sanction of the court in pledging the policy to secure a past indebtedness to one creditor. However that may be, there is no evidence whatever that the receiver at the time he paid the premium, or at the time the assignment was made, knew that any pledge of the policy had been made to the bank, or attempted himself to make any pledge thereof to the bank. The mere fact, if it be true, that the bankrupts, prior to the filing of the petition, had

deposited the policy as a pledge with the bank to secure its indebtedness, could not enable the bank to hold the policy as a pledge after the insurance company had entered into the new contract with the receiver. No contract between the insured and the bank could in any wise affect the power and authority of the insurance company to cancel the policy and to make a new contract with the receiver. The effect of what was done in this case was to make a new contract between the insurance company and the receiver, thereby, in legal effect, canceling the original policy between the insurance company and the insured, and the making of a new contract as between the insurance company and the receiver.

The law is settled that the receiver had the right to take out insurance upon the property which came to his hands. *Insurance Co. v. Chase*, 5 Wall. 512, 18 L. Ed. 524; *Thompson v. Insurance Co.*, 136 U. S. 294, 10 Sup. Ct. 1019, 34 L. Ed. 408. It is equally well settled that he had no authority whatever to pay the premium to the bank upon a policy which had become forfeited by the action of the court in taking the property out of the hands of the bankrupts, and placing it in the hands of the receiver. The bank, having advanced the money, of course had a claim against the bankrupt's estate that it might prove as any other creditor, but it was not entitled to be paid by the receiver or to receive a preference. For the reasons stated, I am of the opinion that the action of the referee should be affirmed, and the relief sought by the bank denied.

In re CAMPBELL.

(District Court, E. D. Wisconsin. July 7, 1900.)

BANKRUPTCY—PREFERRED CLAIMS—WAGES DUE LABORERS.

The claim of a laboring man against an estate in bankruptcy for wages, for services rendered the bankrupt, which is assigned after the filing of the petition in bankruptcy, is entitled to allowance, under Bankr. Act, § 64b, as a preferred claim in the hands of the assignee.

In Bankruptcy. On question certified by the referee,—whether the claims of four laborers for wages earned within three months before the date of filing the petition in bankruptcy, respectively amounting to \$41.47, \$26.82, \$25, and \$20.28, all assigned to the claimant after the commencement of the proceedings in bankruptcy, are entitled to allowance as debts which have priority.

Julius E. Roehr, for claimant.

Nickerson, Roemer & Aarons, for trustee.

SEAMAN, District Judge. Section 64b, Bankr. Act, clearly provides that debts of the character stated shall have priority, and the only question is whether they can be so allowed in favor of an assignee. A provision of like effect under the act of 1867 was construed by Judge Blatchford to authorize such allowance (*In re Brown*, 4 Ben. 142, Fed. Cas. No. 1,974), and I have observed no ruling otherwise under that act. Counsel for the trustee relies upon the decision of Judge Lochren in *Re Westlund* (D. C.) 99 Fed. 399, as ruling

contra for the purposes of the present case. That decision is predicated, however, on the fact that the assignment in question was made prior to the filing of the petition, and the wages were not, therefore, due to the workmen at the commencement of the proceedings. Whether such interpretation is correct requires no consideration here, for the reason that the referee certifies (as the undisputed proofs show) that these claims were assigned after the bankruptcy proceedings were commenced. I am of opinion that the claims are entitled to priority in the hands of the assignee, and should be so allowed.

IN re ROGERS' MILLING CO.

(District Court, W. D. Arkansas, Ft. Smith Division. June 6, 1900.)

1. **BANKRUPTCY—PREFERENCES—PROVABLE CLAIMS.**

Under Bankr. Act 1898, § 57, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," a creditor cannot prove any claim against the bankrupt's estate, though it be a distinct and separate debt from the one preferred, until he surrenders the preference he has obtained.

2. **SAME—PETITION BY CREDITOR HOLDING PREFERENCE.**

Under Bankr. Act 1898, § 59, providing that, where the whole number of creditors of any person is less than 12, one of such creditors, whose claims equal the sum of \$500, may file a petition to have him adjudged a bankrupt, but limiting such right of petition to creditors only having "provable claims," a creditor is not entitled to maintain such petition who within four months next preceding the filing of the petition has received payment of a claim which is separate and distinct from that upon which the petition is based.

3. **SAME—INSOLVENCY—EVIDENCE.**

Evidence that an alleged bankrupt upon the filing of a petition in involuntary bankruptcy had assets that cost over \$30,000, while his liabilities amounted in the aggregate to less than \$16,000, and that, after allowing a reasonable discount for natural decay and wear and tear, the assets are greater in amount, at a fair valuation, than the liabilities, is not sufficient to support the petition.

In Bankruptcy.

Hill & Brizzolara and L. H. McGill, for petitioner.

James A. Rice, for Rogers Milling Co.

ROGERS, District Judge. This is a case of involuntary bankruptcy. The petition is filed by a single creditor, H. L. Stroud, and the Rogers Milling Company is a private corporation organized under the laws of the state of Arkansas. The undisputed evidence in the case shows that the Rogers Milling Company within four months next before the filing of the petition herein paid a note of \$1,500 to the petitioning creditor. Nothing appears either in the petition or the answer of the payment of this note. It was developed by the proof, however, and the fact of the payment is undisputed. The debt upon which the petition is based is a separate and distinct debt from the note which was paid, but they were both promissory notes, and both in existence at the time the payment of the \$1,500 note

was made. The question arises as to whether or not a petitioning creditor who has received a preference can maintain a petition so long as he does not, by the petition, surrender such preference. It was decided under the bankrupt law of 1867 that petitioners, having accepted an unlawful preference in respect of the debts set forth in their petition, could not maintain the petition so long as they did not, by the petition, surrender such preference; and the practice seems to have been to give the petitioners an opportunity to amend the petition in that respect, and, if no such motion was made, to dismiss their petition. *In re Rado*, Fed. Cas. No. 11,522; *In re Hunt*, Fed. Cas. No. 6,882; *In re Marcer*, Fed. Cas. No. 9,060. It will be seen, however, that in each of these cases the payments had been made upon the particular debt upon which the petition was based. Such was not the fact in the case at bar. Under the law of 1867, I have no doubt that the petitioning creditor in this case could maintain the petition, but the law of 1867 differed from the law of 1898 in this: In the act of 1898, § 57g, it is provided that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." The language of this provision is much broader than that contained in the former bankrupt act. Under the act of 1867 such creditors were prohibited from proving only the debt or claim on account of which the preference was made. Rev. St. § 5084. Under that provision the courts held that where a creditor had two disconnected debts, and had received a fraudulent preference as to one only, he might prove the other and receive dividends upon it. *Loveland*, Bankr. p. 257, § 135; *In re McVay* (D. C.) 13 Fed. 443; *In re Aspinwall* (D. C.) 11 Fed. 136; *In re Richter's Estate*, 1 Dill. 544, Fed. Cas. No. 11,803; *In re Holland*, Fed. Cas. No. 6,604. It has been held, under the above provision of the bankrupt act of 1898, that a creditor cannot prove any claim against the bankrupt's estate until he has surrendered any preference he may have obtained. *In re Knost*, 2 Am. Bankr. Rep. 471, affirmed in 99 Fed. 409; *Electric Co. v. Worden*, 2 Nat. Bankr. N. 434, decided by the circuit court of appeals for the Seventh circuit (also, reported in 39 C. C. A. 582, 99 Fed. 400); *In re Conhaim* (D. C.) 97 Fed. 924.

It would seem, therefore, that under the section of the bankrupt act of 1898, as quoted above, a petitioning creditor, having accepted an unlawful preference in respect of any claim which he may have held against the bankrupt's estate, cannot maintain the petition so long as he does not surrender such preference,—in other words, his claim must be a provable claim; for by section 59b of the bankrupt act of 1898 it is provided that:

"Three or more creditors who have provable claims against any persons which amount in the aggregate, in excess of the value of the securities held by them, if any, to five hundred dollars or over; or if all the creditors of such persons are less than 12 in number, then one of such creditors whose claims equal such amount may file a petition to have him adjudged a bankrupt."

It is, therefore, only creditors who have "provable claims" who may file a petition to have one adjudged a bankrupt, and the claims

of no creditor are provable, under these decisions, so long as he may hold an unlawful preference. But I am not disposed to rest the case upon that point. I am persuaded, after a careful review of the testimony in this case, that when the petition was filed the Rogers Milling Company was not insolvent. The testimony shows that the plant of the Rogers Milling Company, consisting of four lots, a building, machinery and appliances therein contained, cost, when constructed, in the neighborhood of \$25,000. It had been constructed 12 or 14 years. A considerable portion of the machinery had been placed in it at a much more recent period. It was in good repair. Of course, it was not as valuable as when it was constructed,—neither the machinery nor the building. In addition to this property, it had other real property, valued by some of the witnesses at twelve or fourteen hundred dollars, and by none of them at less than eight or nine hundred dollars. It had other assets, consisting of grain, flour, mill products, notes, and accounts, of the value of about \$6,000. Its indebtedness amounted in the aggregate, when the petition was filed, to \$15,820, including principal and interest. Allowing a reasonable and fair discount for natural decay, wear and tear, and the use of the machinery, the court is of opinion that the weight of the testimony shows that the assets were greater in amount, at a fair valuation, than the liabilities, and for this reason the petition in this case should be dismissed at the costs of the petitioning creditor. It is so ordered.

WALKER et al. v. COLLINS CIGAR CO.

(Circuit Court of Appeals, Third Circuit. May 31, 1900.)

No. 29.

PATENTS—INFRINGEMENT—CIGAR CUTTERS.

The Phillippi patent, No. 398,345, for a cigar cutter, claims 1 and 2, if valid, must be limited to the mechanism shown and described in the drawings and specification. As so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

J. C. Sturgeon, for appellants.

C. W. Miles, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from the decree of the circuit court for the Western district of Pennsylvania dismissing a bill charging infringement of letters patent of the United States No. 398,345, dated February 19, 1889, issued to Frank A. Phillippi for an improvement in "Cigar-cutters," and now held and owned by the appellants, complainants below. The answer sets up the usual defenses. The patent in suit contains six claims, but the charge of infringement has been restricted to claims 1 and 2. They are as follows:

"(1) In a cigar-cutter, the combination of a shaft having a gear and spring mounted thereon with a shaft provided with a pinion adapted to mesh with

said gear, and having a cutter-wheel mounted at one side, and with devices for releasing the cutter-wheel to permit the spring and intermediate mechanism to rotate the same, substantially as specified.

"(2) In a cigar-cutter, the combination of a shaft having a gear and a spring mounted thereon, or its described equivalent with a shaft provided with a pinion adapted to mesh with said gear, and having a cutter-wheel mounted at one side and provided with stops, and devices, substantially as shown and described, for releasing the cutter-wheel, substantially as specified."

In the description the patentee states:

"This invention has relation to machines for cutting the tips or 'tucks' from cigars; and among the objects in view are to provide a cheap simple machine for the above purpose that is composed of as few parts as possible, that can be easily manufactured and assembled, and when complete and in use will give a clean cut to the ends of cigars submitted thereto. Other objects and advantages of the invention will hereinafter appear, and the novel features will be particularly pointed out in the claims."

Phillippi filed his original application for a patent for his invention November 4, 1886. This application, after sundry amendments, was allowed January 11, 1887. Thereafter it was placed in interference and was re-allowed June 8, 1887, but subsequently was forfeited for non-payment of the final fee. Afterwards, November 10, 1888, Phillippi filed the application on which the patent in suit was granted. In the proceedings on his original or forfeited application he was required by the patent office to acknowledge the state of the art. He accordingly inserted in his application the following statement:

"I am aware that a rotating cutter has been employed to sever the ends of cigars and therefore do not broadly claim such as of my invention."

This acknowledgment not being deemed sufficient by the patent office, he substituted the following:

"I am aware that a rotating cutter having stops, and a cam-lever adapted to be projected into the path of said cutter has heretofore been employed and therefore do not broadly claim such as of my invention."

This admission disposes of the contention of the appellants that Phillippi's device was a primary or pioneer invention. The counsel for the appellants admits that the tripping and stopping mechanism of the patent in suit is not the important feature of the invention, but contends that "the gearing of a spring shaft to a cutter-wheel shaft so as to temper the force of the action of the cutter-wheel so as to prevent self destructive action upon the stop mechanism was the all important feature of the invention." The learned judge below well said that it was "an old and common expedient to transmit motion through a primary shaft with a gear intermeshing with a pinion of a second shaft." The prevention of "self destructive action upon the stop mechanism" was, we think, merely a matter of mechanical adjustment. An examination of earlier patents in evidence, including patent No. 221,911, dated November 25, 1879, granted to Charles Cook for an improvement in "Automatic Cigar Lighters" and German patent No. 25,760, dated January 28, 1884, granted to Rudolph Schubert for an automatic cigar-cutter for the removal of cigar tips, satisfies us that if the patent in suit is valid the mechanism covered by it is confined to that shown and described in the drawings and description and specifically claimed. Each of the two claims in controversy men-

tions as an element of the combination "a cutter-wheel mounted at one side." It is urged by the appellants that the words "mounted at one side" do not refer to the side of the case, and that the words "at one side" should be treated as "surplusage." We are unable to adopt this view. The mechanism as shown and claimed discloses a cutter-wheel mounted at one side of the case, through which side the cigar is inserted in order that its tip may be brought within the plane of rotation of the cutters. If the cutter-wheel were not so mounted a cigar inserted through the side of the case, as shown and described, would not be operated on as contemplated, and the mechanism would wholly fail to perform its function. The cigar-cutter used by the appellee differs from that of the appellants in that there is no cutter-wheel mounted at one side of the case, the cigars are inserted through the top of the case and their tips removed by the peripheral blades of a solid cutter-block mounted midway between the opposite sides of the case and also midway between the spring and the gear. Aside from the foregoing considerations the mechanism covered by the patent in suit is of extremely doubtful utility and is not a marketable device. Nor do the automatic cigar-tip cutters manufactured and sold by the appellants conform to the requirements of their patent.

The decree of the circuit court is affirmed.

POSTAL TEL. CABLE CO. v. NETTER.

(Circuit Court, E. D. Pennsylvania. June 15, 1900.)

1. PATENTS—SUIT FOR INFRINGEMENT—NECESSARY PARTIES.

An assignee of the exclusive right, jointly with the assignor, to use a patented design, cannot maintain a suit for infringement of the patent without joining the assignor.

2. TRADE-MARKS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

To justify a preliminary injunction against infringement of a registered trade-mark, as in case of a patent, both the right and the injury asserted must be clearly shown.

In Equity. Suit for infringement of a patent and a trade-mark. On motion for preliminary injunction.

Frank Shattuck, for complainant.

Furth & Singer, for respondent.

DALLAS, Circuit Judge. The bill of complaint in this case charges the defendant with infringement of a certain design patent and also of trade-mark. The moving papers do not include a copy of the patent, but in the affidavit of the vice president and general manager of the complainant corporation it is said that "the leading feature of the said design consists in the representation of the Atlantic Ocean, half of the terrestrial globe, irregular lines being shown as extending across the said ocean, and the whole being surrounded by a cable-like border so located as to leave a margin directly about the central representation." The copies of the complainant's envelopes and blanks which are annexed to the bill do not display any design

which corresponds with this description, unless, perhaps, in the case of one of the complainant's receiving blanks; and the exhibits to the bill which are respectively marked "Fac Simile Defendant's Envelope" and "Fac Simile Defendant's Blank" are, as respects "the leading feature of said design," quite unlike the envelope or any of the blanks annexed to the bill as being those of the complainant. Moreover, the bill is plainly defective in that it lacks a necessary party. The plaintiff's title to the patent, as stated in the bill, rests upon an instrument of writing, whereby "the Commercial Cable Co. granted to the said Postal Telegraph Cable Co. the exclusive right, jointly with itself, to make, sell, and use the improvements described and claimed in the said letters patent," etc. A grantor who retains such an interest in the patent as the Commercial Company is thus admitted to have reserved must be made a party to a suit for its infringement. Curt. Pat. § 403 et seq.; Rob. Pat. § 1099, and cases cited in notes. The main reliance of the plaintiff is, however, upon the alleged violation of trade-mark. But its case is no stronger on this ground than on the other. It stands upon the statutory registrations referred to in its bill; and necessarily does so, for it is only of suits upon trade-marks registered under the acts of congress that this court has jurisdiction without regard to the amount in controversy, and the bill contains no averment respecting the sum or value of the matter in dispute. Furthermore, it is clear that the defendant has not affixed the trade-mark complained of to any "merchandise" within the meaning of the statute (Act March 3, 1881; Rev. St. Supp. p. 323, § 7); and the weight of the proofs is plainly against the plaintiff on the question as to whether any person is likely to be imposed on by the use made by the defendant of the stationery complained of, and there is no evidence that any one has in fact been misled. "As has frequently been said, to justify a preliminary injunction the plaintiff's case must be clear in all respects;" and certain it is that neither as to patent nor trade-mark has this plaintiff clearly established either the right or the injury which it asserts. *Van Camp Packing Co. v. Cruikshanks Bros. Co.*, 33 C. C. A. 280, 90 Fed. 814. The motion for a preliminary injunction is denied.

ROEHR v. BLISS et al.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 161.

PATENTS—INVENTION—DOOR FRAMES.

The Boda patent, No. 385,233, for finishing of house interiors, as to claims 1, 2, and 3, which cover, as an article of manufacture, a completed door frame made in two parts, to be joined together after they are placed in the wall opening, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Chas. L. Burdette, for appellant.

E. Henry Hyde, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. It would serve no useful purpose to enlarge upon the opinions expressed by Judge Shipman and Judge Townsend when the patent in suit was before them respectively. 82 Fed. 445; 98 Fed. 120. We concur in the views taken by each of them, and entertain no doubt of the invalidity of the patent. It could not involve any invention to make a complete door frame in two parts. All that was necessary to be done by the carpenter was to make a complete frame, and then divide the jamb longitudinally into two sections by the saw. It could not involve any invention to join the two sections together again. Any carpenter exercising the common skill of the calling would be able to do this, and, if he wanted to make the interlocking jamb, which is a subordinate feature of the alleged invention as specified in some of the claims, he would have known how to do so by tonguing and grooving the respective faces of the jamb. The decree is affirmed, with costs.

NEWARK SPRING-MATTRESS CO. v. RYAN.

(Circuit Court of Appeals, Third Circuit. June 1, 1900.)

No. 3.

1. PATENTS—INVENTION—BED-SUPPORTING FRAME.

The Palmer patent, No. 251,630, for a bed or mattress supporting frame, claim 1, is void for lack of invention and patentable novelty.

2. SAME—SUIT FOR INFRINGEMENT—ESTOPPEL.

A release obtained by a stockholder in a corporation for past infringement of a patent in his personal business does not create an estoppel against the corporation which will prevent it from denying the validity of the patent.

3. SAME—PLEADING.

Where the complainant in a suit for infringement relies upon an estoppel of the defendant to make the defense of nonvalidity of the patent, he should plead such estoppel in his bill, by way of anticipation.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Milton E. Robinson, for appellant.

Stephen J. Cox, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the circuit court of the United States for the district of New Jersey, made as of the September term, 1899, sustaining the validity of complainant's patent, No. 251,630, granted to Frederick A. Palmer, December 27, 1881, for a bed or mattress supporting frame. 96 Fed. 100. The suit is a suit in equity brought by complainant, as assignee under the patent, of certain territory, including the state of New Jersey. The patent was granted for the term of 17 years, and expired December 27, 1898,—about 6 months before the decision of the circuit court was made in the case. The defendant below is a corpora-

tion carrying on a manufacturing business at Newark, N. J. Only the first claim of the patent is claimed to be infringed. That claim is as follows:

"A bed bottom, or supporting frame for beds and mattresses, which comprises in its construction end rails, A A¹, which project beyond its side rails, B B¹, and a woven wire or other suitable fabric, C, which extends laterally outward beyond and above the side rails, B B¹, substantially as and for the purpose described."

The assigned errors mainly relied on are that the court erred in holding that the first claim of the patent in suit was valid; that the court erred in failing to hold that the patent in suit was void on account of the issuance to Frederick A. Palmer, the patentee of the patent in suit, of patent No. 237,586, on February 8, 1881, prior to the filing of the application for the patent in suit; that the court erred in failing to hold that the patent was anticipated by certain other patents in evidence, and by certain structures made the subject of Exhibits No. 2 and No. 10 by the defendant in the record. The specifications of the patent in suit set forth the object and essential features of the invention as follows:

"The main object of my invention is to provide a bed bottom, or supporting frame for beds and mattresses, whereby, when its side rails are set between the side rails of a bedstead, the end rails of the supporting frame will afford the means for holding the frame in position upon the bedstead without other appliances for such purpose, while at the same time the end rails of said frame will afford a support whereby the elastic fabric stretched over the frame may be extended out beyond the side rails of the bedstead, so that a person sitting upon a side edge of the fabric will not have his body come in contact with or press upon a side rail of the bedstead."

Reading this specification in connection with the claim, it appears that the essential feature of the alleged invention is moving the side rails of an ordinary bed or mattress frame inwardly, towards each other, so as to allow the ends of the crossbars to project beyond the side rails sufficiently to rest on the side rails of the bedstead. The objects to be secured, as set forth in the patent, being: First, to support the mattress frame on the side rails of the bedstead by these projections of the end rails, and thus dispense with the use of slats in the bedstead; and, second, to carry the sides of the woven-wire fabric out over the side rails of the bed, so that a person sitting upon the side edge of the fabric will not have his body come in contact with or press upon the side rail of the bed. All the elements of this construction described by the claim (that is to say, the side rails and the end bars and the fabric) were old, and are not claimed to be novel with the patentee. All that is claimed by the patentee as new is the projecting end bars, and the extension laterally outward beyond the side rails of the woven wire fabric, for the purpose described. We are not inclined to think that this device involved invention, within the meaning of the patent law, or that it is other than what would have easily occurred to an ordinarily skillful mechanic engaged in such work, as a means of supporting a bed frame, with the consequent lateral extension of the woven-wire fabric to the full length of the end bars. However this may be, we are clearly of opinion that, as claimed, the patented de-

vice lacks novelty. More than four months previous to the date of the application for the patent in suit, to wit, on February 8, 1881, the same patentee had taken out a patent, which is No. 237,586. This patent, with the proceedings as disclosed in the file wrapper, are set out in the record. The specifications of this first patent, as they now stand, say:

"My invention relates to movable frames of wood or metal, made to fit any bedstead, and * * * designed to support the bedding and to take the place of all slats."

The first claim of this patent includes end bars "extending beyond the side rails," and "a woven-wire or other suitable fabric, W, applied upon the end bars, and extending beyond or overhanging the side rails of the frame." This seems to us a characteristic and essential feature of the invention, without which the patent would not have been granted. It is identical with the essential feature of the patent in suit, and comes within the rule that forbids the issuance of a second patent to a patentee for an alleged invention, the essential characteristic of which has been already patented to the same patentee. But we refer to this prior patent, and the proceedings in the patent office that preceded its issuance, as indicated by the file wrapper, for another purpose, and that is to show that the patentee himself acquiesced in a finding of the patent office that the existing state of the art negatived the patentability of the device of the patent in suit. The original specifications of this first patent, as filed in the patent office, contained the following:

"* * * Which fabric shall, at the sides thereof, be above and over and extending beyond the side rails, overhanging the same, so that the elastic fabric and the bedding thereon shall be supported, while a person sitting on the edge of the bed shall be protected and kept from the sharp edge of the mattress frame, and also prevented from tilting backward in a depressed place between one of the side rails of the frame and the woven wire or other fabric."

In acting on the application as originally filed, the patent office held that the paragraph just quoted should "be erased, in view of the patent to O. A. A. Rouillion, No. 33,685, of November 5, 1861, in bed bottoms." The specifications also contained the following statement:

"By my invention I obtain a mattress frame that can be used to great advantage in iron bedsteads, from the fact that the end rail or bar projects over the side rails, and furnishes a support from the mattress frame upon the sides of the bedstead, and the fabric is enabled to extend over and beyond the entire width of the bedstead, leaving neither of the rails uncovered, while, with mattress frames heretofore used, extra irons, of Z form, are required, on which to suspend the mattress frame within the bedstead; and, as in such case the fabric cannot overhang the sides,—being narrower than the frame,—more or less of width as resting surface is lost."

And as to this the patent office said:

"The ensuing paragraph is objectionable, as it fails to recognize the existing state of the art."

Upon this finding and reference, the applicant struck out all of the before-quoted matter from his original specifications, and by so doing must be taken to have acquiesced in the action of the patent office, and to have practically admitted that the essential features

of the patent in suit had been anticipated and lacked novelty. But the defendant below, and the appellant here, has placed in the record, as exhibits, certain structures, and also certain patents, which claim and describe, and in their drawings exhibit, a device for wire mattresses and bed bottoms that clearly embody these essential features of the patent in suit. Exhibit 2, above referred to, presents a structure which seems to us obviously to embody the essential features set forth in the claim and specifications of the patent in suit. It is the hospital litter, which, according to the testimony, was made prior to 1879, and was set forth in a printed catalogue of 1878, with a cut which clearly exhibits the characteristics of the alleged invention. We see the end bars extended so as to rest and support the wire mattress on the sides of the litter, and the woven fabric extending laterally to the extremities of the end bars, and thus beyond the sides of the litter. If we remove from this litter its legs, or fold them under, and cut off the handles for carrying it, with a slight extension of the end bars it could be set on the bedstead precisely as the patent in suit, and accomplish the purpose which it was designed to accomplish. Curiously enough, in the specifications of the first Palmer patent, referred to (No. 237,586), the patentee seems to have had in mind this very structure, for he states:

"The object of my invention is to provide an improved movable frame or mattress, to be used in bedsteads (or to be supplied with legs and stand on the floor), in the place of slats, springs, or other appliances for the support of the bedding."

It seems impossible to us that this patentee should successfully claim novelty for the device of his patent, after this exhibit has been examined. The device was open to the use of the public, and as to it no monopoly could, at the date of the patent or since, be claimed.

Some of the patents offered in evidence also show clear anticipation of the alleged invention of the patentee. We refer especially to the Tracey patent, No. 202,302, of April 9, 1878, Fig. 6 of which shows a bed bottom having overhanging end rails and fabric exactly as called for in claim 1. The construction shown by the patent to Boda, No. 170,333, is also, in our opinion, an anticipation of the alleged invention of the patent in suit. Also, we find in the Young patent, No. 170,040, dated December 16, 1875, every feature of the patent in suit. We do not deem it necessary to discuss these anticipatory patents in detail, as we have already indicated sufficiently our reasons for denying novelty to the device of the patent in suit, as well as the element of invention, within the meaning of the patent laws.

The appellee contends that the corporation appellant is estopped to deny the validity of the patent in suit by the fact that one of its principal stockholders accepted, some months before the organization of the said corporation, a special license for the city of New York, in his own business. And he further contends for an estoppel by reason of a certain release that was obtained from him by the said stockholder and another large stockholder, as a co-partnership, just about the time of, or a few days after, the organization of the defendant company. This release was for all past infringement of the

parties, in their own personal business, and could not in any way affect the defendant corporation, as an estoppel, even if the release had not contained, as its concluding paragraph, the following: "It is understood that this does not in any way bind or affect the corporation known as the Newark Spring-Mattress Company." But another and conclusive objection to the point thus made is that the complainant has not pleaded the estoppel he claims, and defendant was without the notice in the pleadings to which he was entitled. Notwithstanding the forty-fifth equity rule, the complainant was at liberty, and should have availed himself thereof, to plead, by way of anticipation, the estoppel to the defense of nonvalidity of the patent. We are of opinion, therefore, that the testimony on this point was improperly taken, and should be stricken out of the record. The decree appealed from should therefore be reversed, and a decree dismissing the bill of complaint ordered.

THE ELK et al.

(Circuit Court of Appeals, Third Circuit. May 29, 1900.)

No. 8.

COLLISION—LIABILITY—EFFECT OF FAILURE TO KEEP PROPER LOOKOUT.

A tug cannot be held liable to contribute to the damages caused by a collision in which her tow was injured, because of her failure to keep a proper lookout, where she was not otherwise in fault, and from the facts shown it appears that the omission in no manner contributed to the collision.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Henry R. Edmunds, for appellant the Carbonero.

John F. Lewis, for appellant the A. R. Gray.

Horace L. Cheyney, for appellee the Elk.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. A libel was filed by Edward McIlvaine, master of the barge Elk, against the steam-tug Carbonero to recover damages resulting from a collision between the two vessels in the Delaware River on the night of December 9, 1895. Subsequently on the petition of the master of the Carbonero the steam-tug A. R. Gray was under rule 59 in admiralty made a party defendant. The Elk at the time of the collision was in tow of the Gray. The court below held that both the Carbonero and the Gray were at fault, and decreed that the damages sustained by the libellant should be equally divided between those vessels. (D. C.) 95 Fed. 846. We entirely agree with the learned judge below that the libellant was entitled to recover full damages, and further, that the Carbonero was at fault. It is unnecessary to recapitulate the evidence on these points. We

think, however, he was in error in decreeing any of the damages against the Gray. In the course of his opinion he says:

"Both the side and towing lights of the Gray were properly set and burning, and the captain was at the wheel; but there was no lookout either on the tug or on the barge and the barge displayed no lights. The Elk was low in the water, and neither her load nor herself obstructed the view of the lights upon the tug. There was no moon, but the night was not dark, and the lights of an approaching vessel could be seen for at least half a mile, and probably much farther. * * * With regard to the liability of the Gray, I see one point only upon which it can be rested, but of this there can be no doubt; she had no lookout either upon the barge or upon her own deck, and under the authorities such omission ordinarily is blamable negligence. I have been referred to no statute or rule that required the Elk to carry lights, lashed as she was to the Gray; but a lookout should have been stationed either upon the tug or upon the barge. Under the facts in proof it is impossible to say whether the collision would or would not have been avoided, if this had been done. The inquiry would be speculative, and therefore profitless; for present purposes it is enough to say that the Gray failed in a plain duty, and that an injury has occurred which might have been prevented if the duty had been performed. The Gray, therefore, must also be held liable for the collision."

The law is well settled that the absence of a special or proper lookout does not subject a vessel to liability for damages for collision, unless such absence has in fact contributed to the collision. In *The Blue Jacket*, 144 U. S. 371, 389, 390, 12 Sup. Ct. 718, 36 L. Ed. 477, the court said:

"It is well settled that the absence of a lookout is not material, where the presence of one would not have availed to prevent a collision. * * * The provision of article 24 of the act of March 3, 1885, is that a vessel is not to be exonerated from the consequences of any neglect to keep a proper lookout. It does not say that a vessel shall, because of not keeping a proper lookout, be visited with the consequences of a collision. If the collision does not result as a consequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequences of the collision."

The circumstances of this case are such as to negative the idea that the omission to have a special lookout on the Gray brought about or in any manner contributed to the collision. The Carbonero could plainly see the lights on the Gray and the latter vessel could plainly see the lights on the former for a distance of at least half a mile, and the two vessels exchanged signals. On the facts disclosed it was wholly immaterial, so far as the collision in question is concerned, whether the Gray had or had not in addition to her crew a special lookout, and that vessel accordingly should not have been held responsible.

The decree of the District Court is reversed with direction to enter a decree for full damages and costs in favor of the libellant and against the claimant of the Carbonero in accordance with this opinion.

THE LANGFOND and THE WILLIAM E. FERGUSON.

THE WILLIAM E. FERGUSON.

(District Court, E. D. New York. June 2, 1900.)

COLLISION—TOW AND ANCHORED STEAMER.

Evidence considered, and *held* to show that a collision between a tow and a steamer at anchor was due to the fault of the tug in failing to allow for the length of her tow and the effect of the tide in changing her course after passing the steamer.

In Admiralty. Libels for collision.

Charles Thaddeus Terry, for the Dredging Co.

Butler, Notman, Joline & Mynderse, for the steamship Langfond.

James J. Macklin, for the tug Ferguson.

THOMAS, District Judge. On February 9, 1899, at about 9 a. m., the Langfond, a foreign, iron, unladen steamship, of about 2,500 gross tons and 1,634 net tons, and whose length was about 300 feet, and whose width and draft were, respectively, 40 and 22 feet, dropped her starboard and largest anchor upon the western anchorage grounds in the harbor of New York. Within an hour thereafter it was discovered that the steamer had drifted from the anchorage grounds to the eastward, under the influence of a severe westerly wind of from 40 to 50 miles per hour. The anchor continued to drag until the vessel had crossed the main channel, which was about 1 mile wide, to a point approximately 1,000 feet from the western limit of the eastern anchorage grounds, when the anchor held. Thereupon the vessel swung a little to the north from her westerly heading, so that the starboard anchor chain passed around the stem to the port side, which added to the difficulty of raising the anchor, as did the low temperature. For the purpose of relieving the strain on the anchor chain, which was 60 fathoms in length, and to enable the winches to hoist the anchor, so that the vessel might return to the anchorage grounds, the steamer was moved slowly forward under her own steam. But she ran past her anchor, whereupon she was stopped and allowed to drop back for a distance to facilitate operations. While in this situation the tug Ferguson, towing four loaded mud scows, the first on a bridle hawser some 250 feet in length, and the others singled out on hawsers some 6 feet in length, passed under the stern of the Langfond; but the starboard side of the third scow in the line was carried against the propeller of the steamer, and the front and starboard side of the fourth scow were brought in collision with the propeller, whereby the propeller and scows were injured. The Ferguson has been libeled in behalf of the steamer, and the Ferguson and steamer have been libeled by the owner of the scows. The scows were not in fault, and the cause of the collision must be traced to the tug or steamer, or both. The steamer is not at fault, so far as the present issues are concerned, unless at a time immediately preceding the collision, and after her anchor had begun to hold and she had gone forward as above stated, she was negligently permitted to drop back on the tow by force

of the westerly wind and the slack in her anchor chain, of which she is accused. If her failure to put out two anchors on the anchorage grounds, whereby she drifted to the place of accident, could be regarded as negligent, as it is not, such alleged negligence was not the proximate cause of the collision, since at that time the anchor was holding the vessel, and the tug and tow were not embarrassed by the former mischance, nor by her presence in the wide main channel, of which they had timely notice. Before considering whether the Langfond did, at the commencement of the passage of the tug and tow, drop back upon the tow, and thereby contribute to the injury, the maneuver of the tow for the purpose of passing under the Langfond's stern should be considered. It is urged against the tug that she went to the eastward, under the Langfond's stern, rather than to the westward, across her bow. The channel is a mile wide. The ebb tides set strongly and naturally to the southwest at the place of collision, but the wind was strong from the west, which to some extent neutralized the usual set of the tide; and two or three coal barges had (one or all) dragged from the western anchorage grounds, so as to occupy some part of the main channel, but they were near the limit of the anchorage grounds. There was a broad mile for passage, and if, as claimed by the tug, the steamer was near the center of the channel, and the coal barges trespassed upon the main way, still there was undoubtedly room for the tug to go to westward; and yet she may not be criticised for passing under the steamer's stern, as she had for the purpose something like a thousand feet of clear water, and other similar tows had just passed in safety. But, if it be concluded that there was sufficient room to the eastward, why did the collision arise? From the evidence of the master of the tug, it is clear that he knew the precise situation of the Langfond at an early time. The evidence of the pilot of the tug shows that, even while he was far away, he had an opportunity to see, and in fact did see, the Langfond; that he saw her drifting at anchor, saw her anchor chain, saw her go forward of her anchor, drop back again on that account, go forward again,—in short, that whatever was done he saw done. He testified that he knew he had before him a vessel at anchor, and that he was to pass her as such. Such testimony is as follows:

"Q. The first time you saw this steamer, Langfond, did you think she was a ship at anchor? A. Yes, sir. Q. What made you think so? A. Because laying there; and, if I remember right, I think I see her anchor chain. Q. You saw her anchor chain out? A. Yes, sir. Q. You knew, then, that you had to pass a ship at anchor? A. Yes, sir. Q. On one side or the other? A. Yes, sir; and made calculations for that. Q. You meant to do your whole duty with reference to that? A. Yes, sir. Q. When did you cease to see that she had an anchor chain? A. I don't know. Q. Was there any time before you passed her that you saw she hadn't taken up her anchor chain? A. That she hadn't taken them up? No, sir. Q. You knew all the while she had an anchor chain out? A. Yes, sir. Q. What made you think she was going to sea? A. By her working ahead. I thought they were heaving an anchor when they worked ahead. Q. They were heaving the anchor, and that is your reason for thinking that? A. Yes. Q. But she was still during all that time,—an anchored ship, so far as you are concerned? A. Yes, sir. Q. And your duty was to pass her as an anchored ship? A. And, if she hadn't drugged that anchor, we would have passed her in safety. There was plenty of room. Q. When you saw her back before she moved forward, you thought she was then

heaving her anchor? A. Getting her anchor; yes, sir. Q. She went forward 500 or 600 feet, and backed up 500 or 600 feet. What did you think she was doing that for? A. I thought maybe she stopped her engine, as they do sometimes when they run over an anchor, like that, and come back again. I thought she had gone over the anchor."

In view of this evidence, it is easily concluded that it was the duty of the master of the tug to use care to adjust his course so as to take the tug and her tow past the Langfond, regarded as an anchored ship. He made proper calculations for the tug, but not for the tow, which left the barge helpless, as they were without steering apparatus. It will be observed that he and other witnesses for the tug place the distance at which the tug passed the stern of the steamer at 250 feet. But the master of the tug states that when the first scow arrived opposite the stern of the steamer the distance was reduced to 100 feet. Further questioning enlarged the space possibly to 125 or 150 feet. The mate of the tug fixes the distance between the tug and the steamer at 250 feet, and the distance between the first scow and the steamer at 100 feet. Now, it appears that it was not until the first scow reached a position astern the steamer that the ship's propeller stopped its motion, and that thereafter she took on the motion astern of which the Ferguson complains. Hence, in going 250 feet, the length of the leading hawser, the tow was brought 100 to 150 feet nearer to the steamer than was the tug when she passed the steamer; that is, by some force not attributable to the steamer, the tow approached the steamer about 1 foot for every 2 feet it went forward. The scows would probably average 100 feet in length, so that by the time the third scow was reached the tow would have advanced some 200 feet more, and the forward part of the third scow would, by the same ratio, have been near to or in contact with the propeller; and the evidence is that the collision was with the forward part of the third scow. This mathematical demonstration, based on the evidence of the master and mate of the tug, cannot be escaped, and shows that before the propeller stopped, or the steamer began to drop astern on the tow as claimed, the tow was directed towards the propeller, and that the traction, continued at the same rate, must have produced the collision between the third scow and the propeller, just as in fact it did occur. Now, the evidence is undisputed that the tug, after passing the steamer, pulled several points to the westward; and this undoubtedly drew his tow, aided by the southwesterly set of the tide, directly upon the steamer. There is much evidence in behalf of the tug that the turning of the tug several points to starboard would tend to throw the tow to the eastward; but the fact is glaring, and overcomes theory: The tail of the tow approached, and did not recede from, the steamer. There is very much evidence that the tug passed nearer the steamer than stated by the master and mate of the tug, but it is sufficient to accept the narration of such persons. That explains the collision, and disposes of the claim that the collision was caused by the steamer going astern upon the tow. The evidence of those on board the steamer is that she did not go astern, and that she was stopped because it was seen that a collision was imminent. It is useless to pursue the question. It is evident that the tug drew her tow into a ship obviously at anchor,

and that she did not make sufficient allowance for the tow in rounding the stern of the steamer. The libelant Helliesen should have a decree for damages against the Ferguson, with costs, and the libelant the Interstate Dredging Company should have a decree against the Ferguson, with costs; but the libel as to the Langfond is dismissed.

THE COMET.

(District Court, S. D. New York. May 11, 1900.)

COLLISION—VESSEL DRIFTING FROM ANCHORAGE.

The schooner yacht Comet, 62 tons and length 80 feet, was anchored in her usual grounds during a night in summer, when a sudden and severe squall came up, the wind blowing for 15 minutes at from 40 to 60 miles an hour. Six men were on board below, and at once came up and dropped a second anchor, the two weighing 400 and 600 pounds, respectively. The anchors dragged for a distance, and then held, but subsequently again dragged, and the vessel drifted against a pier, and in doing so injured another yacht, which had just previously drifted to the pier and had been made fast. *Held*, that the injury was due to a peril of the sea, and not to any failure in the use of reasonable nautical skill, or to insufficient anchors or the selection of improper anchorage grounds, the Comet having anchored on the same grounds, using the same anchors, for 20 years previously, without mishap; nor could she be charged with fault, under the circumstances, in failing to keep an anchor watch, which was not customary on such vessels, and would not have changed the result.

In Admiralty. Suit for collision.

George H. Bruce and Philip Carpenter, for libelant.
Pryor & Truax, for claimant.

BROWN, District Judge. A little after 1 o'clock in the morning of June 29, 1899, the sloop yacht Thorn of about 8 tons, and 51 feet long, and the schooner yacht Comet of 62 tons' burden, and about 80 feet long, were both driven from their usual anchorage grounds off Bay Ridge in a sudden squall, and dragging their anchors brought up against the long pier at the foot of Sixty-Fifth street, Brooklyn. The Thorn reached the pier first, and was there made fast alongside without much damage. A few minutes afterwards the Comet was carried past her; but her main boom projected considerably beyond her stern and raked across the deck of the Thorn and carried away a portion of the Thorn's cabin, broke her mast, and did some other damage, for which the above libel was filed. The Comet brought up a little inside of the Thorn, her overhanging stern running up over the pier and a part of her hull resting upon a float belonging to a club boat house near the pier.

Upon the whole testimony I think the accident should be classed with perils of the sea, as properly attributable to the sudden and extraordinary violence of the squall, and not to any failure in the use of reasonable nautical skill and prudence, or of insufficient anchors, or the selection of improper anchorage ground.

The anchorage had been a usual and customary place for anchoring

for a long time; the Comet had been anchored in about the same position by ranges for some 20 years previous; her two anchors were of about 400 and 600 pounds each, and she had never dragged from her anchorage there before. Her position was about a quarter of a mile off shore, that is, about 700 feet outside of the Sixty-Fifth street pier, which was itself about 700 feet long; and she was about 300 or 400 feet to the northward of that pier. The Thorn had come in not long before the squall and had anchored a little inside of the Comet. It was a mild summer night, the wind was light until two minutes past 1 a. m., when the squall came on from the northwest or north northwest, blowing for five minutes at the rate of 66 miles per hour; during the next five minutes, 56 miles per hour; during the next five minutes, 40 miles; and for some time afterwards at the rate of 30 miles per hour. Six men were on board the Comet and all were below when the squall came on with rain, without previous warning. The quarter master immediately came on deck and the second anchor was thrown out. After dragging so as to be about on a line with the end of the Sixty-Fifth street pier, the anchors held for a few minutes, during which time the Thorn drifted past, dragging her anchors on the port side of the Comet, but too far away to send her a line which was called for. Soon afterwards the Comet again dragged and touched the pier, first outside of the Thorn, and afterwards raked across her with her boom, as above stated. The watchman at the dock and the man in charge of the boat house say that the Comet came in from five to seven minutes after the Thorn. From this testimony it is probable that the Comet's first dragging was during the first few minutes of the squall, and that her anchors then held her for not more than from five to seven minutes. Her men say, that as the violence abated, the wind continued puffy; so that her anchors were probably again loosened by the gusts in the natural rising of the waves.

Complaint is made that the Comet should have had an anchor watch; but the evidence is that an anchor watch is not customary upon yachts in that region. It was not a place where other vessels were to be expected; and the likelihood of any such violent storm as to cause dragging (which had not happened to the Comet there in 20 years) was so small in the summer season, that I cannot find that the maintenance of an anchor watch was obligatory, having reference merely to so improbable a contingency as this. It is evident, moreover, that an anchor watch would not have avoided dragging. The approach of a thunder shower at night, even if it could have been perceived by a watch, would not have excited apprehension or caused any additional anchor to be cast over until the squall had come and shown that another anchor was necessary. In fact the squall came on with almost instantaneous suddenness, and the men came up at once; so that the second anchor was thrown out within a minute or two as early as it could have been thrown if an anchor watch had been on deck. Evidently this would have made no difference in the result.

It is also urged that the yacht might have made sail and crawled off after the wind had abated somewhat. The weight of expert evi-

dence on this head is altogether against this contention. I have no doubt that the Comet reached the Thorn within the first 15 minutes of the squall, during which time the wind ranged from 66 miles to 40 miles per hour; and in such a wind I am satisfied that nothing useful could have been accomplished by any attempted use of the sails. The weight of testimony is that had any such attempt been made, it would have resulted in carrying the Comet ashore more quickly, and that the only reliance was upon the anchors, and on paying out the chain. This was done. When the Comet's anchors first held near the line of the pier, it was reasonable to suppose that they would continue to hold; and considering the small space available, and the very high gale, then from 40 to 56 miles per hour, it would seem to me a very foolish act to touch the sails while the anchors held, and that raising them after she began to drift again would have been useless and would have sent her ashore the more quickly.

The proof on these points on the part of the libellant, is especially defective in two respects: First, in the absence of any expert skilled in the use of yachts; and, second, the failure to call the master of the Thorn, the only man on board her, though during part of the trial he was in court. He especially was presumptively best acquainted with all the circumstances of the occasion, and should have been the first person to point out any negligence in the management of the Comet, if there was any. On the part of the claimant, on the other hand, the evidence of the best experts is that the anchors were reasonably sufficient and that there was no mismanagement of the boat. The proof shows that the anchors did not foul, and that the dragging was purely from the violence of the wind.

The cases cited by the libellant of *The Mary E. Cuff* (D. C.) 84 Fed. 719, and *The Eloina*, 10 Ben. 458, Fed. Cas. No. 4,420, and *The Martha Davis* (D. C.) 94 Fed. 559, are plainly inapplicable, as in those cases no second anchor was thrown out; while in the first above case and also in *Clapp v. Young*, 1 Sprague, 40, Fed. Cas. No. 2,786, no person was left on board.

Libel dismissed, but without costs.

WESTERN UNION TEL. CO. v. WHITE.

(Circuit Court, W. D. Virginia. June 30, 1900.)

REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—EVIDENCE—JURISDICTION.

To an action to restrain the prosecution of a suit in a state court because of the removal to the federal court of a previous suit based upon the same cause of action, which was still pending defendant answered that, while in the writ filed in the first action his demand was placed at \$2,500, it was his intention to claim only \$1,500; that he paid the writ tax required by the laws of the state upon that sum only; and the first action was dismissed, and the second suit brought, because of a mistake in the form of the action. *Held* that, no declaration having been filed in the first action, the amount in controversy must be determined from defendant's answer herein, and, it appearing that this was but \$1,500, the federal court was without jurisdiction thereof, and the same should be remanded to the state court, and the injunction restraining the second action dissolved.¹

In Equity. On motions to dissolve injunction awarded the plaintiff against the defendant, and to remand action at law to the state court.

Scott & Staples, for plaintiff.

R. W. Winborne, for defendant.

PAUL, District Judge. In this cause the plaintiff filed its bill praying that the defendant be enjoined from prosecuting two actions at law, one in trespass and the other in debt, both instituted in the corporation court of the city of Buena Vista, Va. The complainant is a nonresident of the state of Virginia. The bill alleges that on the 19th day of December, 1899, the defendant, Hugh A. White, brought an action at law in the corporation court of the city of Buena Vista to recover damages of the plaintiff, the telegraph company, for its failure to deliver to the said Hugh A. White a message sent by one G. W. White in the month of ———, 1899, from Moorefield, W. Va.; the plaintiff in said suit laying his damages in the writ at \$2,500. The process issued in said action at law was made returnable to the rules to be held on the first Monday in January, 1900, and was served on the 19th day of December, 1899. That on the 28th day of December, 1899, the defendant, the telegraph company, delivered to the clerk of the corporation court of Buena Vista, its petition for the removal of said action into this court, and at the same time executed and delivered to the clerk a bond, with security, as required by the statute. The petition and the bond were filed on the 29th of December, 1899, the clerk indorsing each as follows: "Filed December 29th, 1899, after case ordered dismissed. D. H. Rucker, Clerk." The bill further alleges that after the filing of the petition and bond for removal, to wit, on the 21st day of February, 1900, the said Hugh A. White, upon the same cause of action embraced in the suit first mentioned, instituted two other actions at law in the corporation court of the city of Buena Vista against said telegraph company; in one claiming the sum of \$1,500, and in the other the sum of \$250. The bill further al-

¹ Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75, and *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

leges that the cause of action on which these two suits are founded is identically the same as that on which the first suit is based; that the defendant, Hugh A. White, proposes to abandon the first suit instituted, and to rely on the two suits last brought; that the claims are placed at less than \$2,500; that all this is being done for the purpose of evading the jurisdiction of the federal court; that, on the filing of the petition and bond for the removal of the case into this court, this court became invested with jurisdiction of all matters of controversy between said White and said telegraph company; and that the corporation court of the city of Buena Vista was thereby deprived of all jurisdiction in the premises, and has no right to entertain any action that might be thereafter brought by said White on the same cause of action,—and prays that said White be enjoined from prosecuting the two actions at law instituted by him against complainant, and now pending in the corporation court of the city of Buena Vista. The injunction was granted as prayed for, and the motion now before the court is to dissolve this injunction. The defendant, White, files his answer to the bill, and avers that in the action which he instituted in the corporation court of the city of Buena Vista on the 19th day of December, 1899, which was an action of assumpsit, the damages claimed or expected to be claimed did not amount to \$2,500, or anything like that sum, though this was the amount of damages laid in the writ; that the action of assumpsit was brought for the purpose of recovering the statutory penalty allowed in the state of Virginia against telegraph companies for failure to deliver messages promptly, and also for the recovery of such damages as he might be entitled to recover as the sendee of such message by reason of the default of the defendant in its contract for the transmission and delivery of the message; that, after the writ issued, it was his purpose to prepare and file a proper declaration setting forth therein his cause of action, both for the statutory penalty and for the damages resulting from the breach of contract, but that he never expected to claim in such declaration, or to recover as much as \$2,500 in any event, even with the statutory penalty and damages added together, and at the time he instituted said action “he advised the clerk of the corporation court of the city of Buena Vista that he did not expect to claim or recover more than \$1,500, and that the writ tax as required by the laws of Virginia should be paid only upon that amount; and that this was accordingly done.” He files as an exhibit with his answer the receipt of the clerk, supported by the affidavit of the clerk showing that the writ tax paid was on the sum of \$1,500. He further avers that upon an investigation of the law upon the question of pleading and practice in the state of Virginia he was advised that he could not maintain an action of assumpsit for the statutory penalty, nor could he, as the sendee of such message, maintain such action for damages resulting from the breach of any contract, and that for other reasons an action of trespass on the case was preferable; that for these and other considerations he, on the 29th day of December, 1899, before the return day of the writ, and before he had any intimation or suspicion that the defendant would make an effort to remove said action into this court, gave notice to the clerk of the corporation court of the city of Buena

Vista that said action was abandoned, and ordered the same to be dismissed without prejudice; and that the clerk dismissed the same as directed. The answer denies that the petition and bond of the defendant in the action at law in the state court were delivered to the clerk of that court on the 28th day of December, 1899, and avers that the said petition and bond were not delivered to the clerk of said court until after the plaintiff in said action had directed the same to be dismissed. As evidence of this he files the memorandum entered by the clerk, ordering the dismissal of the case, as follows:

"The clerk of the corporation court will please dismiss the above case of Hugh A. White vs. Western Union Telegraph Company, without prejudice to Hugh A. White in bringing a new action. Dismiss at 1st January rules, 1900.

"Dec. 29th, 1899.

Hugh A. White, Plaintiff."

The correctness of this entry is sustained by the affidavit of the clerk of the state court. The clerk of that court also makes an affidavit that the order to dismiss the action at law was given him about half past 9 or 10 o'clock in the morning of the 29th of December, 1899, and that the petition and bond of the defendant for the removal of the case into the federal court were received by mail about 4 o'clock in the evening of that day. At the March term, 1900, of this court at Lynchburg, the Western Union Telegraph Company filed a copy of the record of the action at law instituted on the 19th day of December, 1899, and the same was docketed. From an inspection of the record it appears that the petition and the bond were not presented to the state court, and that no action thereon was taken by that court. Whether this must be done before a copy of the record can be filed in this court it is not material to consider. The motions to dissolve the injunction and to remand the action at law to the state court are based on two grounds: First, that at the time the petition for removal was filed in the clerk's office of the state court the plaintiff had directed his action to be dismissed, and that there was at that time no suit pending which could be removed; second, that the amount in controversy in the action sought to be removed is not sufficient to confer jurisdiction on this court.

It will only be necessary to consider the second ground. The amount of damages alleged in the writ is \$2,500, and the defendant therein, the telegraph company, insists that this sum must determine the question of jurisdiction, there being no declaration filed at the time the petition for removal was filed; that, \$2,500 being the amount of damages claimed in the writ, the plaintiff cannot be allowed, after the petition for removal has been filed, to show that the amount he intended to demand in his declaration, had he filed one, was the sum of \$1,500. It is well settled that "in all actions where the relief demanded is a judgment in money the amount claimed by the plaintiff as due to him is the amount in controversy, and furnishes the test of jurisdiction; but this amount is to be ascertained not merely by the sum named in the ad damnum clause, or the prayer for judgment, but also by a consideration of the amount of the debt or damages as set out in the body of the declaration." Black, Dill. Rem. Causes, § 52; Lee v. Watson, 1 Wall. 337, 17 L. Ed. 557; Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; Bowman v. Railway Co.,

115 U. S. 611, 6 Sup. Ct. 192, 29 L. Ed. 502; *West v. Woods* (C. C.) 18 Fed. 665. No declaration having been filed in this case in the state court, the only claim demanded in the record is the amount of damages laid in the writ. The only other evidence before the court as to the amount in controversy is that offered by the plaintiff to show that, had he filed his declaration in the state court, it was his purpose to claim therein only \$1,500. This court has no power to compel the plaintiff to file a declaration showing what he claims, so as to determine the amount in controversy. It will have to settle this question on the testimony of the plaintiff in that suit as it is presented in his answer to the bill of injunction. The tax law of Virginia (Acts Assem. 1883-84, c. 450, § 14) provides for a tax on suits commenced in a circuit or corporation court. This is known as a "writ tax," and in each suit (except a suit in chancery) "there shall be a tax thereon, if the amount of debt or demand for damages shall not exceed five hundred dollars, of one dollar; and when the debt or demand for damages exceeds five hundred dollars, there shall be an additional tax of ten cents for every hundred dollars or fraction of one hundred dollars of such debt or demand, in excess of five hundred dollars: provided that in all such suits the plaintiff or his attorney may endorse upon his writ or notice the real amount claimed in his action, and the tax upon the suit shall be fixed with reference to the amount so claimed." The plaintiff, when he brought his action, paid the writ tax on \$1,500. In addition to his own affidavit that he paid the writ tax only on the sum of \$1,500, he files the certificate, under oath, of the clerk of the corporation court of the city of Buena Vista, which is as follows:

"Hugh A. White vs. Western Union Tel. Co.

"Action Trespass on the Case in Assumpsit.

"I hereby certify that at the time the plaintiff brought the above suit he declared he did not expect to recover in excess of fifteen hundred dollars, and writ tax made accordingly.

D. H. Rucker, Clerk."

This evidence fully sustains the plaintiff in his assertion that when he brought his action it was his intention to claim but \$1,500 in his declaration, and not \$2,500, as the damages were laid in the writ. This being true, the amount in dispute, had the declaration been filed, would not be sufficient to give this court jurisdiction. The evidence fails to sustain the contention of the defendant company that the first action was dismissed, and two separate actions brought for the purpose of evading the jurisdiction of this court. The plaintiff, White, appears to have acted in good faith in the course he pursued. He abandoned his first action because he had made a mistake in the remedy he had adopted, and directed its dismissal before the defendant filed its petition and bond for removal, and before he knew that the removal was contemplated. The injunction awarded herein on the 22d day of March, 1900, restraining Hugh A. White from prosecuting two actions at law in the corporation court of the city of Buena Vista, will be dissolved, and the bill dismissed, at the costs of the plaintiff in injunction. The action at law of Hugh A. White against the Western Union Telegraph Company will be remanded to the corporation court of the city of Buena Vista, with costs to the plaintiff.

INTERSTATE COMMERCE COMMISSION v. LOUISVILLE & N. R. CO.
et al.

(Circuit Court, S. D. Alabama. December 2, 1899.)

No. 207.

1. CARRIERS—CONCLUSIONS OF INTERSTATE COMMERCE COMMISSION—PRESUMPTION OF CORRECTNESS.

Findings of fact in a report of the interstate commerce commission are made by law prima facie evidence of the matters therein stated, and the conclusion of the commission, based upon such findings, that a rate charged by a railroad company between two points is unreasonable and unjust, is presumed to be well founded and correct, and will not be set aside unless error clearly appears.

2. SAME—ENFORCEMENT OF ORDERS OF COMMISSION.

Findings and conclusions of the interstate commerce commission that the transportation of freight by the defendant railroads from New Orleans to Lagrange, and the transportation of like freight from New Orleans to other and more distant points, were under substantially similar circumstances and conditions, and that a higher rate charged to Lagrange than to the more distant points was discriminative, and also unreasonable and unjust in itself, and in violation of the interstate commerce law, affirmed, and an order based on such findings enforced by injunction.

In Equity. Suit by the interstate commerce commission against the Louisville & Nashville Railroad Company and others to enforce an order of the commission relating to rates charged by the defendant companies. See 101 Fed. 146.

L. A. Shaver and M. D. Wickersham, for complainant.

Ed. Baxter, for defendants.

TOULMIN, District Judge. On careful examination and consideration of the evidence and arguments in this case, the court concurs in the conclusion of the interstate commerce commission:

1. That the transportation of freights by defendants from New Orleans to Lagrange, and the transportation of like freight from New Orleans to Hogansville, to Newnan, to Palmetto, and to Fairburn, are under substantially similar circumstances and conditions, and that freight rates over defendant's line, which are higher from New Orleans for the shorter distance to Lagrange than for the longer distance to either of the other places mentioned, violate section 4 of the act to regulate commerce.

2. That higher rates charged by defendants from New Orleans to Lagrange than for longer distances from New Orleans to Hogansville, Newnan, Palmetto, and Fairburn on traffic carried under like conditions and circumstances, and at less cost for the transportation service to Lagrange, are unreasonable and unjust to the petitioner, Fuller E. Calloway, and subject him, and, as a locality, the city of Lagrange itself, to undue and unreasonable prejudice and disadvantage, and give undue preference and advantage to the localities of Hogansville, Newnan, Palmetto, and Fairburn, and dealers and merchants doing business therein, and that said higher rates are in violation of sections 1 and 3 of said act.

3. The court is not so clear as to the proposition that the rates from New Orleans to Lagrange are unreasonable and unjust in themselves, and relatively so as compared with the rates to Atlanta. The question as to what is a reasonable and just rate is a very difficult one. "No more difficult problem can be presented than this." *Ames v. Railroad Co.* (C. C.) 64 Fed. 173; *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 332, 17 Sup. Ct. 540, 41 L. Ed. 1007. But the findings of fact in the report of the commission are made by law prima facie evidence of the matters therein stated, and the conclusions of the commission based upon such findings are presumed to be well founded and correct, and they will not be set aside unless error clearly appears. The record does not clearly show that the commission's findings and conclusions on this branch of the case are erroneous,—are not in accordance with the law and the evidence,—and the court should not overrule or in any manner interfere with them.

It being made to appear to the court that the order of the said commission here drawn in question has been disobeyed, it is ordered that a writ of injunction issue, in accordance with the prayer of the petition, restraining the defendants from further continuing such disobedience of said order, and enjoining obedience to the same.

MANHATTAN TRUST CO. v. SIOUX CITY & N. R. CO. (TRUST CO. OF NORTH AMERICA, Intervener).

(Circuit Court, N. D. Iowa, W. D. June 15, 1900.)

1. JUDGMENT—MATTERS CONCLUDED.

An adverse decree entered on a petition of intervention filed in a creditors' suit against an insolvent railroad company, and seeking to establish and enforce a landlord's lien against property of the company for the rental of terminal facilities under a lease, does not preclude the intervener from filing a second petition asking payment, from a fund in court from the subsequent earnings of the road under the receivership, of rentals accruing under the lease within six months prior to the receivership.

2. RAILROADS—RECEIVERSHIP—PREFERRED CLAIMS.

On a bill filed by the trustee in a railroad mortgage, on behalf of all creditors of the company, for the conservation of its property, receivers were appointed, who operated the road until its sale under a foreclosure of the mortgage subsequently had under an amended bill. *Held*, that a claim against the company for rental of terminal property accruing under a lease within the six months prior to the receivership was entitled to priority of payment over the bondholders from the fund in court produced by the operation of the road by the receivers, as an ordinary and necessary running expense of the road.

In Equity. On intervening petition.

Strong & Cadwalader, Geo. N. Wickersham, and Craig L. Wright, for complainant.

Bevington & Kennedy, for intervener.

SHIRAS, District Judge. The proceedings with which the intervention petition now before the court is connected were commenced in this court on the 5th day of October, 1893, by the filing of a bill by the Manhattan Trust Company as trustee in a mortgage executed by the

Sioux City & Northern Railroad Company to secure an issue of bonds in the sum of \$1,920,000. The purport of this bill was not to obtain a foreclosure of the mortgage, for at the time it was filed the mortgagor was not in default in the payment of any portion of the mortgage debt, either principal or interest, but it was filed for the purpose of obtaining the appointment of a receiver to take the charge and management of the railway property covered by the mortgage, on the ground that the mortgagor was permitting the property to become incumbered with liens for unpaid taxes, and in other ways was allowing the property to be wasted and depreciated; and it was prayed that a receiver be appointed by the court, to take possession of the property and operate the same, to the end that the income therefrom should be properly applied, and the property should be preserved for the benefit of all interested therein. In accordance with the prayer of this bill, receivers were appointed, who took possession and control of all the property of the Sioux City & Northern Railroad Company; and under the orders of the court they paid off all the back and accruing taxes, the sums due employes and for supplies furnished, the balance due connecting roads, made all necessary repairs to place and keep in good repair the roadbed and rolling stock belonging to the railway company, and also paid on the interest coming due to the bondholders the total sum of \$234,000. Subsequent to the filing of the original bill and the appointment of the receivers, installments of interest came due on the mortgage bonds, and were not paid; and thereupon an amended bill was filed in the case, praying for the foreclosure of the mortgage, and finally a decree of foreclosure was entered, the property was sold, and about January 1, 1900, the possession thereof was delivered up to the purchaser at the sale,—the purchase being in fact made for the benefit of the bondholders. The accounts of the receivers have been duly settled and approved, and after paying all the foreclosure costs and expenses, the compensation of the receivers, and all other claims connected with the receivership, there now remains in the registry of the court the sum of \$71,160.91. The intervener, the Trust Company of North America, now brings before the court the claim for rental due to the Sioux City Terminal & Warehouse Company under the terms of a lease executed by the terminal company to the Sioux City & Northern Railroad Company under date of December 14, 1889, whereby the terminal company leased to the railroad company its depot, depot grounds, and other terminal facilities at Sioux City for the term of 99 years, at the agreed rental of \$90,000 per year, payable quarterly. Upon a petition of intervention heretofore filed in this case on behalf of the Trust Company of North America, it was held and adjudged by this court that the terminal company, notwithstanding the fact that it had executed a mortgage to the Trust Company of North America upon the leased property, still retained the right to terminate the lease according to its terms, and that the terminal company had exercised this right by the action to that end taken under date of December 23, 1893, and further held that the terminal company was not entitled to a landlord's lien upon the rolling stock of the railroad company used in and about the leased premises. The present or amended petition of intervention seeks to obtain an order for the payment of the

rental due, on the ground that it is a claim arising out of the ordinary running of the railroad, which is in equity, and under the particular facts of this case, entitled to payment in preference to the debt due the bondholders; and it is also claimed that the Trust Company of North America, which has succeeded to the rights of the terminal company in said lease under a sale upon foreclosure of a mortgage by the terminal company, is entitled to demand from the Sioux City & Northern Railroad Company rental at the stipulated sum of \$90,000 up to the present date. As already stated, this court has ruled and decreed that the lease in question was terminated by the action of the terminal company taken on December 23, 1893, and the terminal company and the intervener, as successor to its rights, cannot now claim rental under the terms of the lease after that date. In considering this question, this court held that although, under the terms of the lease, the larger part of the rental was to be paid to the trust company for the benefit of the bondholders secured by the mortgage executed by the terminal company, yet the lease secured to the terminal company the right to terminate the lease. If the trust company, as the representative of the bondholders, deemed the action taken by the terminal company in terminating the lease to be inimical to the interests of the bondholders, it should have taken steps to set aside the action of the terminal company, but it has not done so; and therefore the rights of the parties must be determined on the basis of acquiescence in the action taken, which, as stated, terminated the lease on December 23, 1893. The receivers continued to use the depot at Sioux City, and have paid the price agreed upon for such use and occupation of the premises since October 5, 1893; and therefore the intervener has no claim for rental or for the use of the premises since that date. On that date, however, there was due and owing from the railroad company to the terminal company for the rental of the depot grounds for the three months ending September 14, 1893, the sum of \$22,500, and the further sum of \$5,250 for rental to October 5th; and the question arises whether this claim should not be paid out of the money in the registry of the court.

On behalf of the Manhattan Trust Company, as the trustee in the mortgage executed by the railroad company, it is contended that the proceedings had on the first or original petition of intervention filed by the present intervener are a bar to the claim now presented. An examination of the petition shows that it was intended to assert the right of the Trust Company of North America to collect the rentals of parts of the Terminal Building leased to third parties, and not occupied by the railroad company, and also to assert a claim for a landlord's lien under the statutes of Iowa upon the property of the railroad company used upon the leased premises. The petition did not present the equity now relied on; nor did the court, in its opinion or decree, consider or pass upon the questions now presented, and therefore in fact there has not been had an adjudication thereon. It is, however, strongly contended that the decree entered must be held to be an adjudication on all the claims the intervener could have urged in aid of its rights, and in support thereof counsel cite *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195; *David Bradley Mfg. Co. v.*

Eagle Mfg. Co., 18 U. S. App. 349, 6 C. C. A. 661, 57 Fed. 980; Franklin Co. v. German Sav. Bank, 142 U. S. 93, 12 Sup. Ct. 147, 35 L. Ed. 948. The original petition of intervention was intended to present the question of the right to a landlord's lien upon specific property. In hearing this matter, the court decided that the lease had been terminated by the action of the terminal company, and that, for the rental due, the right to a landlord's lien did not exist; and, under the rule laid down in the cases cited, the intervener is precluded from relitigating these questions, no matter what new facts or views of the law might be advanced to show that a different conclusion should have been reached thereon. But this does not prevent the intervener from now asserting a right to be paid out of the money in the registry of the court. When the original petition was presented, this fund had not been accumulated, and it could not be known whether the income from the property in the hands of the receivers would be sufficient to cover the claim of the intervener, after paying the necessary operating expenses, and discharging the lien for taxes and other like matters. It is therefore open to the intervener to insist upon its right to payment out of the funds in the hands of the court, and the question presented is whether this claim for rental due for the use of the terminal facilities by the railroad company should be paid, in preference to the mortgage debt, out of a fund realized from the property while in the hands of the receivers. The rental in question came due during the six months preceding the appointment of the receivers. It is a debt arising out of the ordinary running and management of the railroad, being the rental for the use and occupation of the depot and depot grounds at Sioux City; and therefore was strictly part of the ordinary and necessary running expenses of the railroad, payment of which was expected to be made out of the income of the railroad company.

If the court had not taken possession of the railway property by the appointment of the receivers, the income from the property would have been applicable to the payment of the rental in question, in preference to the payment of the mortgage debt, under the rule laid down in *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339; and the appointment of the receivers did not change or defeat the right and equity of the intervener in this respect. As already stated, the receivers were appointed and possession of the property was taken under the original bill filed, which was not a bill for the foreclosure of the mortgage, but was a bill filed on behalf of all parties interested, which would include the terminal company, whose rights are now represented by the intervener. The debt for the use of the terminal property at Sioux City is a claim enforceable against the railroad company, and one which, in the ordinary management of the affairs of the company, would have been properly payable out of the income of the road. The court is now in possession of the income in an amount more than sufficient to pay the sum due for rental, and, unless the bondholders can show a better right thereto, no reason exists why the rental should not be paid. The rights of the bondholders are created by the trust deed or mortgage executed to the Manhattan Trust Company, and this instrument does not in terms create a lien in favor of the bondholders

upon the income derived from the mortgaged property, and the receivers took possession of the property as much for the benefit and in the interest of the terminal company as for the bondholders. The possession of the mortgaged property did not pass to the bondholders until delivery thereof in pursuance of the sale, which delivery took place on January 1, 1900, and there is no ground for holding that a lien proper in favor of the bondholders was created on the income of the property prior to that date. The right of the bondholders to the fund in court, which is the balance of the income realized before January 1, 1900, is not, therefore, a lien prior in right and equity to the claim of the intervener; but, on the contrary, it is a claim which in equity must be held to be inferior to the right of the intervener. The equity of the intervener is based upon the fact that the income from the property should be applied to the payment of the sum due for the use and occupancy of the depot grounds in Sioux City, as that was a necessary expense in the management of the road. The receivers took possession of the depot, in connection with the other property, on the 5th of October, 1893, and have paid for the use thereof since that date. The claim of the intervener, therefore, is limited to that date, and consists of the amount coming due September 14, 1893, to wit, \$22,500, and the sum due up to October 5th, to wit, \$5,250, or in all the sum of \$27,750, which, with interest from maturity, constitutes the sum total to which the intervener is entitled to be paid out of the fund in the registry of the court, together with the costs of this proceeding. Decree accordingly.

A. B. FARQUHAR CO., Limited, v. NATIONAL HARROW CO.

(Circuit Court of Appeals, Third Circuit. June 1, 1900.)

No. 30.

INJUNCTION—GROUNDS—THREATENING SUITS FOR INFRINGEMENT OF PATENTS.

While the owner of a patent may lawfully warn others against infringement, and, by means of circulars or letters distributed among agents and customers of a manufacturer of goods claimed to infringe, give notice of his rights as he understands them, and of his intention to enforce them by suits, when done in good faith, the sending of such notices and circulars in bad faith, and without any intention of bringing the suits therein threatened, but solely for the purpose of destroying the business of such manufacturer, constitutes a fraudulent invasion of property rights, against which the party injured is entitled to relief in equity by injunction.

Appeal from the Circuit Court of the United States for the District of New Jersey.

William C. Strawbridge and John G. Johnson, for appellant.

E. H. Risley and Risley & Love, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. We entirely concur in the statement of the court below that "the patent owner is justified in using all lawful means to protect his monopoly," and that "he may give notice of his rights as he understands them, and of his intention to ask the courts

to enforce them in suit to be brought for the purpose." But the bill in this case, which was dismissed on demurrer (99 Fed. 160), charges the defendant with something more than the use of lawful means to protect its monopoly. It alleges, not merely that the defendant is giving notice of its rights and of its intention to enforce them, but that it—

"Is now endeavoring to break up and destroy the harrow business of your orator, and to drive it out of the field of the manufacture of spring-tooth harrows. * * * by the circulation among the customers and agents of your orator of letters, addressed and mailed to said customers and agents, in and by which said customers and agents are falsely and maliciously informed that the harrows of your orator's manufacture, handled by said customers and agents, are infringements upon patents owned by the defendant corporation; * * * that the threats of the defendant company against the customers and agents of your orator are rendered the more effective and harmful to the business of your orator by circulars in which, by innuendo, it is conveyed to customers and agents of your orator, and contrary to the fact, as the defendant, the National Harrow Company, and its officers, well know, that your orator is not able to fulfill, by reason of lack of means, and will otherwise evade, guaranties given by your orator to its customers and agents to protect them against suits for infringement brought by the National Harrow Company against them; that said threats of the defendant against the customers and agents of your orator are rendered still more effective by the circulation by the defendant company of notices in and by which it is falsely stated and pretended that certain patents owned by the defendant company have been adjudicated and sustained in contested cases, and injunctions issued against the defendants therein; that the defendant has continued for many years, and particularly for the past three years, the sending of the letters and circulars hereinbefore referred to, to the customers and agents of your orator, for the purpose of breaking up and destroying your orator's business in spring-tooth harrows; that the threats of suit against the customers and agents of your orator are not made in good faith, or with any intention of instituting suit against such customers or agents or against your orator."

Assuming, as on demurrer must be assumed, the truth of these allegations, we are of opinion that the court below erred in holding them insufficient to entitle the complainant to relief in equity. Where notices are given or circulars distributed in good faith to warn against infringement, no wrong whatever is committed; but where, as is here averred, they are not made or issued with such intent, but in bad faith, and solely for the purpose of destroying the business of another, a very different case is presented. In such a case property rights are fraudulently assailed, and a court of chancery, whose interposition is invoked for their protection, should not refuse to accord it. *Emack v. Kane* (C. C.) 34 Fed. 46; *Kelley v. Manufacturing Co.* (C. C.) 44 Fed. 23, 10 L. R. A. 686; *Casey v. Union* (C. C.) 45 Fed. 135, 12 L. R. A. 193; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.* (C. C.) 54 Fed. 730, 19 L. R. A. 387; *Computing Scale Co. v. National Computing Scale Co.* (C. C.) 79 Fed. 962; *Lewin v. Light Co.* (C. C.) 81 Fed. 904; *Railway Co. v. McConnell* (C. C.) 82 Fed. 65; *Adriance, Platt & Co. v. National Harrow Co.* (C. C.) 98 Fed. 118; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. The objection that the "bill is lacking in allegations necessary to establish jurisdiction of the circuit court" is not well taken. *Herbert v. Rainey* (C. C.) 54 Fed. 248-251; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, *supra*.

The decree is reversed, and the cause will be remanded to the circuit court, with direction to enter a decree disallowing the demurrer to the bill of complaint, and with leave to the defendant to answer within such time as that court may prescribe.

HOOVER v. SALLING.

(Circuit Court, W. D. Wisconsin. June 29, 1900.)

PUBLIC LANDS—ENTRY OF TIMBER CLAIM—APPLICATION—PERSONAL EXAMINATION OF LAND BY APPLICANT NECESSARY.

Under 20 Stat. 89, §§ 2, 3, requiring the applicant for the purchase of timber lands to make affidavit that the land is unfit for cultivation and valuable chiefly for timber, the applicant must have personally examined the land, so as to be able to make said affidavit from his personal knowledge.

Sanborn, Luse & Ellis, for complainant.
Lamoreux & Shea, for defendant.

BUNN, District Judge. The complainant brings her action to recover 160 acres of land from the defendant, by a bill of complaint as follows:

"Stella W. Hoover, residing at Iron River, Bayfield county, Wisconsin, and a citizen of the state of Wisconsin, brings this her bill of complaint against Ernest N. Salling, residing at Manistee, Michigan, and who is a citizen of the state of Michigan, and thereupon your orator complains and says: That the matter in controversy in this suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs. That on the 13th day of April, 1894, your orator was and still is a citizen of the United States, and a resident of the town of Iron River, in said county of Bayfield, and that the lands herein-after described then were surveyed public lands of the United States, not included within any military, Indian, or other reservation of the United States, and were and still are chiefly valuable for timber, and which had not and have not been offered at public sale according to the statutes of the United States, and that the same did not then and do not now constitute any mining claim under said laws, and did not and do not include the improvements of any bona fide settler, and did not then and do not now contain any gold, silver, cinnabar, copper, or coal, and were not and had not been selected by any state under any law of the United States donating lands for internal improvements, education, or other purposes, and that the said lands were then proper to be entered as public lands under the provisions of the act of congress of June 3, 1878, as amended by the act of congress of August 4, 1892. That on said 13th day of April, 1894, your orator, being then so entitled to enter said lands as aforesaid, duly filed with the register of the land district at Ashland, Wisconsin (being the land district in which the said lands then were and still are), a written statement in duplicate designating by legal subdivision the particular tract of land which she desired to purchase under the provisions of said act, correctly describing it as the south half of the northeast quarter of section five, township forty-eight north, of range seven west, in said county of Bayfield, and stating and setting forth in said application that she desired to purchase said tract of land; also, that the same was unfit for cultivation, and was chiefly valuable for its timber; that it was uninhabited; that it contained no mining or other improvements, and that, as deponent verily believes, it did not contain any valuable deposit of gold, silver, cinnabar, copper, or coal; that the plaintiff had made no other application under the said act; that she did not apply to purchase the same on speculation, but in good faith and to appropriate it to her own exclusive use and benefit; and that she had not directly

or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which she might acquire from the government of the United States should inure in whole or in part to the benefit of any person except herself,—which said application or statement was duly verified by the oath of the said applicant before the register of the said land office within the said district where the said lands were situated, and that all the statements and allegations of the said application were and are true. That upon the filing of said statement as provided in the said act the said register posted a notice of such application, embracing a description of the land by legal subdivision, as so described in said application, in his office, for a period of sixty days, and at the same time furnished to the plaintiff a copy of the same, which was published in a newspaper published nearest the location of the said premises for a like period of sixty days. That, after the said application of your orator was so made, one James Toole made an application under the said acts of congress to enter the said lands, and thereafter, and before the expiration of said period of sixty days, the said Toole, for a valuable consideration to him paid by your orator, duly relinquished in writing all his claim in or to the said land, and duly filed with said relinquishment in the said land office of the United States at Ashland aforesaid. That after the expiration of said period of sixty days your orator appeared at said land office and submitted her proof under the said application, and requested that her claim be allowed, and then and there offered to the land officer to pay for the same the price provided for in said acts of congress. On said day the said James Toole filed a protest against the application and entry of your orator, alleging that she had never been upon or seen the said land or any part thereof at the time she made her application, and that he, the said Toole, had filed an application under the said act of congress to enter the said land. That on said day your orator furnished to the said register of the land office satisfactory evidence that the notice of said application prepared by said register of the land office was duly published in said paper as required by said act of congress, and that the said land was of the character contemplated in the said act, was unoccupied and without improvement, and that it contained no valuable deposit of gold, silver, cinnabar, copper, or coal. That such proceedings were thereafter had in the said land office and in the general land office of the United States in the matter of the said application and entry of said land that the land officers of the United States erroneously and unlawfully held and decided that your orator was not entitled to enter the said land under the said acts of congress, for the reason that it was held that she had not, before making her application, made a personal examination of the said land, and that she did not offer to pay for the said land with her own money, but obtained said money from her husband. Your orator submits that the said rulings and decisions were erroneous and void, for the reason that your orator was and is a qualified entryman under the said acts of congress, and that no rule of said department could make it incumbent upon her to visit the said lands before making her application, and that it was entirely irrelevant to the said inquiry in the said land office whether the money offered to be paid by your orator was her own money, or belonged to her husband or some other person. That thereafter, and on the 23d day of January, 1897, the said officers of the United States duly issued to the said James Toole a certificate of the purchase of the said lands under the said act, and also issued to him a patent therefor, to the manifest prejudice and injury of your orator, which said patent was dated on the 6th day of April, 1897. That thereafter, and on or about the 5th day of November, 1898, by deed executed on that day the said James Toole and his wife sold and conveyed the legal title to said lands to one James Maloney, and that the said Maloney at the time of taking said deed had full notice and knowledge of the right and interest of your orator in said lands, and was not a purchaser thereof for value. That thereafter, and on the 7th day of November, 1898, by the deed executed on that day the said James Maloney and his wife sold and conveyed to the defendant the legal title to the lands herein described, and that said defendant at the time of making said purchase had full notice and knowledge of the right and interest of your orator in the said lands, and is not a bona fide purchaser thereof for value."

To this complaint the defendant put in a general demurrer.

The complainant by her said bill thus challenges the regulation of the land department requiring proof of a personal examination of the land under the act in question, and the question submitted is whether such regulations are reasonable and valid in law. Sections 2 and 3 of the act (see 20 Stat. 89) provide as follows:

"Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the general land office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

"Sec. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the general land office of the papers and testimony in the case, a patent shall issue thereon: provided, that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the commissioner of the general land office."

The benefits of this statute were afterwards, by act of congress of August 4, 1892 (chapter 375, 27 Stat. 348), extended to all "public land states." Pursuant to the above provision contained in section 3, the commissioner of the general land office prescribed certain regulations, which, so far as is known or suggested, have never been,

until this suit was begun, challenged or in any way brought in question. The construction given to this law by the land department of the government is shown by the regulations made after its passage in 1887 by Commissioner Sparks, contained in volume 6 of the Decisions of the Department of the Interior, relating to public lands (pages 114, 115, 116). Subdivisions 6, 7, 8, and 11 are as follows:

"(6) A person applying to purchase a tract under the provisions of this act is required to make affidavit before the register or receiver that he has made no prior application under this act; that he is by birth or naturalization a citizen of the United States, or has declared his intention to become a citizen. If native born, parol evidence to that fact will be sufficient. If not native born, record evidence of the prescribed qualification must be furnished. The affidavit must designate by legal subdivisions the tract which the applicant desires to purchase, setting forth its character as above; stating that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, if any exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title he may acquire from the government of the United States shall inure in whole or in part to the benefit of any person except himself. (7) Every person swearing falsely to any such affidavit is guilty of perjury, and will be punished as provided by law for such offense. In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land or of any right, title, or claim thereto, are absolutely null and void as against the United States. (8) The sworn statement before the register and receiver required as above (section 2 of the act) must be made upon the personal knowledge of applicant, except in the particulars in which the statute provides that the affidavit may be made upon information and belief." "(11) The evidence to be furnished to the satisfaction of the register and receiver at time of entry, as required by the third section of the act, must be taken before the register or receiver, and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by you upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. You will test the accuracy of affiant's information, and the bona fides of the entry, by close and sufficient oral examination. * * *

By the form prescribed for the applicant's sworn and final statement, on page 117, he is required to swear that he has personally examined the land, and from his personal knowledge states that it is unfit for cultivation and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor, as he verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal. Appended to those regulations is a statement signed by Mr. Lamar, secretary of the interior, dated July 16, 1887, to the effect that a strict compliance with them is required. These regulations show the contemporaneous construction which was placed upon the act by the land department after its passage. Upon full consideration of the language of the act, I cannot say that such a construction is not reasonable. The act specifies in terms wherein the sworn application may be made upon belief. From this circumstance alone it may be inferred that in all other respects the oath should be made from personal examination and knowledge. It was wholly reasonable and proper that in regard to mineral deposits,

which would be under the ground, the oath might be upon belief, but as to whether the land was timber land and unfit for cultivation, or farm land and adapted to farming purposes, could be told from personal inspection and knowledge. Considering the terms and purposes of the statute, it can hardly be presumed that a person residing in Maine or Florida, a thousand miles away, should be allowed to enter land in Wisconsin under the timber act by taking an oath as to the situation and character of the land upon information and belief, without any personal knowledge of the fact. Again, the act provides that, if any person taking the oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury. This, also, would point to the same construction, as it is hardly possible to punish for perjury upon an affidavit made on information and belief. A contemporaneous construction placed upon the act by the land department, whose business it was to administer the law, and acquiesced in for 13 years, should certainly have great weight with the court, and should not be disregarded, and patents of land by the government set aside, except for the strongest reasons and upon clear and palpable grounds. *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; *Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; 5 Land Dec. Dep. Int. 483. Upon the whole, therefore, I am of opinion that the regulations of the land commissioner under the statute in question are reasonable, and fairly calculated and intended to carry into effect the intent and meaning of the act of congress. The demurrer to the bill of complaint will be sustained, and the bill dismissed.

EDWARDS v. SOUTHERN RY. CO.

(Circuit Court, N. D. Georgia. June 12, 1900.)

No. 1,496.

1. NEW TRIAL—GROUNDS—INSTRUCTIONS.

A new trial will not be granted because of the inadvertent omission of the court to give an instruction requested, and to which the party was entitled, where no exception was taken to the omission, and it appears clear to the court that it did not affect the verdict.

2. SAME—EXCESSIVE VERDICT—DAMAGES FOR WRONGFUL DEATH.

In an action for wrongful death, under a statute which authorizes the recovery of the full value of the life of the deceased, although such value must be ascertained by calculations from earning capacity and probable duration of life, it is still a matter largely resting in the discretion of the jury, who are authorized to take into account the business capacity of the deceased, and other facts shown affecting his probable earnings; and a verdict will not be interfered with on account of its amount unless clearly insufficient or clearly excessive.

Action to Recover Damages for Wrongful Death. On motion for new trial.

Hoke Smith and H. C. Peebles, for plaintiff.

Dorsey, Brewster & Howell and Sanders McDaniel, for defendant.

NEWMAN, District Judge. The motion for new trial in this case, so far as the same has been urged in argument, is upon two grounds. The first is that the court failed to give a written request of the defendant. The failure to give this request was a pure inadvertence, as the defendant was undoubtedly entitled to it, and the presiding judge had it on the desk before him, with the intention of reading it. The omission to do so was not intentional. No exception, however, was taken by counsel for the defendant to the failure of the court to give this request. It would be a question for consideration as to whether the failure to give this request should be considered on a motion for new trial, notwithstanding there was no exception by defendant's counsel, if it was believed that it had, or could have had, any material effect in causing a verdict in favor of the plaintiff. It could hardly have had such effect. It seems clear that there would have been a verdict against the defendant even if this request had been given. Consequently the failure to give it is not sufficient ground for the granting of a new trial, even if it is proper to consider it under the circumstances.

The next ground of the motion is that the verdict is excessive. The suit by the plaintiff is for the homicide of her husband. Under the statutes of Georgia, she is entitled to recover the full value of the life of the deceased. According to the mortality and annuity tables in evidence, and which have been principally used in arguing this motion for a new trial, this was a full verdict, unquestionably. There was evidence, however, that the deceased had earned as high as \$90 and \$100 per month some time before his death. At the time of his death he was not earning this much. He had accepted a subordinate position, as the evidence shows, because the climate of Florida did not agree with his wife, and he had moved from that state for this reason. The deceased was 36 years of age at the time he was killed, and, according to all the evidence, an efficient man in his business of railroading, and in perfect health. The jury were not confined to the use of the mortality and annuity tables, but had a right to consider all the evidence before them. I do not feel justified in saying that the amount of the verdict was more than the full value of the life of the deceased. Notwithstanding the fact that in case of homicide the value of the life of the deceased must be ascertained by calculations from the earning capacity and probable duration of life, it must still be a matter largely for the jury to determine, considering the business capacity, attention to duty, the character of employment, the health of the deceased, and other matters that tend to throw light on the value of life. The court should not interfere with a verdict in such a case unless it is clearly insufficient or clearly excessive. I have gone over this evidence carefully, so far as it affects this question; and, in my opinion, I would not be justified in interfering with the verdict. The motion for a new trial is overruled.

UNITED STATES LIFE INS. CO. v. ROSS.

(Circuit Court of Appeals, Fifth Circuit. June 1, 1900.)

1. DEPOSITIONS—RESIDENCE OF WITNESS—DEATH—MOTION TO SUPPRESS.

Under Act Cong. March 9, 1892, providing that the deposition of a witness taken in the mode prescribed by the laws of the state where the action is pending, and under Rev. St. § 865, providing that, when a deposition has been properly taken, it may be used on the trial if the witness be dead, where the deposition of a witness residing within 100 miles of the place where court is held is taken in a cause pending in the state court, in accord with the laws of the state, the deposition will not be suppressed, upon removal of the cause to the federal court, on the ground of the witness residing within 100 miles of the place of holding court, if the witness be dead when the motion is made.

2. SAME—NOTICE OF TAKING—SERVICE ON ATTORNEY FOR FOREIGN INSURANCE COMPANY—REVOCATION OF APPOINTMENT.

After the appointment of H. as state agent and attorney to accept service for defendant had been revoked, and before another attorney to accept service had been appointed, plaintiff gave notice to defendant, by service on H., for the taking of H.'s deposition. *Held* that, since defendant could not revoke the authority of its attorney to accept service without appointing another on whom service could be made, the deposition of H. could not be suppressed for want of service on defendant.

3. LIFE INSURANCE—ACTION ON POLICY—EVIDENCE—DIRECTING VERDICT.

The undisputed evidence showed that about four months before the death of plaintiff's intestate defendant issued to him a policy of insurance upon his life, and transmitted it to its general agent for the state of Texas for delivery; that the deceased accepted the policy, but by agreement the agent paid for him the first premium, and retained possession of the policy; that about 60 days thereafter defendant received the first semi-annual premium, while deceased was in good health, and retained the same until advised of the death of intestate. *Held*, that the court properly instructed the jury to find for plaintiff.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Geo. Clark and D. C. Bolinger, for plaintiff in error.

W. S. Baker, S. P. Ross, and D. H. Hardy, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On October 21, 1897, J. E. Ross, the defendant in error, administrator of R. L. Long, deceased, brought his action against the United States Life Insurance Company, the plaintiff in error, in the state district court of Limestone county, Tex., to recover the sum of a policy of insurance alleged to have been issued to the intestate, with legal interest thereon, and 12 per cent. damages, and a reasonable attorney's fee. The cause was duly removed into the circuit court of the United States for the Northern district of Texas, and such proceedings were had therein as resulted in a judgment in favor of the defendant in error.

The specifications of error relied on to reverse this judgment are: (1) That the court erred in overruling the motion of the plaintiff in error to suppress the deposition of J. W. Harris, and in admitting that deposition to be read in evidence over the objection of the plaintiff in error; (2) that the court erred in instructing the jury to return

a verdict for the defendant in error, over the objections of the plaintiff in error, made at the time, for the reason that the evidence in this case was conflicting as to whether the policy of insurance sued upon had been delivered to plaintiff's intestate during his lifetime. Six errors are assigned, but the foregoing statement is the substance of the contention made by the plaintiff in error in this court.

In the circuit court the plaintiff in error made two motions to suppress the deposition of the witness J. W. Harris, the first of which was filed on April 1, 1898, and the ground of this motion was that the deposition was taken without giving the plaintiff in error legal notice thereof. The United States Life Insurance Company is a corporation organized under the laws of the state of New York. On the 7th day of October, 1893, by an agreement in writing, it appointed James W. Harris, of Waco, Tex., its agent for all that part of the state of Texas in which it authorizes its agents to do business (except a certain portion then under contract to A. J. Miller, of Ft. Worth), and at or about the same time it constituted and appointed him its attorney to receive and accept service of process agreeably to the statute laws of that state. On the 15th of January, 1897, it duly renewed this appointment. The written agreement constituting Harris the agent of the insurance company in Texas provided, among other things, that either party thereto might terminate it by giving to the other 30 days' notice in writing to that effect. Acting on this provision, the insurance company gave notice to Harris of the termination of their contract, and it became complete, and the contract terminated, on the 9th of September, 1897. On September 25, 1897, and again on October 6, 1897, the counsel who now appear for the defendant in error wrote to the plaintiff in error demanding the payment of the amount of the R. L. Long policy. On October 16, 1897, the plaintiff in error, by its actuary, William T. Standen, addressed a letter to Hon. Jefferson Johnson, insurance commissioner of the state of Texas, advising him that:

"Mr. J. W. Harris, of Waco, Tex., is no longer our manager, and subagents working for him, and for whom you issued licenses, no longer represent this company in that way. We therefore ask you to promptly revoke the licenses and power of acceptance on behalf of this company issued to Mr. Harris and all the subagents above referred to, as we have now no accredited representative working for us in your state."

On October 19, 1897, Commissioner Johnson acknowledged the receipt of this letter of revocation of authority of Mr. J. W. Harris and other agents to represent the company in Texas, and said, "Their certificates of authority and power to accept service have been canceled by this office." On October 22, 1897, the commissioner wrote again to the plaintiff in error to this effect:

"Gentlemen: After a consultation with the attorney general, we are of opinion that you have no right to cancel or order the cancellation of the powers of attorney to your agents in this state. The intent of the law is that no life insurance company shall be permitted to transact business or to collect premiums upon policies in force in the state of Texas without having an attorney appointed in the state to accept service from such policy holders as may have a legal claim against the company. You may regard our letter accepting your cancellation as having no authority, as we now declare these powers of attorney as being good, unless you shall appoint an attorney for service at once in this state. We await your action in this matter before taking any

further steps. It will not be profitable for the United States Life Insurance Company to undertake to avoid suit by the method you have seen fit to follow.

"Yours, very truly,

Jefferson Johnson, Commissioner."

On October 23, 1897, the proper notice for taking the deposition of J. W. Harris, with a copy of the interrogatories, and a precept to serve the same, was issued to the sheriff of McLennan county, Tex., and on the 25th of October was duly received by him, and served on J. W. Harris and W. W. Seley as agents of the United States Life Insurance Company. W. W. Seley is the president and sole owner of the Waco State Bank in Waco. On two or three occasions (the dates not given) the plaintiff in error had forwarded to the Waco State Bank claims upon its policy holders for premiums, etc., which were collected by the bank in the usual course of business, but not as agent for the United States Life Insurance Company, except for the special collection of each particular claim as received in the usual course of bank collections. This motion to suppress the deposition of J. W. Harris came on to be heard on the 22d of April, 1898, and the court, having heard the motion, the answer of the plaintiff thereto, and the argument of counsel thereon, was of opinion that the motion was not well taken, and on April 27, 1898, ordered that the same be overruled; to which ruling the defendant (the plaintiff in error), by its counsel, excepted, and tendered its bill of exceptions. In this bill of exceptions it is stated that on the hearing of this motion "it was further shown that the plaintiff never at any time received notice from the defendant company of the appointment of Jefferson Johnson as its attorney to receive service in lieu of the said Harris, and only received notice of said appointment of said Johnson from the said Johnson himself on or about October 30, 1897. It was admitted by the defendant that immediately upon notice of the appointment of said Johnson as the defendant's attorney to receive service in lieu of said Harris, which was after the perfection of service on said Harris and said Seley, the plaintiff caused service of notice and copies of interrogatories to be made on the said Johnson as the defendant's attorney, and that upon the expiration of the five days provided by the laws of the state of Texas for service of notice and copies of interrogatories upon said Johnson the plaintiff caused a commission to issue, with said interrogatories and the cross interrogatories of defendant attached, to take the answers of the witness J. W. Harris; and that before said commission could reach the hands of an officer qualified to take depositions, and immediately after the issuance of said commission, the said J. W. Harris died." On April 27, 1899, the plaintiff in error (the defendant below) made a second motion to suppress the deposition of J. W. Harris—First, on the ground on which its first motion had been made; and, second, because it appeared from the deposition, and from the interrogatories filed by the plaintiff, and from other portions of the record, "that at the time said deposition was taken the witness J. W. Harris resided at Waco, in the county of McLennan, in the state of Texas, and that this suit was then pending at the county seat of Limestone county, in the state of Texas, to wit, at the town of Groesbeck; and it is alleged that said town of Groesbeck is distant from the town of Waco, which was then and there the residence of the witness J. W. Harris,

less than one hundred miles, to wit, a distance of fifty miles, and that under the laws of the United States in such cases made and provided said deposition was unauthorized and invalid, and cannot be used upon the trial of this case." The second ground of this motion to suppress the deposition of J. W. Harris is clearly not good. The deposition was taken while the case was yet in the state court, in strict accordance with the provisions of the state law and practice in all other respects except that which is made the first ground of this motion. After the case was removed to the circuit court, the question whether the deposition could be used on the trial is one of federal, and not state, practice. But it is one which does not relate back to the time of the taking of the deposition under the state law. It appears from the recitation we have made from the bill of exceptions taken to the overruling of the first motion to suppress this deposition that several months before that motion was made the witness Harris had died, and at the time that motion was heard it was made to appear to the satisfaction of the court that the witness then was dead. If, therefore, the deposition was correctly taken according to the state law and practice, and it was made to appear to the satisfaction of the court that at the time the motion to suppress the deposition was acted upon, and at the time the deposition was offered in evidence on the trial, the witness was dead, the objection taken that the witness resided at a point less than 100 miles distant from the point where the state court was held, in which court the cause was pending at the time the deposition was taken, is not good. The act of congress approved March 9, 1892, provides that it shall be lawful to take the deposition or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held. But, independent of this act, the taking of depositions in the state court must be governed by state law. And section 865 of the Revised Statutes provides that, where depositions have been properly taken, such depositions may be used on the trial of the cause when it appears to the satisfaction of the court that the witness is then dead. By the laws and practice in Texas depositions may be taken in the state courts where the witness resides without the county in which the court is held. This record shows that the state court in which the case was pending was held in Limestone county, and that the witness resided in McLennan county. Unless, therefore, the objection which suggests the want of proper notice is good, the motion to suppress the deposition was properly overruled. As far as we can gather from the very able briefs, and from such consideration of the case as we have been able to give it ourselves, this ground of the motion presents a question of first impression. We have been referred to no direct authority on the subject, nor to any having a very close analogy as we view it. But, acting on our own construction of the language of the different provisions of the statute law of Texas on the subject, and gathering therefrom the apparent intention and spirit of the legislation of that state in reference to foreign corporations doing business therein, we are constrained to concur in the view of the attorney general of the state of Texas, and of the commissioner of insurance, and of the learned judge of the circuit court who overruled the motion, and we hold with him that the service of the notice to take the deposi-

tion in question, which was made upon J. W. Harris on the 25th day of October, 1897, having been made before the plaintiff in error had appointed Hon. Jefferson Johnson its attorney to acknowledge service of legal process in any suit or legal proceeding against said company in the state of Texas (which latter appointment seems not to have been made in New York until the 26th day of October, 1897, and not to have reached the appointee in Texas until the 30th day of that month) is binding on the plaintiff in error, and constituted legal notice to it of the intention of the defendant in error to take the deposition in question. That there was no necessary connection between the service that J. W. Harris was to render under his contract as the business agent of the licensee, and his competency or duty to accept service of legal process, or have the same served on him so as to bind the plaintiff in error, manifestly appears from the fact that at present the honorable commissioner of insurance, who certainly is not the business agent of the plaintiff in error, is constituted its representative to acknowledge service of legal process, etc. It will hardly be contended that the plaintiff in error could now revoke the authority of the Honorable Commissioner Jefferson Johnson to accept or receive service of legal process binding on the company without at the same time appointing some other attorney by whom such service could be accepted, or on whom service could be made. In the nature of the case, the appointee, while still alive, and capable of being reached, must continue to be competent to have such service made on him until a successor is appointed, and has qualified by acceptance. Therefore the fact that the agreement between the plaintiff in error and J. W. Harris terminated, according to its terms, on the 9th of September, 1897, does not necessarily involve or affect that representative capacity in which he was authorized to accept service of legal process, or at least to have service made upon him agreeably to the terms of the statutes of Texas for the protection of the citizens of Texas who held policies of insurance issued by the plaintiff in error, then doing business under and subject to the terms of its permission in that state. One of the vital conditions precedent to obtaining and using such permission was and is that the licensee should have and keep in that state such a representative by whom service could be accepted, or upon whom it could be had. We think the commissioner decided justly and wisely that the plaintiff in error could not revoke the authority it had granted without substituting another appointee by whom service could be accepted, or on whom it could be made, so as to bind the licensee. We conclude, therefore, that the first specification of error urged upon our attention is not well taken.

As to the second specification of error, given above, we are clear that it is not well taken. We have examined all the testimony with care, and we believe that the summary made by the trial judge is so supported by all the evidence that we are justified in accepting it as the uncontradicted testimony in the case. We therefore content ourselves with introducing here that part of the judge's charge which summarizes the proof:

"(1) Robert L. Long made his application in writing August 30, 1894, to the defendant company, for insurance upon his life in the sum of ten thousand

dollars. (2) That, in pursuance of said application, the defendant company issued the policy sued upon September 10, 1894, and immediately thereafter transmitted the said policy from its home office in New York City to J. W. Harris, of Waco, Texas, he then and there being the general agent of the defendant company for Texas. (3) That shortly after receiving said policy the said J. W. Harris went to Mexia, Texas, and took the policy with him for the purpose of delivering it to the said Robert L. Long, and collecting from him the first semiannual premium due thereon, amounting to \$68.10. (4) That the said Robert L. Long accepted the said policy, and by agreement between him and the said J. W. Harris the said J. W. Harris agreed to pay said first premium for the said R. L. Long to the defendant company, and at the request of the said Robert L. Long the said J. W. Harris retained possession of said policy. (5) The said J. W. Harris delivered to the said R. L. Long said policy, and by his monthly report of November 28, 1894, remitted to the defendant company the said first semiannual premium; and that the said defendant company received the same shortly thereafter, and during the lifetime and sound health of the said Robert L. Long, and retained possession of same until advised of the death of the said R. L. Long. (6) That the said Robert L. Long died January 19, 1895. (7) That the defendant company waived proofs of death of the said Robert L. Long. That, the foregoing facts having been proven upon this trial, and being undisputed, you will find for the plaintiff."

It is contended in the brief for the plaintiff in error, and urged in the earnest oral argument made by its counsel in this court, that the deposition of the witness Harris, and the letter dated January 31, 1895, written by Harris to the company, and offered in evidence by the defendant in error on the trial of this case in the circuit court, conflict the one with the other, and present such an impeachment of that witness' veracity as to require that his deposition and his letter, in connection with the other testimony in the case, should have been submitted to the jury. We do not find the substantial variance as to any matter of fact in the deposition and the letter in question which counsel for the plaintiff in error suggests. To our minds, the substantive facts appear to be clearly shown by the letter and the deposition, the one in accord with the other; and on the proof as presented on the trial it became the duty of the trial judge to direct a verdict for the plaintiff, because, if he had not done so, and a different verdict had been returned, it would have been his duty to have set the verdict aside, and have awarded the plaintiff a new trial. Where the state of proof presents such a case, the judge is clearly right in directing a verdict; and, though it is a matter of some delicacy to review his discretion in cases where that discretion is exercised in favor of submitting an issue to the jury, the tendency of the later decisions is to hold the trial judge rigidly to the discharge of his duty, and, where the proof is such that it could rightly sustain but one view of the case, to direct a verdict. The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge, dissents.

In re TAYLOR.

MATTOON NAT. BANK OF MATTOON, ILL., v. FIRST NAT. BANK OF
MATTOON, ILL., et al.

(Circuit Court of Appeals, Seventh Circuit. June 21, 1900.)

No. 664.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—ANSWER—PROOF OF INSOLVENCY.

Where, to a petition in proceedings in involuntary bankruptcy, a creditor answers, alleging that the alleged bankrupt is not insolvent, and the case is submitted on the pleadings, the allegations of the answer must be taken as true, and an adjudication of bankruptcy upon the pleadings is error.

2. SAME—PETITION—OCCUPATION OF DEBTOR.

Under Bankr. Act 1898, § 4, providing that any natural person, except a wage earner or a person engaged chiefly in farming, may be adjudged an involuntary bankrupt, a petition in involuntary bankruptcy which does not show the business of defendant, or that he does not come within the excepted classes, is subject to demurrer on such ground.

3. SAME—ANSWER—OCCUPATION OF DEBTOR.

Under Bankr. Act 1898, § 59f, providing that a creditor may file an answer and be heard in opposition to the prayer of the petition, an answer by a creditor to a petition in involuntary bankruptcy that the alleged debtor is "engaged chiefly in farming or the tillage of the soil" sets up a good defense.

4. SAME—DEFAULT OF DEFENDANT—EFFECT.

The default of defendant to a petition in involuntary bankruptcy, through failure to appear, does not convert the proceeding into one of voluntary bankruptcy.

Appeal from the District Court of the United States for the Southern District of Illinois.

On the 23d day of October, 1899, the appellees filed in the district court of the United States for the Southern district of Illinois their petition to have Jerome L. Taylor declared an involuntary bankrupt. On the same day there was issued out of the clerk's office an order, directed to Taylor, to show cause why the prayer of said petition should not be granted. There was also issued at the time a subpoena, made returnable on the 31st day of October, 1899. On the 24th day of October the subpoena was served by the United States marshal, by reading and delivering a copy of the same, together with a copy of the petition, to Rosa Taylor, the wife of Jerome L. Taylor, at his usual place of abode. On the 26th day of October the appellees filed an amended petition, stating that the appellees are creditors of Taylor, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500, and that Taylor is insolvent, and that within four months next preceding the date of the petition Taylor committed an act of bankruptcy, in that he suffered certain judgments to be taken against him on the 6th day of October, 1899, by the appellant, upon which judgments the appellant caused executions to be issued and placed in the hands of the sheriff of Coles county. On the 31st day of October the appellant filed its answer to the first amended petition; setting up therein, among other things, that Taylor was a person engaged chiefly in farming or tillage of the soil. To this answer on the 28th day of November, 1899, the appellees filed exceptions, among which was that the appellant cannot set up in defense that Taylor was chiefly engaged in farming and the tillage of the soil. On the 28th day of November the court sustained the exceptions to that portion of the answer of the appellant which alleges that Taylor was engaged chiefly in farming and the tillage of the soil, to which ruling of the court appellant excepted. On January 22, 1900, a second amended petition was filed, in substance similar to the first, with some variations which need not be noted here. To this the appellant filed a special de-

murrer alleging, among other things, that the same did not negative the fact that the defendant was a person engaged chiefly in farming and the tillage of the soil, and so within the terms and purview of the statute providing for involuntary bankruptcy. This demurrer, after argument, the court overruled; holding that such a plea was a special privilege, which no one but the bankrupt could plead or take advantage of, to which ruling the appellant excepted. On the same day the appellant filed its answer to the second amended petition, and therein alleged that Taylor was a person engaged chiefly in farming and the tillage of the soil, and cannot be declared an involuntary bankrupt, and, further answering, denied that Taylor is, or was at the time of the filing of the petition, the filing of the original petition, or the first amended petition, or the second amended petition, or at the time said judgments in favor of the appellant were obtained, at the time the executions were issued, at the time the sheriff had set for the sale, or at any time between the said times, insolvent, as defined in the bankruptcy act. Default was then taken on the second amended petition as to Taylor, to which entering of default the appellant excepted. Thereupon the cause was submitted on the pleadings, and, the cause being so submitted and heard by the court, the appellees made motion to have the court, upon the pleadings, adjudge Taylor an involuntary bankrupt, and he was so adjudged, to which ruling and order of the court sustaining said motion and entering such order of adjudication the appellant excepted, and was allowed its bill of exceptions, which was thereupon signed and sealed by the court.

Edward C. Craig, for appellant.

I. B. Craig and James Vause, Jr., for appellees.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge, upon the above statement of facts, delivered the opinion of the court.

There are two reasons why we think it was error to adjudge Taylor to be a bankrupt in an involuntary proceeding against him, upon the pleadings, without further issue being joined and proofs taken: One is that the answer avers that Taylor was not insolvent, as is required by the bankrupt law, and the other that the court overruled the special demurrer to the petition, and because the fact was afterwards set up in the answer that he was a person engaged chiefly in farming and in the tillage of the soil, which allegations in the answer, if no exception to them had been sustained, on a submission of the case upon the pleadings, without evidence taken, should have been taken as true. The case was chiefly argued and submitted upon the latter question, and that is the only one, therefore, which we care to consider. We think the court erred in holding that the alleged bankrupt being a farmer, and therefore not coming within the provisions of the law governing involuntary bankruptcy, was a personal privilege, which could only be set up by the bankrupt in person. The question was jurisdictional, rather than personal. The law (Bankr. Act 1898, § 4) provides that any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, may be adjudged an involuntary bankrupt upon default or an impartial trial. The alleged bankrupt did not appear or answer, but the appellant, who had obtained a lien upon this property, appeared and set up the fact in an answer. There was nothing in the petition to bring the alleged bankrupt within the terms of the statute. It did not allege what the

defendant's business or occupation was, and there was no allegation to show that he did not come within the excepted classes, which, under the law, are too important to be wholly ignored. Farmers and wage earners constitute a large majority of the people. These are excepted from that portion of the clause relating to involuntary bankruptcy, and the petition should either have shown what the business of the defendant was, or that he did not come within the excepted classes. The answer set up this fact, the allegations of which when the case was submitted on the pleadings, without proofs taken, must and would have been taken as true, had not the court sustained the exceptions of the petitioners to the appellant's answer. The answer was a good and valid answer to the petition, and the exceptions to it should not have been sustained by the court. The statute (subchapter 6, § 59f) expressly provides that creditors other than the original petitioners may file an answer and be heard in opposition to the prayer of the petition. If they can appear in the case and file an answer, then it follows that they can set up any facts which go to defeat the proceeding. If the answer made by the appellant was true, then it was not a case for involuntary bankruptcy, and should have been dismissed. If Taylor was simply a farmer, or chiefly a farmer, and engaged in the tilling of the soil, there was no authority or jurisdiction under the law to force him into bankruptcy. The appellant might gain a rightful preference by obtaining judgments, as it did, and issuing executions, which, in the hands of the sheriff, became a lien upon the defendant's property. This being the case, and the appellant being the real party in interest, it would be very strange if it could not set up the only plea which could avail to protect its property rights so legally acquired. If the facts alleged in the answer were true, it had a vested right, which could not be taken away by the default of the defendant in the bankruptcy proceeding to appear and answer, nor without due process of law and a hearing in court. These the appellant has not had. If the petitioning creditors wished to contest the question raised by the answer, there should have been a replication put in, denying the allegations, and a trial had before an adjudication was made. *Simpson v. Ready*, 12 Mees. & W. 740; *Vavasour v. Ormrod*, 6 Barn. & C. 430; *Potter*, Dwar. St. 119; *Grant Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279; *Carriage Co. v. Stengel*, 2 Am. Bankr. R. 383, 37 C. C. A. 210, 95 Fed. 637; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Geo. M. West Co. v. Lea Bros. & Co.*, 2 Am. Bankr. R. 463, 19 Sup. Ct. 836, 43 L. Ed. 1098.

There was a suggestion made on the argument that the defendant's not appearing made the case one of voluntary bankruptcy. But the two proceedings are quite distinct, under the law, and cannot be confounded in such a way. The statute provides just what the proceedings shall be in each class of cases. To become a voluntary bankrupt, the proposed bankrupt must file his personal petition in writing to become such, accompanied by schedules of his debts and assets. Involuntary bankruptcy is a proceeding by the creditors adverse to the bankrupt. By making default in such a proceeding, the defendant does not become a petitioner in his own behalf, under the clauses

for voluntary bankruptcy, and he cannot by making default affect interests in property attaching before the proceedings in bankruptcy are begun. The judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

FELLOWS et al. v. FREUDENTHAL.

(Circuit Court of Appeals, Seventh Circuit. June 23, 1900.)

No. 661.

1. **BANKRUPTCY—DISCHARGE OF BANKRUPT—OBJECTIONS BY CREDITOR—MAKING FALSE OATH.**

Where the offense, under Bankr. Act 1898, § 29b, of "having knowingly and fraudulently made a false oath" in the affidavit to a petition for discharge, and accompanying the schedule of assets, by omitting property held in the wife's name, is made a ground of objection to the discharge of a bankrupt, the proof must establish ownership in fact by the bankrupt of the property in question, and clear knowledge of such fact on his part.

2. **SAME—EVIDENCE.**

Evidence that a bankrupt omitted from his schedule of assets certain shares of stock held by his wife in her own name, and which were purchased by her with money borrowed from her mother and brother-in-law after her husband had failed in business, and that the husband was employed as manager of the business of the corporation, is not sufficient to establish the offense, under Bankr. Act 1898, § 29b, of "having knowingly and fraudulently made a false oath" in bankruptcy proceedings.

3. **SAME—AVOIDING PRIOR FRAUDULENT CONVEYANCE—JURISDICTION.**

Whether shares of stock purchased with money borrowed upon the joint note of the husband and wife, and issued to the latter, can be impounded for the benefit of the husband's estate in bankruptcy, can be determined only in a direct proceeding between the proper parties, and not collaterally on the statutory hearing for the discharge of the bankrupt, which cannot involve the rights of the wife.

4. **SAME—STATUTE NOT GIVEN RETROACTIVE EFFECT.**

Bankr. Act 1898, §§ 14b, 29b, making the offense of knowingly and fraudulently making a false oath by the bankrupt in the bankruptcy proceedings, in respect to his property, a ground for denying him a discharge, do not extend to previous conduct or transactions which are merely fraudulent as to creditors, and not made criminal.

5. **SAME—REFERENCE.**

Since, under Bankr. Act, § 2, the district courts are invested with jurisdiction both at law and in equity, to "enable them to exercise original jurisdiction in bankruptcy proceedings," they have the power to order a reference of an issue made by creditors on a bankrupt's petition for discharge.

6. **SAME—REFERENCE—COSTS.**

Where objections made by creditors to a bankrupt's application for discharge are assigned by the district court to the referee in bankruptcy for hearing, the referee is entitled to a reasonable fee for the services so performed, in addition to the fees allowed him under the bankruptcy law.

Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois.

This appeal is from an order of the district court, sitting in bankruptcy, in the matter of Frankenthal, Adler, and Freudenthal, bankrupts, entered on final hearing of the application of Joseph Freudenthal, one of the bankrupts, for a discharge, upon objections interposed by J. F. Fellows, J. C. Archibald, W. H. Fellows, and George L. Hastings, appellants, as creditors of such bank-

rupt. The testimony was heard by the referee, under an order of reference, and was submitted to the court with the findings of the referee and exceptions thereto. The order overrules the exceptions, in effect overrules the objections, grants the discharge, and requires that the appellants, as objecting creditors, pay the costs of the hearing, including the costs of the referee thereupon, taxed at \$25. The grounds of objection to the discharge, although specified in various forms, relate to an alleged interest in certain shares of stock omitted from the schedules filed by the bankrupt, and it is alleged that he "knowingly and fraudulently" made a false oath and a false account in the proceedings by such omission. The witnesses called in support of the objections were Joseph Freudenthal, the bankrupt, and Leo Fax, and their testimony shows that the shares of stock in question are 71 shares, of \$100 each, of the capital stock of the Central House-Furnishing Company (an Illinois corporation, organized in November, 1895), which are held in the name of Jennie Freudenthal, the wife of the bankrupt; that for 59 of these shares Mrs. Freudenthal subscribed on the books of the company at the organization, personally paid the face amount in cash, and the shares were thereupon issued to her, and have ever since been held by her, and in her name; that she subsequently at various times took and paid for other shares, to the amount of 12, all constantly held in her name. The authorized capital stock of the corporation was 100 shares, of which 88 shares have been paid in and issued, and the remaining 12 shares are held as so-called treasury stock, carried on the books of the company in the name of Samuel Freudenthal, who appears as an original subscriber for such purpose. Albert Neuberger holds 16 shares of the issued stock, and the bankrupt holds 1 share, which he schedules. Aside from their relation as husband and wife, no interest of the bankrupt is shown at any time in the shares held by Mrs. Freudenthal, unless it appears in one or both of the circumstances found by the referee in conformity with the undisputed testimony, relating (1) to the derivation of the means invested by Mrs. Freudenthal in this stock; and (2) to the participation of the bankrupt in the operations of the company. (1) In 1894 Mrs. Freudenthal borrowed from her mother, Lena Liebenstein, \$3,000, and from her brother-in-law, Leo Fax, \$2,500, which money she invested in the stock of a corporation called the Freudenthal Manufacturing Company; owning all the stock, except 1 share held by the bankrupt. Fax acted as the representative of Mrs. Liebenstein in arranging that loan, and in both instances paid the money to Mrs. Freudenthal; notes being taken, which were signed by her and by her husband as well. But Fax testifies that the husband had no other part or share in the transaction, was not given credit nor considered to be worthy of credit, and his name was taken upon the note for the reason alone that it was supposed to be "necessary, in loaning money to a married woman, to have her husband join in the papers." It further appears that the bankrupt failed in 1893, had no property, and was not engaged in business when this loan was effected. Subsequently the business of this corporation was wound up, and Mrs. Freudenthal obtained repayment of a portion of her investment in its stock, and the proceeds thus received were applied by her in payment of the 59 shares in the Central House-Furnishing Company, upon her original subscription. Whether the 12 shares afterwards taken by her were paid out of the proceeds of the business or otherwise is not definitely stated. The notes to Mrs. Liebenstein and Fax are outstanding and unpaid, but Mrs. Freudenthal has paid the interest, and both parties consented to her reinvestment in the stock of the new company. (2) The business of the Central House-Furnishing Company is that of "buying and selling goods upon the installment plan." It was managed by the bankrupt, as president, and Neuberger, as secretary,—the latter being the only member having previous experience in its line,—and was profitable. The bankrupt received a salary,—\$35 per week at one time, and later increased to \$40,—and had no other share in the business, except his 1 share of stock, which was paid by his wife. No dividends were formally declared at any time, but amounts were drawn out from time to time out of earnings by Mrs. Freudenthal and by Neuberger, and charged, respectively, upon the books of the company; and money so drawn by Mrs. Freudenthal "was largely used by her in contributing to the support of their family." The bankrupt filed with his petition a schedule of his property, which shows only wearing apparel, watch and chain, jewelry, and 1 share of stock in this

corporation, of a total valuation of \$260, and an affidavit by which he declares the "schedule to be a statement of all his estate, both real and personal, in accordance with the act of congress relating to bankruptcy"; and the petition is likewise verified in the usual form.

Frank White, for appellants.

Horace Kent Tenney, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

The facts upon which the objections to the discharge of the bankrupt rest are undisputed, and two questions only are presented by the assignment of errors: (1) Whether the conceded facts clearly sustain the objections; and, if not, (2) whether costs were properly charged as taxed against the objecting creditors.

1. The bankruptcy act is imperative in granting to the bankrupt the right to a discharge "unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." Section 14b. The objections in the case at bar are confined to the first-mentioned cause, and specify as the offense committed by the bankrupt that he "knowingly and fraudulently" made (1) "a false oath in relation to this proceeding in bankruptcy," and (2) a false account in the same matter; but the testimony relates solely to the charge of making a false oath, and the only contention is that the affidavits of the bankrupt to his petition and accompanying schedule of property are false because he omits from the schedule a showing of ownership by himself of the shares of stock in the Central House-Furnishing Company which are held in the name of his wife. The serious offense thus charged is one of the crimes punishable by imprisonment under the bankrupt act, and its ingredients are clearly defined in section 29b as "having knowingly and fraudulently * * * made a false oath" in the proceedings. This language is followed in stating the ground of objection, and it is obvious that no ground exists, within the statute, unless the proof establishes both ingredients of the offense,—ownership in fact by the bankrupt of the shares in question, and clear knowledge of such fact on his part, either directly shown or necessarily implied from the circumstances. In the case at bar the proof establishes neither of these requisites. Legal title to the shares of stock was vested in the wife, through her original subscription and subsequent purchases, directly from the company, and has so remained ever since, without apparent ownership in the bankrupt in any form. It is contended, however, that these transactions in the name of the wife were mere devices to cover up and place beyond the reach of creditors property acquired by the bankrupt, and held in fact for his use and benefit; and, if the testimony establishes this proposition of fact, decisions of the supreme court of Illinois are cited as to the status of the legal title in such

case which would tend to complicate the issue upon the one question of ownership in fact, with this possible result; that the issue whether an offense was committed would then be left to depend upon the mere presumption of knowledge by the bankrupt of the effect in law of the transaction,—upon a mere legal fiction,—in lieu of evidence to establish knowledge in fact. But neither of the problems thus suggested requires solution here, for the reason that the testimony fails to support the appellants' contention that the title of the wife in the shares of stock held by her conclusively appears to be so held as a mere cover and fraudulent device for actual ownership by the bankrupt. Indeed, the testimony discloses no ground for impeachment of the transaction as a fraud upon creditors, unless it be because of their relation as husband and wife, supplemented by the fact that the husband was employed by, and shared in the management of, the corporation, and the possible inference that 12 of the 71 shares obtained by the wife were paid for out of her share of the corporate profits. Whether sufficient ground exists, either in these circumstances or otherwise, to impound for the benefit of the estate any of the shares so held, can be determined only in a direct proceeding between the proper parties, and not collaterally on the statutory hearing for discharge, which cannot involve the rights of the wife, and where the single question presented by the objections is, has the bankrupt knowingly made a false oath in the omission to schedule as his individual property shares of stock which are issued to and claimed by his wife? As the act limits the grounds of objection, so far as applicable here, to the commission of a criminal offense within section 29b, it is plain that the issue cannot extend to prior conduct or transactions merely fraudulent as to creditors, and not made criminal. Such is the construction of these provisions uniformly adopted by the district judges, so far as their opinions appear reported, and it is approved as applicable to the order overruling the objections under consideration.

2. In reference to the remaining assignment of error, the award of taxable costs against the objecting creditors was authorized by subdivision 18 of section 2 of the bankruptcy act, and the allowance of \$25 as costs of the referee on the hearing is the only debatable question. Section 40 of the act expressly provides that "referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case," together with a small percentage on payments out of the estate. This provision is in harmony with the purpose manifested throughout the act, to so limit all allowances as to secure economical administration of proceedings and estates in bankruptcy; and the duty of the courts to construe and administer the act in conformity with that purpose is well declared and exemplified in the opinion of Jenkins, Circuit Judge, speaking for this court, in the recent case of *In re Curtis*, 100 Fed. 784. If the charge in question is for services rendered by the referee in the performance of the duties of a referee under the act, it is plainly not taxable as costs in this instance; for, however inadequate the prescribed compensation may be, he takes the office cum onere, and must abide by the fees so fixed. In sections 38 and 39 the jurisdiction and duties of referees are spe-

cifically enumerated, but the matter of hearing applications for a discharge is not included, either in direct terms or inferentially, while subdivision 4 of section 38 clearly excepts such hearings from his jurisdiction. Moreover, section 14b expressly provides that "the judge shall hear the applications for a discharge, and such proofs and pleas as may be made in opposition thereto." As the district courts are invested with jurisdiction both at law and in equity, to "enable them to exercise original jurisdiction in bankruptcy proceedings" (section 2), the power unquestionably exists to order a reference for the purpose of the hearing pursuant to the equity practice; and it would be practically impossible to conduct the hearings otherwise in districts like the Northern district of Illinois, with the press of other business, and cases in bankruptcy under the present act numbering in the thousands. The reference is then made to the referee in the capacity of special master, not as referee in bankruptcy, and for a duty independent of the latter office, and in no sense incompatible. To avoid confusion, it would seem better practice to designate the appointee as special master for the purpose in the order, but the fact that the name of "referee" or "referee in bankruptcy" is retained instead cannot affect his performance of the duties. His report is advisory, only, and the final hearing is before the district judge. For the necessary service so performed under the order of reference, the appointee is entitled to a reasonable allowance, unaffected by the fact that he held as well the office of referee in bankruptcy, and was probably chosen for that reason. The spirit of the act should be observed, as we have indicated, in making the allowance; and, from the testimony shown in this record, the amount so taxed appears to be reasonable, in that view. The order of the district court is accordingly affirmed.

In re EGGERT.

(Circuit Court of Appeals, Seventh Circuit. June 15, 1900.)

No. 656.

1. BANKRUPTCY—PREFERENCES—CREDITOR'S KNOWLEDGE OF DEBTOR'S INSOLVENCY.

In determining whether the taking of security by a creditor constitutes an illegal preference, under Bankr. Act 1898, § 60b, the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency. On the other hand, it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but it is sufficient if he has reasonable cause to believe him insolvent. If facts and circumstances with respect to the debtor's financial condition are brought home to him such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose.

2. SAME—REVIEW ON PETITION FOR REVISION—FINDINGS.

A finding that a creditor of a bankrupt did not have reasonable ground to believe his debtor to be insolvent at the time he obtained security for his debt is one of fact, rather than law, and cannot, therefore, be reviewed by the circuit court of appeals on a petition for revision filed under Bankr. Act 1898, § 24b.

3. SAME—JURISDICTION TO REVIEW ON PETITION.

Query: Can the action of the court of bankruptcy be reviewed on original petition in cases where an appeal lies?

On Review of an Order of the District Court of the United States for the Eastern District of Wisconsin.

On the 18th day of January, 1900, William T. Doyle, the trustee in bankruptcy of Louis A. Eggert, filed his petition in this court seeking a review and reversal of an order of the court below. The petition in substance alleges the adjudication in bankruptcy, the appointment of the trustee, and asserts that the Rundle-Spence Manufacturing Company on the 1st day of July, 1899, being a creditor of the bankrupt to the amount of \$1,373.04, and within four months prior to the bankruptcy, received from the bankrupt a partial assignment of a claim against the city of Milwaukee as security for its debt. On the 30th day of August, 1899, by stipulation between the Rundle-Spence Manufacturing Company and the trustee, the latter was allowed to receive from the city of Milwaukee the amount of Eggert's claim, without prejudice to the rights of the Rundle-Spence Manufacturing Company to assert in the bankruptcy court its claim thereto to the extent of the amount assigned. Upon receipt by the trustee of the amount of the claim against the city, the Rundle-Spence Manufacturing Company filed its claim in the court of bankruptcy, asserting its right to be paid out of the fund received the sum of \$1,241.10, being the amount assigned to it by the bankrupt. The petition further states that upon the hearing of this claim the referee found the following facts and conclusion of law.

Findings of Fact.

(1) I find that on the 1st day of July, 1899, Louis A. Eggert, the bankrupt herein, was indebted to the Rundle-Spence Manufacturing Company in the sum of thirteen hundred seventy-three dollars and four cents (\$1,373.04) for merchandise delivered between the 28th day of April, 1899, and the 5th day of June, 1899, on credit. That on the 1st day of July, 1899, Rundle-Spence Manufacturing Company adjusted its account with the said Louis A. Eggert by giving him a discount of ten per cent., which is the usual discount for cash in that line of business, and was done pursuant to the contract under which the goods were purchased, and agreeing to accept twelve hundred forty-one dollars and ten cents (\$1,241.10) in payment, and that on said 1st day of July said Louis A. Eggert gave an order for the sum of twelve hundred forty-one dollars and ten cents (\$1,241.10) on the city of Milwaukee, directing it to pay that amount to the Rundle-Spence Manufacturing Company from any moneys due or to become due the said Eggert; that said order was informal and subsequently on the 5th day of July, 1899, the said Louis A. Eggert made an assignment to the Rundle-Spence Manufacturing Company of the amounts due or to become due him from the city of Milwaukee by reason of a certain contract for plumbing on the Fifth Ward School, to the amount of twelve hundred forty-one dollars and ten cents (\$1,241.10); and that the said assignment was on the 5th day of July, 1899, filed with the city treasurer and the city clerk of the city of Milwaukee by the Rundle-Spence Manufacturing Company.

(2) That the bankrupt, Louis A. Eggert, for a number of years previous to the 17th of August, 1899, the date of the filing of the petition in bankruptcy, was engaged in the plumbing business in the city of Milwaukee. That the Rundle-Spence Manufacturing Company is a corporation engaged in the manufacture and sale of plumbing supplies at Milwaukee, Wisconsin. That the said Rundle-Spence Manufacturing Company and other corporations and firms engaged in a similar business are members of an association which meets a number of times each month, the purposes of said association being for the mutual protection of the members, and the exchange of information as to trade matters and the standing of parties to whom the members are selling goods on credit. That, under the rules of the association if any debtor of any member of the association fails to meet his obligations promptly and allows accounts against him to remain unpaid, he is placed upon the cash list and no member of the association can give him credit or furnish him any goods except for cash. That at a meeting of the association held on the 18th of May, 1899, at which a representative of Rundle-Spence Manufacturing Company was

present, Louis A. Eggert, the bankrupt, was reported as being behind in his payments, and entitled to no further credit from the members of the association. That on the 15th day of June, 1899, at another meeting of the association, at which a representative of Rundle-Spence Manufacturing Company was present, the report showing that Louis A. Eggert was behind in his payments was renewed, and the Rundle-Spence Manufacturing Company also reported that its account against Eggert, amounting to thirteen hundred seventy-three dollars and four cents (\$1,373.04), was past due. That the bankrupt at the said meeting was placed upon the cash list, and could no longer obtain credit from the said Rundle-Spence Manufacturing Company or any other member of the association. That at the time the Rundle-Spence Manufacturing Company took the assignment of the claim from the bankrupt against the city, to wit, on the 1st day of July, 1899, said Rundle-Spence Manufacturing Company knew that the said Eggert was behind in his payments with his creditors, and could obtain no goods or merchandise from members of the association except for cash. That the fact that Eggert was reported as being behind in his payments did not in itself indicate that he was insolvent; that the Rundle-Spence Manufacturing Company prior to the taking of the assignment of the said claim made no investigation or inquiry as to whether the said Eggert was solvent or insolvent, and that in obtaining the assignment of said claim against the city of Milwaukee the said Rundle-Spence Manufacturing Company practiced no fraud or deceit, nor did it act in collusion with the bankrupt.

(3) That the petition in bankruptcy herein was filed on the 17th day of August, 1899, and that the assignment of the claim against the city of Milwaukee by the bankrupt to the Rundle-Spence Manufacturing Company was made within four months prior thereto, and that on the 1st day of July, 1899, Louis A. Eggert, the bankrupt, was insolvent, and that the effect of the enforcement of the transfer by the bankrupt to the Rundle-Spence Manufacturing Company will enable it to obtain a greater percentage on its debt than other creditors of the same class.

(4) That the Rundle-Spence Manufacturing Company on the 16th day of September, 1899, filed its claim in the proceedings herein. In which it set forth that at the time of the filing of the petition in bankruptcy the bankrupt was indebted to it in the sum of thirteen hundred and seventy-three dollars and four cents (\$1,373.04), and that it held as security therefor the assignment of the claim against the city of Milwaukee. That there is a conflict of testimony as to whether the assignment was taken in payment or as security, the bankrupt testifying that it was taken as security, and the treasurer of the Rundle-Spence Manufacturing Company that it was understood and agreed that it was taken in payment, although no receipt was given therefor, and that the claim was filed under a misapprehension. It not being necessary for the purpose of this decision, I do not here determine whether it was taken either in payment or as security.

Conclusion of Law.

(1) As a conclusion of law, I find that the Rundle-Spence Manufacturing Company at the time of the obtaining of the assignment of the claim against the city of Milwaukee from the bankrupt, to wit, on the 1st day of July, 1899, had no knowledge of the fact that the said Louis A. Eggert, the bankrupt herein, was insolvent, and had no reasonable cause to believe that it was intended by the transfer to give it a preference.

Thereupon the referee ordered that the petition of the Rundle-Spence Manufacturing Company be granted, and that the trustee pay to that company the sum of \$1,241.10, and upon such payment being made the claim of the Rundle-Spence Manufacturing Company filed in the proceedings of September 6, 1899, be expunged. Thereafter, on the 10th day of December, 1899, an application was made to the district court for a review of the order of the referee, upon which, on the 8th day of January, 1900, an order was made affirming the order of the referee. The petition further claims that by virtue of section 60, subds. "a," "b," of the bankrupt act (30 Stat. 544, c. 541), and under the findings of fact, the transfer was avoided, and that it was also repugnant to section 67e of that act, and asks for a review and reversal of the order of the district court.

W. P. Bloodgood, for petitioner.

A. G. Weissert, for respondent.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The petition does not state the precise question of law presented to and ruled upon by the court below, and in this respect fails to follow the practice pointed out in *Re Richards*, 37 C. C. A. 634, 96 Fed. 935. We however gather from the petition that the construction of subdivisions "a" and "b" of section 60 of the bankrupt act is supposed to be involved, and this view obtains support from the opinion delivered by the court below upon affirming the order of the referee. In *re Eggert*, (D. C.) 98 Fed. 843. These subdivisions are, respectively, as follows:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. (b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"Insolvency," as employed in this section, is thus defined by the act (chapter 1, § 1, cl. 15):

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

In this respect the act is widely different from the bankrupt act of 1867. There the term "insolvency" was construed to mean an inability to meet one's obligations as they matured in the ordinary course of business. The term "insolvency" in the present act is equivalent to the term "bankruptcy" in the former act. While, therefore, rulings under the former act are inapplicable in a certain sense, because of this difference in the meaning of the term "insolvency," they do apply so far as they determine the principles of law by which it is to be ascertained whether a creditor receiving a preference had reasonable cause to believe that the debtor had not at the time property sufficient, at a fair valuation, to pay all of his debts. In the leading case of *Grant v. Bank*, 97 U. S. 80, 81, 24 L. Ed. 972, it was said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicions a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security or receiv-

ing payment of a debt under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate, and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would in fact have the effect of producing bankruptcy in many cases where it might otherwise be avoided."

In *Barbour v. Priest*, 103 U. S. 293, 296, 26 L. Ed. 480, it is said:

"The obvious meaning of this provision is to require the concurrence of the creditor who gets security for his debt in the purpose of defeating the bankrupt act. Such person must have reasonable cause to believe the grantor in the conveyance was insolvent at the time it was executed, and that it was made with intent to defeat the bankrupt law. Both these must exist as facts which the grantee had reasonable cause to believe. And so careful was congress to protect the rights acquired by an honest creditor, that, unless bankrupt proceedings are commenced by or against the debtor within four months after such a preference, it should stand good, though the creditor knew the debtor was insolvent, and knew that the conveyance was intended to defeat the purpose of the bankrupt law in securing equality of distribution of the debtor's property. And this period was reduced by the act of 1874 to two months. It has never been denied, so far as we are advised, that it is necessary for the assignee of the bankrupt, in attacking such a conveyance, to prove the existence of this reasonable cause of belief of the debtor's insolvency in the mind of the preferred party."

In *Stucky v. Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640, the court reaffirmed the doctrine of *Grant v. Bank*, and observed that:

"A creditor dealing with a debtor who he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law."

In the earlier case of *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, the court, discussing the character of evidence necessary to establish a reasonable cause to believe, observes:

"It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy."

And on page 49, 13 Wall., and page 483, 20 L. Ed.:

"The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, or even that they should

in fact have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business."

In *Buchanan v. Smith*, 16 Wall. 277, 308, 21 L. Ed. 286, the court says:

"Insolvency, in the sense of the bankrupt act, means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions, and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, in a case like the present, as would lead a prudent business man to the conclusion that he (the debtor) is unable to meet his obligations as they mature in the ordinary course of business. Such a party (that is, a creditor securing a preference from his debtor over the other creditors of the debtor) cannot be said to have had reasonable cause to believe that his debtor was insolvent at the time, unless such was the fact, but if it appears that the debtor giving the preference, whether a merchant or trading company, was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put him, as a prudent man, upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact by reasonable inquiry. Ordinary prudence is required of a creditor under such circumstances, and, if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty."

In *Wager v. Hall*, 16 Wall. 584, 600, 21 L. Ed. 506, the court says:

"Nothing remains, therefore, to be re-examined, except the issue whether the respondents had reasonable cause to believe that the mortgagor was insolvent, and that the conveyance was made in fraud of the provisions of the bankrupt act. Proof that the respondents had actual knowledge that the mortgagor was insolvent at the time is not required to support the prayer for relief, but the allegation in that behalf is sustained if it appears that they had reasonable cause for such belief, as that is the language of the bankrupt act. Actual knowledge of the alleged fact is not made the criterion of proof in such an issue, nor is it necessary that it should appear that the respondents actually believed that the mortgagor was insolvent, but the true inquiry is whether they, as business men acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances known to them at the time the conveyance was made. Unless the debtor was in fact insolvent, it cannot be held that such a grantee had reasonable cause to believe the allegation, but if it appears that the debtor was in fact insolvent as alleged, and that the means of knowledge were at hand, and that such facts and circumstances were known to the grantee as were clearly sufficient to put a person of ordinary prudence and discretion upon inquiry, it is well settled that it would be his duty to make all such reasonable inquiries to ascertain the true state of the case. Purchasers are required to exercise ordinary prudence in respect to the title of the seller, and if they fail to investigate when put upon inquiry, they are chargeable with all the knowledge which it is reasonable to suppose they would have acquired if they had performed their duty in that regard. Creditors have reasonable cause to believe that a debtor, who is a trader, is insolvent when such a state of facts is brought to their notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business. All

experience shows that positive proof of fraudulent acts between debtor and creditor is not generally to be expected, and it is for that reason, among others, that the law allows, in such controversies, a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof, which is a rule clearly applicable to the facts and circumstances disclosed in this record."

In *Dutcher v. Wright*, 94 U. S. 553, 557, 24 L. Ed. 131, the court says:

"Insolvency, in the sense of the bankrupt act, means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions; and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature in the ordinary course of his business. Reasonable cause for such belief cannot arise unless the fact of insolvency actually existed; but if it appears that the debtor giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact to be so by reasonable inquiry."

In *Bank v. Cook*, 95 U. S. 343, 346, 24 L. Ed. 414, the court says:

"It is scarcely necessary to discuss the authorities as to the meaning of the words 'having reasonable cause to believe the party to be insolvent.' When the condition of a debtor's affairs is known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe."

The supposed conflict between these cases is imaginary, not real. In *Grant v. Bank*, and the cases subsequent in point of time, the court was dealing with the facts spread upon the record, and did not find occasion to consider the facts and circumstances which, brought home to the creditor, would put him upon inquiry of his debtor's financial condition. In the cases antedating *Grant v. Bank* the question of notice arose and was considered. The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose. In applying this principle to the present case, we encounter a difficulty not present in the cases referred to. By the terms of the statute which authorizes the present petition, we are restricted to a review in matter of law merely, and are bound by the facts found by the court below. We can only ascertain and determine

whether the facts found sanctioned the judgment of the lower court. The facts established are within narrow compass. They are that Eggert was insolvent; that he had failed to meet his obligations promptly as they matured; that, by the rules of the association of which the Rundle-Spence Manufacturing Company was a member, Eggert was not, while such debt remained unprovided for, entitled to purchase goods upon credit, but only for cash; that the assignment of the claim against the city was not given or received by collusion of debtor and creditor. The finding is somewhat wanting. There is failure to find that Eggert himself was conscious of his insolvency. The aggregate of his assets and of his liabilities is not given. The only fact brought home to the creditor, and which it is claimed should have aroused inquiry, is that he was somewhat behind in the prompt payment of his obligation. We cannot say, as a conclusion of law, that knowledge of that fact standing alone was sufficient to put the creditor upon inquiry. Indeed, it may be said that a majority of merchants absolutely solvent, in the sense in which the term is employed in the bankrupt act, are not at all times able to promptly meet their obligations as they mature. To hold that a creditor receiving payment of or security for a past-due debt is, by the mere fact of knowledge that the debt is past maturity, put upon inquiry of his debtor's inability to pay all his debts, and that under such circumstances he received payment or security at his peril, would be to put at hazard many business transactions and make the act oppressive. The fact of such inability, coupled with other facts and circumstances brought home to the creditor, might be sufficient to put him on inquiry; but this is the only fact from which the deduction is sought that the creditor had reasonable cause to believe his debtor insolvent, and, standing alone, it is insufficient to raise an inference of law that the creditor is chargeable with knowledge of the facts which inquiry would have elicited. The question whether one has reasonable cause to believe is essentially a question of fact, possibly of mixed fact and law. In actions at law the question, under proper instructions from the court, is one for the jury (*Forbes v. Howe*, 102 Mass. 427, 436); and in suits in equity, one for the court, as was the case in all the decisions above referred to. In *Wilson v. Bank*, 17 Wall. 473, 487, 21 L. Ed. 728, the court recognizes that the question is one of fact for the court or jury, and observed thereupon as follows:

"Undoubtedly very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the bankrupt act would color acts or decisions otherwise of no significance. These cases must rest on their own circumstances. But the case before us is destitute of any evidence of the existence of such a motive, unless it is to be imputed as a conclusion of law from facts which we do not think raise such an implication."

The referee found that the creditor had no knowledge of the fact that the debtor was insolvent, and had no reasonable cause to believe that it was intended by the transfer to give a preference. This is inaccurately stated as a conclusion of law. The action of an or-

dinarily prudent man under given circumstances is necessarily a question of fact, rather than one of law. We are bound by the finding of the court below.

The contention that the facts found show the transaction to be a scheme to hinder, delay, or defraud creditors within the meaning of section 67e, is without merit. The term hinder, delay, or defraud creditors had a well-defined and recognized meaning at the common law, and has that signification as employed in the act. The payment or securing to a creditor of an honest debt by the debtor is not to hinder, delay, or defraud creditors, within the well-established signification of the term.

It may be doubtful if congress designed to allow a review by this court upon original petition in cases in which an appeal is allowed, since the petition is only another mode of appeal for review of the action of the bankruptcy court, although limited to matter of law. It would seem more probable that this mode of review was intended to apply only to cases in which the right of appeal is withheld, since the remedy, whether by appeal or by petition, is summary and effective. We suggest, but do not find it needful to determine, the question. Being unable to say, as a conclusion of law, that mere knowledge that the debtor was behind in his payments puts the creditor upon inquiry, and charges him with notice of the facts which such inquiry might disclose, and being bound by the facts found by the court below, we are constrained to deny the petition.

In re MCGURN.

(District Court, D. Nevada. June 16, 1900.)

1. BANKRUPTCY—DISCHARGE OF BANKRUPT—OPPOSITION—OBJECTIONS BY CREDITORS.

Under Bankr. Act 1898, § 14b, providing that upon an application for a discharge the judge shall hear such proofs and pleas as may be made in opposition thereto, and discharge the applicant, unless he has committed an offense punishable by imprisonment as provided in said act, or with fraudulent intent has destroyed, concealed, or failed to keep books of account from which his true financial condition may be ascertained, specifications in opposition to a bankrupt's application for a discharge, and the proofs in support thereof, must distinctly allege and establish one or more of the above grounds for refusing to discharge.

2. SAME—BURDEN OF PROOF.

Upon the hearing of objections to the discharge of a bankrupt, the burden of proof is upon the opposing creditors to establish their charge against the petitioner by satisfactory and sufficient evidence.

3. SAME—FRAUDULENT CONVEYANCES—EVIDENCE.

Evidence that, more than 10 years before the enactment of the bankruptcy law, the petitioner for a discharge in bankruptcy sold his business, for a valuable consideration, to his wife, who thereafter employed her husband to manage and conduct the same for her, and that he took therefrom from \$200 to \$300 per month for his personal expenses, is not sufficient to support an opposition to the discharge of a bankrupt, on the ground that said business is in fact the property of the bankrupt, and should have been included in his schedule of assets, where it appears that the validity of said transfer to the wife has been contested by the opposing

creditor in the state courts, and a judgment rendered establishing its validity, and no additional facts or proceedings are adduced to bring the case within the provisions of the bankrupt act.

Petition for Discharge in Bankruptcy.

Torreyson & Summerfield, for petitioner.

Alfred Chartz, for opposing creditor.

HAWLEY, District Judge (orally). On November 4, 1899, T. R. McGurn, petitioner herein, was adjudged a bankrupt on his voluntary petition. The matter was referred to the referee. Proceedings in due course of law were had, and on April 21, 1900, the petitioner made regular application for his discharge, and an order was made for the usual publication and notice to creditors. All of the formal prerequisites to a discharge have been complied with. On April 25, 1900, H. H. Beck, who had an existing and proved claim of \$2,764.61 against petitioner, filed his opposition against petitioner's application for discharge upon the ground that the "said bankrupt has not returned either a full or truthful schedule of his property, showing the amount and kind of property, the location thereof, or its money value in detail; that said Thomas R. McGurn, bankrupt, is the owner, and for more than 20 years last past has been the owner, of a large and valuable stock of groceries, provisions, wood, coal, teams, and wagons; and that since on or about February 7, 1887, said T. R. McGurn, bankrupt, has been conducting said business of dealing in general merchandise at Virginia City, Storey county, Nevada, and carries on the same in the name of his wife, Mary F. McGurn; and that said property is of the value of at least \$10,000."

The evidence offered to sustain these charges is wholly insufficient. In brief, it appears therefrom that, in 1887, petitioner, being then engaged in the general merchandise and wood and coal business, sold and delivered the property he then possessed to his wife for a valuable consideration; that she thereafter conducted said business, and employed her husband to manage and conduct the same for her; that in December, 1895, Beck & Thompson obtained a judgment against the petitioner in the district court of Storey county, Nev. (which is the basis of the opposing creditor's claim); that in August, 1897, they procured an execution upon said judgment, and levied upon certain goods then situate in Washoe county, Nev., which were claimed by them to belong to the petitioner herein; that Mrs. Mary F. McGurn, wife of petitioner, brought suit against the sheriff of Washoe county, in the district court of said county, to recover said goods or their value, claiming to be the owner thereof; that the pleadings in that suit presented the issue whether the sale of the stock of merchandise, etc., in Storey county, by T. R. McGurn, was fraudulent and void or bona fide; that the trial of the cause resulted in a verdict in favor of the plaintiff, Mrs. Mary F. McGurn; that in August, 1897, petitioner, T. R. McGurn, was examined in supplemental proceedings, and testified that his wife, in 1892, put \$5,000 into the business at Virginia City; that the business was profitable up to the time of the examination, and was then paying very well; that at such examination he testified that he took from the business \$200 or \$300 per

month for his own personal expenses. (Upon this point the testimony was conflicting.) This covers the entire scope of the testimony offered in this proceeding.

Section 14b of the bankruptcy act of 1898 provides that:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by parties in interest, * * * and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

From this it will readily be seen that there are only two general grounds specified upon which an opposition can be based to a regular application for a petitioner's discharge. There is no claim or pretense that the opposition filed herein is based upon the first ground above stated. Does it come within the second? If so, is there any substantial evidence to sustain the charge? Specifications in opposition to a bankrupt's application for a discharge, and the proofs in support thereof, should be clear, positive, and direct. The opposing creditor or creditors must distinctly allege and prove one (or more) of the statutory grounds for refusing a discharge. In *re Holman* (D. C.) 92 Fed. 512, 515; In *re Rhutassel* (D. C.) 96 Fed. 597; In *re Frice*, Id. 611. The burden of proof rests upon the opposing creditors to establish their charge against the petitioner by satisfactory and sufficient evidence. In *re Holman* (D. C.) 92 Fed. 512; In *re Hixon* (D. C.) 93 Fed. 440; In *re Idzall* (D. C.) 96 Fed. 314; In *re Hirsch* (D. C.) 97 Fed. 571; In *re Wetmore* (D. C.) 99 Fed. 703. No such evidence has been produced. The most that can be said is that there appears to be a suggestion, or a lurking suspicion in the mind of the opposing creditor and of his counsel, that much of the property, or all of it, now owned and held by the petitioner's wife, and the business conducted by her in her own name, is in fact the property and business of the petitioner, and the contention of counsel is that said property should have been included in the schedule of assets. No sufficient evidence has been introduced to sustain this contention. The facts are, as before stated, that the creditor opposing this application applied, prior to the passage of the bankrupt act, to the courts of the state, which were clothed with authority to search the consciences of the respective parties, and to strip the veil from any or all of their fraudulent or simulated dealings, if any existed, and make discovery of the truth; with the result of a verdict from the jury, and a judgment of the court that the sale of the property and business by the petitioner to his wife was not made to hinder, delay, or defraud creditors, but was bona fide and for value, and upon appeal this judgment was affirmed. *McInnis v. McGurn* (Nev.) 55 Pac. 304. This court is requested to review the evidence in that case, and to decide that the courts of the state erred in not rendering a judgment in favor of the opposing creditor herein. This it respectfully declines to do. There must be some other facts, some other proceedings, some further evidence, in order to bring the case within the provisions of the bankruptcy act, and justify this court in refusing to grant petitioner's application.

Under all the facts and circumstances of this case, it cannot consistently be said that the sale was made by petitioner to his wife "in contemplation of bankruptcy"; for it was made years before the bankruptcy act became a law.

Under the provisions of section 14 of this law, heretofore quoted, in order to defeat a bankrupt's petition for discharge on the ground of his having failed to keep proper books of account, it must be shown that such failure was with a fraudulent intent on the part of the bankrupt to conceal his true financial condition, and "in contemplation of bankruptcy." In re Holman, *supra*; In re Carmichael (D. C.) 96 Fed. 594; In re Hirsch, Id. 468; Id., 97 Fed. 571.

The grounds set forth and the evidence submitted by the opposing creditor fail to bring this case within either of the statutory grounds upon which the application for petitioner's discharge could be denied. The general principles herein announced are sustained by the following additional authorities: In re Thomas (D. C.) 92 Fed. 912; Sellers v. Bell, 36 C. C. A. 502, 94 Fed. 801, 807; In re Cornell (D. C.) 97 Fed. 29; In re Freund (D. C.) 98 Fed. 81; In re Webb, Id. 404; In re De Leeuw, Id. 408; Loveland, Bankr. § 278 et seq. The petitioner is entitled to his discharge.

In re PAGE.

(District Court, E. D. Pennsylvania. June 19, 1900.)

BANKRUPTCY—BANKRUPT'S MEMBERSHIP IN STOCK EXCHANGE PASSES TO TRUSTEE.

A seat or membership owned by a bankrupt in a stock exchange is property and passes to his trustee in bankruptcy, and may be sold by the latter as an asset of the bankrupt's estate.

In Bankruptcy.

George W. Jacobs, for bankrupt.

Chas. Welsh Edmunds and Henry R. Edmunds, for trustee.

McPHERSON, District Judge. The question certified by the referee for the opinion of the court is whether a seat or membership in the Philadelphia Stock Exchange is property that passes to a trustee in bankruptcy, and may be sold by him as an asset of the estate. Since the decisions in Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264, and Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915, I regard the question as no longer open for discussion in the federal courts. In the former case it is said upon page 524, 94 U. S., and page 265, 24 L. Ed.:

"There can be no doubt that the incorporeal right which Fenn had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy, and that, if there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee."

In the latter case, *Hyde v. Woods* is referred to with approval in the following language:

"In *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264, it was ruled that the ownership of a seat in a stock exchange board is property,—not absolute and unqualified, but limited and restricted by the rules of the association; that such rules, in imposing the condition upon the disposition of memberships that the proceeds should be first applied to the benefit of creditor members, are not open to objection on the ground of public policy, or because in violation of the bankrupt act; and that in the case of the bankruptcy of a member his right to a seat would pass to his assignees, and the balance of the proceeds upon sale could be recovered for the benefit of the estate. While the property is peculiar, and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors."

In *Sparhawk v. Yerkes*, the court was determining a controversy concerning a seat in the Philadelphia Stock Exchange, and had before it, therefore, those provisions of the constitution of the exchange that are now relied upon to support the proposition that such a seat is a personal privilege merely, and not in any sense or degree a species of property. In view of these authoritative declarations of the supreme court, it would be superfluous to discuss the provisions just referred to.

The action of the learned referee is approved, and the trustee is directed to carry out the order of sale.

In re T. L. KELLY DRY-GOODS CO.

(District Court, E. D. Wisconsin. July 9, 1900.)

1. BANKRUPTCY—PROCEEDINGS BEFORE REFEREE—REVIEW.

General orders in bankruptcy, rule 27 (32 C. C. A. xxvii., 89 Fed. xl.), providing for a "review by the judge of any order made by the referee," does not authorize a general review of proceedings before the referee, or of rulings not directly affecting a sale.

2. SAME.

Specific questions arising in proceedings before a referee in bankruptcy, and upon which the opinion of the district judge is desired, should be presented on the certificate of the referee, or, in the case of orders entered, on petition for review, and not in the form of an assignment of errors.

3. SAME—CORPORATIONS—ACT OF INSOLVENCY.

A petition of involuntary bankruptcy against a corporation, which is based upon a confession of insolvency and the willingness of the corporation to be adjudged a bankrupt, will not be construed as in effect voluntary, and therefore within the exception which excludes corporations from the benefit of voluntary bankruptcy.

4. SAME—SALE BEFORE ADJUDICATION IN BANKRUPTCY.

Although the uniform practice is to make no order of sale of the bankrupt's estate until after the adjudication of bankruptcy unless a sale is necessary to preserve the value of the property, an order of sale made by a referee before the adjudication, while exercising the powers of the district judge under Bankr. Act, § 38, will not be disturbed, where the sale was made by consent, and no prejudice is shown.

5. SAME—ALLOWANCE OF CLAIMS—RENT.

A landlord cannot complain that his general claim for rent is apportioned so as to make a part thereof a claim against the bankrupt's estate, and the

balance a charge against the receiver, at the same rate at which the lease was running, when otherwise he would have been deprived of a preference for the part charged to the receiver.

6. SAME—CONTESTED CLAIM—CREDITOR'S RIGHT TO VOTE FOR TRUSTEE.

While the mere filing of objections to a claim should not exclude the creditor from voting on the election of a trustee, such action by the referee will not be reviewed, when no objection is made to the election, and no facts are presented on which to raise the question of the rights of creditors in such case.

7. SAME—ACTION AGAINST RECEIVER—LEAVE OF COURT.

Leave of a referee in bankruptcy is not necessary to entitle the landlord of a receiver in bankruptcy to bring suit against the receiver for fixtures separated and removed from the demised premises during the receiver's occupancy.

8. SAME—ATTORNEY'S FEES.

A receiver in bankruptcy being required to stand independent of the parties to the litigation, he will not be allowed to charge the estate for services rendered him by the attorney for either party during the continuance of such relation.

In Bankruptcy. On petition for review filed by F. W. Cotzhausen, a creditor, in proceedings before the referee.

F. W. Cotzhausen, in pro. per.

Bloodgood, Kemper & Bloodgood, for trustee.

SEAMAN, District Judge. Rule 27 of the general orders in bankruptcy (32 C. C. A. xxvii., 89 Fed. xi.) provides for "review by the judge of any order made by the referee"; but I do not understand that a general review of the proceedings before the referee, or review of rulings not directly affecting an order made, is intended either by the act or rules. Specific questions as they arise in the proceedings are to be presented on certificate of the referee, or, in the case of orders entered, on petition for review. This petition is in the form of an assignment of errors in the proceedings before the referee, and not within either view thus indicated. Questions of importance, especially of jurisdiction and procedure, are shown, however, if not properly raised; and, to the extent in which the facts are sufficiently stated, I have given consideration, and state the following rulings:

1. The bankrupt is a corporation, and the petition is filed by creditors as an involuntary application, but is based upon an alleged confession of insolvency on the part of the corporation, and of willingness to be adjudged a bankrupt, which appears to have been resolved by the corporate authorities on the day preceding the making of the petition. It is contended that the application is in effect voluntary, and therefore within the exception in the act which excludes corporations from the benefit of voluntary bankruptcy. It must be conceded that this view is not entirely without force. See *In re Bates Mach. Co.* (D. C.) 91 Fed. 625. I concur, however, in the opinion of Judge Brown in *Re Marine Machine & Conveyor Co.*, Id. 630, which upholds the jurisdiction; and, in the absence of controlling interpretation contra, the objection upon that ground is overruled. The act of the corporation in such case is treated as an act of bankruptcy, and leaves it optional with creditors to move thereupon, or not, as advised.

2. The absence of the district judge vested jurisdiction of the petition, of the application for a receiver and other duties thereupon, in the referee (section 38, Bankr. Act), and in the appointment of the receiver and order of sale the referee was exercising the powers of the district judge. It has been the uniform practice of this court, under the act, to make no order of sale until after adjudication of bankruptcy; and, unless the property is of such nature that immediate sale is necessary to preserve its value, such rule will be maintained. Whether the facts stated justified departure in this instance—consent appearing on the part of the bankrupt and other creditors—is not deemed material for present purposes, as a fair sum was realized, and no showing is presented of injurious effect upon any interests. Objections to the several orders, including that of confirmation of the sale, are overruled.

3. Exception is taken to the allowances made upon the claims of the creditor in question (1) in reducing the general claim for rent from \$400 to \$266.67; and (2) in allowing the claim for rent against the receiver at \$133.34, instead of \$250, as claimed. It is plain that this apportionment was in favor of the claimant, as an allowance of the \$400 would have so extended the term of the lease that no allowance could be made for occupancy by the receiver; thus depriving him of the preferential claim. The rulings appear to be just, on the whole, and the rate at which the lease was running was properly adopted as the rate of allowance for the receiver's occupancy. They are therefore approved.

4. It is stated in the same connection that the creditor was not permitted to vote, pending hearing of his claim, upon the election of a trustee; but no question is raised as to the election, and no facts are presented on which to raise the question of the rights of creditors in such case. Surely no construction is admissible which would permit other creditors, through the mere filing of objections to a claim, to exclude a bona fide claimant from voting on the election of a trustee.

5. Exception is stated to the ruling by the referee that he was without jurisdiction to entertain a claim presented against the receiver "for fixtures separated and removed from the demised freehold during the time of the receiver's occupancy," and for not granting leave to the claimant to sue the receiver. No leave to sue the receiver in such case is necessary under the recent legislation by congress, and, the district judge being within the district when the applications were made, the matters were not within the cognizance of the referee. No issue is presented, nor are the conceded facts sufficient, on which to determine the claim upon the merits, as argued on behalf of the claimant.

6. The final objection is to an allowance made in the account of the receiver of \$200 for services of his attorneys, and I am constrained to the opinion that this objection is well founded. It is the well-recognized rule in equity that the receiver shall engage counsel who stands independent of the parties to the litigation (Beach, Rec. § 262), and the estate is not chargeable for services which may be given to the receiver by the attorney for either party during the continu-

ance of such relation. So, in the case at bar, unless the service for which the charge was allowed was both necessary and independent in the sense of the rule referred to, it is not allowable as an expense of the receivership. The purpose of the appointment of a receiver in bankruptcy is one of mere temporary custody, and the duties are generally of the utmost simplicity. If complications arise in which the parties before the court have opposing interests, he should not take counsel of either; and, if under any circumstances the attorney of either party is engaged by him, there must at least be complete severance of all service and duty to the litigant party. Otherwise, any service rendered must be deemed either gratuitous or in the interest of the original client. Here the attorneys for whom the charge is made appear both of record and in fact for the petitioning creditors before and after the receivership, are on the petition for adjudication of bankruptcy, on the application for a receiver, and subsequently appear for the creditors at the meetings held during the continuance and after the close of the receivership. Under such conditions, any service rendered must be referable to their engagement for their clients, and, if chargeable to the estate for any amount, are in that relation only, and upon special order of the court. The objection to the allowance must therefore be sustained. So ordered.

In re RUDNICK.

(District Court, D. Washington, W. D. July 7, 1900.)

1. BANKRUPTCY—SALE OF PARTNERSHIP PROPERTY—TITLE OF TRUSTEE.

The sale by one partner to his co-partner, when the firm has become insolvent, of his entire interest in the business and property of the firm, and the subsequent bona fide sale by the succeeding partner to a third person of the entire property of the firm, which in his hands was exempt from execution, is not such a disposition of the property of the firm as can be avoided by the firm's trustee in bankruptcy, under Bankr. Act 1898, § 70, providing that the trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided, unless he was a bona fide holder for value prior to the date of adjudication.

2. SAME—PREFERENCES.

The transferee under a sale by one partner to his co-partner of his entire interest in the property of the firm not being a creditor, and the effect of the transfer being a loss to all the creditors of the firm, such transfer cannot be impeached as a preference, under Bankr. Act 1898, § 60, making any transfer by an insolvent debtor within four months preceding the filing of a petition in bankruptcy a preference which may be avoided by the trustee of the bankrupt.

This is a case of involuntary bankruptcy, certified to the court by Warren A. Worden, referee, for decision of a controversy as to the right of the trustee to have possession of merchandise formerly owned by the bankrupts as co-partners, and now claimed by Albert L. Fisher, who purchased the same from one of the partners. Decision of the referee in favor of the trustee reversed.

Walter Loveday, for trustee.

D. F. Murray and John C. Stallcup, for creditors.

B. A. Crowl, for Albert L. Fisher.

James Wickersham, for Louis Rudnick.

HANFORD, District Judge. Upon a petition filed by the trustee, the referee made an order requiring the sheriff of Pierce county to show cause why certain merchandise in his custody under a writ of attachment issued by the superior court of the state of Washington for Pierce county should not be surrendered to the trustee. The attachment having been dissolved, the sheriff filed an answer disclaiming any right to retain the goods under the writ of attachment, and alleging that Albert L. Fisher claims to have been in possession of the goods when they were seized, and now demands that they be restored to him. Said Fisher also filed an answer alleging his ownership of the goods and right of possession, by purchase from Louis Rudnick, one of the bankrupts. The trustee filed a reply to the answer of Fisher, making an issue as to the ownership of the property. The material facts in the case were agreed to and stipulated by the parties, and upon a hearing the referee ordered the sheriff to deliver the property to the trustee. Pursuant to a petition by Fisher for a review of the referee's decision, the question has been certified to the court. The facts to be considered as agreed to and stipulated by the parties are as follows:

"(1) That on and prior to the 28th day of November, 1899, David Rudnick and Louis Rudnick were co-partners under the name of Rudnick Bros., and engaged in the business of merchant tailors at Tacoma, Pierce county, Washington. (2) That on the said 28th day of November, 1899, the said co-partnership was dissolved by mutual consent, and David Rudnick on the said day sold and transferred all his interests in the said business and co-partnership property to the said Louis Rudnick for the consideration set forth in Exhibit A, attached to the further answer of Albert L. Fisher herein, at which date said firm was totally insolvent. (3) That on the said day the said David Rudnick withdrew from the said co-partnership business, and the same was thereafter conducted by Louis Rudnick. (4) That notice of the said dissolution was given as set forth in paragraph 11 of the said further answer of Albert L. Fisher. (5) That the said Louis Rudnick is now, and was prior to December 30, 1899, a married man, a householder, and the head of a family consisting of himself and wife, and that he and his said family were then, and now are, residents of the city of Tacoma, Pierce county, Washington, and that he is now, and was at all the times mentioned, a merchant, and that his trade was at all said times that of merchant tailor, and that all the goods mentioned and referred to in the petition and order to show cause herein, and all the goods and merchandise owned by and in the possession of the said Louis Rudnick on the said 30th day of December, 1899, did not exceed in value the total sum of \$350, and that the same consisted of tools, instruments, and material used to carry on his said trade of merchant tailor. (6) That on the 30th day of December, 1899, Louis Rudnick sold, assigned, transferred, and delivered to the said Albert L. Fisher all the goods and merchandise mentioned and referred to in the foregoing paragraph, being the same goods described in Exhibit A attached to the answer of Albert L. Fisher, and on the said day executed and delivered to the said Albert L. Fisher a bill of sale, marked Exhibit B, and attached to the said further answer of Albert L. Fisher herein, which said bill of sale was duly recorded in the office of the auditor of Pierce county, Washington, on the 4th day of January, 1900, as shown in said Exhibit B. (7) That the consideration for the said conveyance was the prior individual indebtedness of the said Louis Rudnick to said Albert L. Fisher, amounting to the sum of \$130, and the further sum of \$50 in lawful money paid to the said Louis Rudnick by the said Fisher on said 30th day of December, 1899. (8) That the said Albert L. Fisher was not at the time of the filing of the petition in bankruptcy herein, nor at any of the times mentioned, and is not now, a creditor of the co-partnership of Rudnick Bros. (9) That the actual and true value of the property mentioned in paragraph 6 did not on said 30th day of

December, 1899, exceed the sum of three hundred and fifty dollars, and that it is now of less value; that said Louis Rudnick was not at any of the times mentioned herein the owner of other property in addition to that mentioned, to exceed in value the sum of twenty-five dollars, and was not at any of said times, and is not now, the owner of any cows, calves, swine, bees, or domestic fowls, nor any provisions or fuel for the maintenance of himself and family."

It is Mr. Fisher's contention that, by the voluntary act of David Rudnick in transferring all of his interest in the property to Louis Rudnick, it ceased to be partnership property, and became the individual property of Louis Rudnick, and exempt from execution, by virtue of the statutes of this state. He also claims that a bankrupt debtor has such an absolute title to property which may be held against attaching and execution creditors under the exemption laws that he may lawfully sell it or dispose of it by giving a preference to one or more of his creditors. It appears to be conceded that Louis Rudnick is entitled, by the statutes of this state, to claim exemptions out of his individual property equal in value to the whole of the property here in controversy, and that if this property did become his, by virtue of a transfer to him of the interest of David Rudnick, valid and binding upon creditors of the firm, the subsequent sale to Fisher is also valid and binding upon the firm's creditors, and upon the trustee appointed pursuant to the national bankruptcy law. One partner has not such an absolute right to the assets of his firm that he can appropriate any part to his separate use without the consent of his co-partner. Each partner has a right to have all the assets of the firm held for payment of the firm debts, and for this reason partners are not permitted to claim exemptions out of the partnership property. The "reason for the rule ceases, however, and with it the rule itself, when the partnership property loses its character as such, and is converted into individual property of the partners, before a partnership creditor has acquired a lien thereon. Partnership creditors have no lien, as such, upon the partnership property for the payment of their claims; and if one partner sells his interest in partnership property to the other in good faith, and before a partnership creditor has levied upon it, the purchaser may claim his exemption." 12 Am. & Eng. Enc. Law (2d Ed.) 157. "The mere insolvency of the firm at the time of the conversion of the partnership into individual property by a sale or division between the partners does not affect the right to claim an exemption." Id. 158. Exemption laws are based upon a wise policy, to save families from becoming so completely impoverished as to become burdens upon the community, and they should be construed liberally to effect the purpose for which they were enacted. On the other hand, the head of a family, who pursues his trade or calling in partnership with others, and who owns nothing except his interest in the assets of his firm, is prevented from claiming exemptions out of the partnership property by a very technical rule, and there should be no straining to extend the rule so as to defeat the policy of the law giving exemptions to poor debtors. The bankruptcy law provides that the trustee of the estate of a bankrupt upon his appointment and qualification becomes, by operation of law, the successor of the bankrupt as to all property and property rights not exempt from execu-

tion, and the title of the trustee relates to and becomes effective from the date on which the court adjudges the bankrupt to be a bankrupt. The right and title of a trustee is, in general, the same as the right and title which the bankrupt possessed prior to the adjudication, but to this is added authority to avoid fraudulent transfers of property. Subdivision "e" of the seventieth section of the bankruptcy law provides as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

The facts in this case, as stipulated, afford no ground for impeaching the transfer of the property made to Mr. Fisher by creditors of the firm of Rudnick Bros. on the ground that he was not a bona fide purchaser for value. Therefore the trustee cannot claim rights, as a representative of creditors, superior to the rights of Rudnick Bros. after their voluntary transfer of the property to a bona fide purchaser for value. I am unable to concur with the referee in holding that by the transfer of David Rudnick's interest in the partnership property an unlawful preference was given, and that the transaction is voidable by the trustee under the provisions of the sixtieth section of the bankruptcy law. The transferee is not a creditor, and, if it be upheld, the transfer will not enable any creditor to obtain a higher percentage of his debt than any other creditor of the same class. The effect of the transaction is a loss to all creditors of the firm, and is strictly impartial. Therefore it cannot be impeached because it is preferential. For the reasons stated I am constrained to reverse the decision of the referee, and vacate the order requiring the sheriff to deliver the property to the trustee.

In re HERRMAN.

(District Court, S. D. New York. June 8, 1900.)

1. BANKRUPTCY—DISCHARGE—APPLICATION UNDER THE ACT OF 1867—EFFECT ON APPLICATION UNDER ACT OF 1898.

An order refusing to discharge a bankrupt under the bankruptcy act of 1867 does not estop the bankrupt from applying for a discharge upon the same facts, and as to the same debt, under the act of 1898.

2. SAME—PLEA IN BAR.

The pendency of an application for the discharge of a bankrupt under the bankruptcy act of 1867 cannot be pleaded in bar of an application by the debtor for a discharge under the act of 1898.

3. SAME.

Debts existing under the bankruptcy act of 1867, and kept alive by subsequent judgment, are not excepted from the operation of the act of 1898.

In Bankruptcy. Discharge. Former proceedings pending.

Horwitz & Samuels, for the motion.

Francis C. Reed, opposed.

BROWN, District Judge. A motion is made for leave to amend the fourth specification of certain creditors in opposition to the bankrupt's discharge, by alleging the pendency of former proceedings in bankruptcy under the act of 1867 and of an application for a discharge therein which is still pending and undetermined. That specification, as it stands, states that the discharge of the bankrupt was refused in the former proceeding. Investigation shows that no order to that effect has ever been entered. The moving creditors have a claim which was proved in the former proceedings and which has been kept alive by a judgment obtained thereon in 1898. The present motion is based upon the theory that the refusal of a discharge in the former proceeding would be *res judicata* as respects the same debt in the present proceeding; and that the pendency of the old application for a discharge would be good as a plea in abatement, as of a former suit pending; and that the discharge of the old debt can only be sought or obtained in the old proceeding. On consideration, I am unable to sustain this view.

Proceedings in bankruptcy are doubtless in the nature of a suit (*Sandusky v. Bank*, 23 Wall. 289, 23 L. Ed. 155; *In re Adams*, 36 How. Prac. 270, 271, Fed. Cas. No. 40; *In re Comstock*, 3 Sawy. 128, Fed. Cas. No. 3,077), and no doubt the refusal of a discharge under the act of 1867 would be *res judicata* upon any subsequent application for a discharge under that act as respects the same debt; and similarly, while a former proceeding is pending, no subsequent application for a discharge from the same debts would be entertained under the same act. But these rules in my judgment have no application to proceedings for a discharge under wholly independent and widely separated statutes of bankruptcy, like those of 1867 and of 1898. The provisions regulating discharges are quite different in the two statutes; so that though a discharge were refused under the act of 1867, the bankrupt upon the same facts might be entitled to a discharge under the act of 1898.

The facts stated in the moving affidavits and the records of this court furnish a strong presumption that the proceedings for a discharge under the former act were virtually abandoned in 1879, as the bankrupt was not likely to succeed in obtaining it. There were then numerous specifications in opposition to his discharge, two of which were the same as are raised in the present proceeding, and which would bar a discharge under the present act if proved. The former proceeding, which has never been determined by the entry of any order refusing a discharge, can have no greater force as a bar to the present proceeding, however, than if an order of refusal had been in fact entered. But even if such an order had been entered, and even if the refusal was solely upon grounds which would bar a discharge under the present act, the debtor would in my judgment still be at liberty to proceed for a discharge under the act of 1898 without reference to the act of 1867, or any proceeding under it; and his right to a discharge now must be determined by the provisions of the present act alone.

The only effect of a refusal of a discharge under the old act was to exclude the debtor from all relief under that act, and to leave his debts

existing as before. The act of 1898, passed 20 years after the repeal of the act of 1867, marks a new beginning. It is wholly independent of the former act. It was designed to give to debtors a fresh start in life, freed from the weight of all former debts, except such as are expressly excluded from the operation of the present act. Old debts existing under the former act and kept alive until now by subsequent judgments, are not excepted from the new act, though a discharge from them under the former act was denied. They are, therefore, presumably within the intent of the present statute. The long disability of the debtor under the pressure of his old debts is in effect made by the present act a sufficient punishment for the offenses which previously barred his discharge. The new act as respects discharges supersedes the old, and its design to give freedom to all debtors upon an honest compliance with its provisions, subject only to its own restrictions, would be clearly thwarted pro tanto, if relief under it were refused merely because similar relief had been refused under the act of 1867.

Upon this view of the intent of the present act, it follows that the facts desired to be set up in opposition to the discharge, are immaterial, and would constitute no bar to a discharge; and on that ground the motion is denied.

CHATTANOOGA NAT. BANK v. ROME IRON CO. et al.

(Circuit Court, N. D. Georgia. May 30, 1900.)

No. 1,086.

1. **BANKRUPTCY—PREFERENCES—RENEWAL OF PLEDGE.**

A pledge of property to secure notes executed within four months prior to proceedings in bankruptcy against the pledgor is not voidable as an illegal preference under Bankr. Act 1898, where the notes so secured were renewals of prior notes also secured by a pledge of the same property; the original indebtedness having been created and the original pledge made prior to the four-months period.

2. **PLEDGE—SUFFICIENCY OF DESCRIPTION OF PROPERTY.**

A description of property pledged by an iron company as "equity in iron in yard #48, Rome, Ga.," is sufficient, as it renders the iron capable of ready identification, and indicates the nature of the pledgor's interest therein.

3. **PLEADING—DEMURRER—CONSTRUCTION OF WRITING.**

On demurrer to a bill seeking to enforce a pledge evidenced by a writing which is set out, the terms of such writing, if ambiguous, must be construed in accordance with the allegations of the bill.

4. **PLEDGE—EQUITABLE LIEN—SUFFICIENCY OF CONTRACT**

An indorsement on the back of notes that the equity of the maker in certain property, which is sufficiently described to render it capable of identification, is pledged as security for the payment of the notes, is sufficient to create an equitable lien in favor of the pledgee upon the pledgor's interest in the property, which, being a mere equity, was incapable of delivery.

5. **EQUITABLE LIEN—SUIT TO ENFORCE—DEFENSES.**

The right of a complainant to enforce a contract as one creating an equitable lien, where it is not claimed that such contract constitutes a legal mortgage, cannot be affected by his failure to record it as a mortgage, as required by the laws of the state to render it enforceable against creditors or purchasers without notice.

6. BANKRUPTCY—EQUITABLE LIENS ON ESTATE—TITLE OF TRUSTEE.

Except in cases affected by fraud or illegal preferences, a trustee in bankruptcy, under Bankr. Act 1898, takes only the interest of the bankrupt in the assets of the estate, and holds such assets subject to all valid claims, liens, and equities enforceable against the bankrupt.

In Equity. On demurrer to bill. See 99 Fed. 82.

King & Spalding and Fouché & Fouché, for complainant.

C. P. Goree, for defendant.

Dean & Dean, for trustee.

NEWMAN, District Judge. The Chattanooga National Bank, of Chattanooga, Tenn., brings its bill against the Rome Iron Company, a Georgia corporation, and Halstead Smith, as trustee in bankruptcy of the said Rome Iron Company. The facts stated in the bill are that on May 27, 1898, the iron company made and executed, for a valuable consideration, to the bank, its five promissory notes, each for the sum of \$5,100 principal, dated at Chattanooga, Tenn., with legal interest from date, and attorney's fees if collected by an attorney by suit or otherwise. To secure the same the iron company executed the following contract on the back of the notes:

"The within note is secured by the pledge and deposit of the following securities, to wit: Equity in iron in yard #48, Rome, Ga. And the Chattanooga National Bank or assigns may, after the maturity of this note, sell the same at public or private sale, for cash or on time, as it or they deem best, without notice to other party, and appropriate proceeds to payment of said note; and, in the event of the above-named securities being more than the amount of this note, the same shall be held to cover any other of our indebtedness to the bank, if the latter shall so elect; and, should suit be brought on this paper, we agree to pay a reasonable attorney's fee and all costs.

"[Signed]

The Rome Iron Co.,

"L. S. Colyar, Pres. Treas."

It is alleged in the bill that "yard #48, Rome, Ga.," referred to, was the yard of the American Pig-Iron Storage Warrant Company, and that the equity referred to was the equity of the Rome Iron Company, over and above the amount due on certain warrants issued by the American Pig-Iron Storage Warrant Company, and secured by said iron. The bill further alleges that the notes referred to were successively renewed as they fell due, each renewal being secured by the same pledge and deposit, until the 4th day of February, 1899, at which time the iron company gave to the bank, in renewal of its debt, five promissory notes, each for the sum of \$5,100, each dated January 20, 1899, and due at 60 days, 90 days, 4, 5, and 6 months, from date, respectively, with legal interest and attorney's fees. These notes each had on them the same indorsement as to pledge of equity in iron in yard No. 48, Rome, Ga. It is then shown in the bill that on February 23, 1899, a petition in involuntary bankruptcy was filed in the district court for this district, by certain creditors, against the Rome Iron Company, seeking to have it adjudged a bankrupt, and that the proceedings usual in such cases were had, and on the 11th day of April, 1899, Halstead Smith, Esq., was duly appointed trustee in bankruptcy of the said Rome Iron Company, and, as trustee, has taken possession of all of its property, real, personal,

and mixed, including the equity and credits of the said Rome Iron Company, and including the equity of the Rome Iron Company in the iron in yard No. 48, heretofore referred to. It is further shown that Smith, as trustee, has been and is disposing of the iron, and paying off the warrants, and has \$30,000, or other like large sum, in his hands, arising as the proceeds of the equity in the iron. It is then averred that the contract or pledge on the back of the notes creates an equitable lien and charge in its favor upon the equity in the iron and the proceeds thereof in the hands of the trustee, and that it is entitled to have the same turned over to it, to be applied to the payment of its debt, principal and interest. It is then charged that Smith, as trustee, refuses to recognize the pledge and lien of the bank; and after alleging that it has not proven its debt in bankruptcy, and has done nothing to relinquish its pledge or equitable lien, it prays for a decree that the Rome Iron Company is indebted to it in the sum of \$25,500 principal, with interest and attorney's fees, and that the bank be decreed to have a valid pledge of, and equitable lien upon, the said equity in the said iron of the Rome Iron Company in yard No. 48, securing its debt aforesaid, and that it be decreed that the said sum in the hands of the trustee, derived from said equity, be subject to its equitable lien and pledge, and be not distributed to the creditors of the Rome Iron Company who have proven their debts. It prays for an injunction against Smith to enjoin him from disposing of the fund in his hands, and that it be paid over to the bank. This case is now here on a demurrer to the bill. The demurrer raises the question whether or not the bank has an equitable lien on the equity in this iron. The grounds of demurrer will not be considered in the order in which they are stated in the demurrer as filed, but in inverse order.

It is claimed that the pledge was made or attempted within four months next preceding the filing of the petition in bankruptcy, and that it does not appear that the same was made or attempted to be made for a present consideration. This ground of demurrer is sufficiently answered by the allegations of the bill which show that the notes dated January 20, 1899, were in renewal of notes which were originally made in May, 1898, and renewed from time to time until the present notes were given. The question raised in this case as to the record of renewed mortgages under the statutes of Georgia will be noticed hereafter.

The next ground of demurrer is that the language of this pledge contains no sufficient description of the property pledged. The description is, "Equity in iron in yard #48, Rome, Ga." It is not necessary that the property should be fully described. All that is necessary is that the language used should be sufficient to identify it. In referring to it as "equity in iron," etc., the meaning intended, clearly, is that some one else has a prior right, and that the pledgor only has an equity after satisfying some paramount lien or right. "Yard #48, Rome, Ga.," clearly means a yard in Rome, Ga., in which iron was stored, and that its number is 48. This renders its identification easy and simple, and altogether the description of the property or of the right in property pledged seems to be quite sufficient.

The next point raised by the demurrer is that the language used in this pledge indicates that something had been previously done. It is contended that the language, "The within note is secured by the pledge and deposit of the following securities, to wit," etc., indicates that something making this pledge effective had been, prior to this entry on the note, placed in the hands of the bank, and, as this had not been done, it was an incomplete and inchoate transaction. It is just as reasonable to suppose, even judging the meaning of this indorsement by its own terms, that it was used in the present tense, as in the past, and that it should be construed as if it said, "The within note is hereby secured," etc., as that it has the meaning claimed by defendant's counsel. But the case is now being heard on a demurrer to the bill, and the bill, in describing the notes, contains the following allegation:

"That to secure the same the said Rome Iron Company executed the following contract upon the back of said notes, in terms and figures as will be more fully set forth hereinafter, wherein and whereby it pledged and deposited as security for said notes all of its equity in the iron in yard No. 48," etc.

Another allegation is,

"The said notes being secured each by the same pledge of said equity in said iron in yard No. 48, Rome, Georgia. * * * A copy of each one of said notes, and of the said contract of pledge and deposit upon the back thereof, is hereto attached, and marked Exhibits A, B, C, D, and E, respectively."

Attached to the bill are copies of the notes, with the indorsement thereon which has been heretofore given in full. The bill clearly alleges, therefore, that this indorsement on the back of the notes is the pledge relied upon, and which complainant seeks to enforce.

The other two grounds of demurrer may be considered together. Each raises the question as to whether or not, there being no delivery of that which was sought to be pledged, and it being a mere equity, incapable of delivery, it could be the subject of a valid pledge. In 3 Pom. Eq. Jur. § 1235, the doctrine with reference to equitable liens is stated in this way:

"The doctrine may be stated, in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey, assign, or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice. Under like circumstances a merely verbal agreement may create a similar lien upon personal property. The ultimate grounds and motives of this doctrine are explained in the preceding section, but the doctrine itself is clearly an application of the maxim, 'Equity regards as done that which ought to be done.' In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given, or transferred as security for the obligation."

This statement of the law is quoted in *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, with apparently full approval by the court.

Testing the case at bar by the foregoing authority, in order that a lien may arise, it is necessary: (1) "That the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified." As has been stated, the reference to this property in the pledge on the back of these notes is clearly sufficient to render the property pledged capable of identification. (2) "Must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given, or transferred as security for the obligation." The clear purpose of this indorsement on these notes is to secure the notes by the equity remaining in the pledgor in the iron referred to. Both as to identification and as to purpose to secure, therefore, there seems to be ample compliance with the law on the subject as stated by the supreme court.

Two grounds not specifically set forth in the demurre: have been urged in argument. The first is the failure to record the instrument under section 2726 of the Code of Georgia, with reference to recording renewed mortgages. I need not go into the niceties of the questions argued at the bar concerning the record of mortgages and of renewed mortgages, respectively, in Georgia, because, in my opinion, it is not pertinent in this case. If this had been an instrument which could have been admitted to record as a mortgage, and was being enforced as such, it might be necessary to go into the meaning of that part of section 2726 referring to the record of renewed mortgages, and the effect of a failure to record against general creditors; but it is sought by this bill to set up this instrument, and enforce it as an equitable lien or mortgage. The necessity for any effort to set up an equitable lien is in cases where there is no formal mortgage which could be foreclosed and enforced in the ordinary way. The point made, therefore, that the failure to record this instrument is an obstacle to its enforcement as an equitable lien, is not tenable.

Since the argument of this case I have been handed by counsel for the trustee a recent decision by Judge Bellinger, of Oregon, in the case of *In re J. S. Booth*, 3 Am. Bankr. Rep. 574, 98 Fed. 975, in which it is said, without citing authority, that the trustee in bankruptcy stands in the position of an innocent purchaser without notice. If this is the law, it would seem to defeat this lien, because it seems entirely clear that an innocent purchaser from the Rome Iron Company, without notice of the pledge to the Chattanooga National Bank, would have obtained a good title; but I must, with the utmost respect, differ with Judge Bellinger as to his opinion of the position in this respect of a trustee in bankruptcy.

This question arose frequently under the bankrupt act of 1867. In *Re Rockford, R. I. & St. L. R. Co.*, Fed. Cas. No. 11,978, it was held that assignees in bankruptcy stand no better than the bankrupts in respect to the assets, excepting in cases of fraud, or of attachments of less than four months' standing. In *Ex parte Dalby*, 1 Low. 431, Fed. Cas. No. 3,540, it was held that the assignee in bankruptcy stands in the place of the bankrupt, and takes only the property which he had, subject to all valid claims, liens, and equities. In *Winsor v. McClellan*, decided in the United States circuit court for the district of Massa-

chusetts in 1843, under the bankrupt act of 1841 (2 Story, 492, Fed. Cas. No. 17,887), in the opinion, by Circuit Justice Story, it is said:

"Now the principle has been long established that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand. 2 Story, Eq. Jur. §§ 1228, 1229, 1411; Langton v. Horton, 1 Hare, 549, 563; Muir v. Schenck, 3 Hill, 228; Murray v. Lylburn, 2 Johns. Ch. 441, 443; Deac. Bankr. (Ed. 1827) pp. 320, 321, c. 10, § 3. The assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities which exist against the same in the hands of the bankrupt. This was clearly laid down by Lord Hardwicke in Brown v. Heathcote, 1 Atk. 160, 162, and has ever since been adhered to, not only in courts of equity, but also, as the case of Leslie v. Guthrie, 1 Bing. N. C. 697, abundantly shows, at law. But I need not dwell upon this point, as it comes very fully under consideration in the case of Rand v. Winslow (not reported), at the last October term of the circuit court in Maine."

In Potter v. Coggeshall (decided in 1870 by Judge Knowles, of the district court of Rhode Island) Fed. Cas. No. 11,322, it was held that, in cases unaffected by fraud, the assignee takes subject to all the equities binding upon the bankrupt. On petition for review in the circuit court, this last case was affirmed by Circuit Judge Shepley. Holmes, 75, Fed. Cas. No. 2,955.

In Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993, with reference to the rights obtained by the assignee in bankruptcy under the act of 1867, it is said:

"The assignment relates back to the commencement of the proceedings in bankruptcy, and vests, by operation of law, in the assignee the property of the bankrupt, with certain specified exceptions, although the same be then attached. It also dissolves any attachment made within four months next preceding the commencement of the proceeding. If there be no such liens, and the property has not been conveyed in fraud of creditors, he has no greater interest in or better title to it than the bankrupt."

In Casey v. La Société de Credit Mobilier, 2 Woods, 77, Fed. Cas. No. 2,496, it is said:

"An assignment in bankruptcy, like any other assignment, by operation of law, passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities."

Citing Mitford v. Mitford, 9 Ves. 100; Gibson v. Warden, 14 Wall. 248, 20 L. Ed. 797; Campbell v. Slidell, 5 La. Ann. 274; Mitchell v. Winslow, Fed. Cas. No. 9,673; Ex parte Dalby, Fed. Cas. No. 3,540.

This case was subsequently before the supreme court, and that court, while holding (Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779) that an assignee in bankruptcy "may well oppose any privilege or preference which the law itself, unaided by a bona fide purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference, even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim," further added, in the opinion by Justice Bradley:

"Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor, because the assignee only takes such title as the debtor has at the time of the assignment or insolvency."

But counsel for the trustee contends that the bankrupt act of 1898 is different in this respect from the act of 1867, and he relies upon section 70a, par. 5, to sustain this view. The language of the provision relied on is as follows:

"Sec. 70a. The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall be vested by operation of law with the title of the bankrupt * * * to all (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

The provision of the bankrupt act of 1867 as to the title vesting in the assignee is as follows:

"All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copy-rights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal; and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee." Rev. St. § 5046.

I am unable to see how any distinction can be drawn, favorable to the contention of counsel for the trustee, between the two acts. The purpose of both acts, although different language is used, seems to be to vest in the trustee the title to the entire estate of the bankrupt; and no distinction can be perceived which justifies the inference that under the last act the trustee takes the property of the bankrupt as an innocent purchaser, without notice, and that in the former he did not. The conclusion is that the demurrer to the bill, upon all the grounds taken therein, must be overruled.

SPRAGUE ELECTRIC RAILWAY & MOTOR CO. V. NASSAU ELECTRIC R. CO.

(Circuit Court of Appeals, Second Circuit. May 28, 1900.)

No. 148.

1. PATENTS—CONSTRUCTION OF CLAIMS—ELECTRIC RAILWAY MOTORS.

Claim 4 of the Sprague patent, No. 324,892, for an improved electric railway motor, must be construed to include as an element the flexible support of the end of the motor opposite the axle, upon which the other end is centered, which is an essential feature of the invention, although such support is not specifically mentioned in that claim, and as so construed the claim is valid.

Wallace, Circuit Judge, dissenting.

2. SAME—INFRINGEMENT.

The Sprague patent, No. 324,892, for an improved electric railway motor, covers a device in which the motor frame is centered at one end upon the driven axle, and supported at the other by a flexible connection with the truck frame or car body, and infringement is not avoided by the fact that

the part of the truck frame from which the nose end of the motor is suspended by a spring connection is not itself spring supported. Claims 2, 4, and 6 of such patent held infringed.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

The Sprague Electric Railway & Motor Company brought in the circuit court for the Eastern district of New York its bill in equity against the Nassau Electric Railroad Company, which was founded upon the alleged infringement of claims 2, 4, and 6 of letters patent 324,892, dated August 25, 1885, and issued to Frank J. Sprague for an improved electric railway motor. The decree of the court found that the defendant had infringed these three claims, claim 4 being construed as requiring that the restrictive elements mentioned in claims 2 and 6, but not specifically mentioned in claim 4, relating to the manner of suspending the off end of the motor, be added as elements to said claim, and directed an injunction and an accounting. 97 Fed. 609. From this decree each party has appealed, the complainant appealing from so much of the decree as restricted and qualified the injunction ordered against the infringement of claim 4.

Claims 2, 4, and 6 are as follows: "(2) The combination of a wheeled vehicle and an electro-dynamic motor mounted upon and propelling the same, the field magnet of said motor being sleeved upon an axle of the vehicle at one end, and supported by flexible connections from the body of the vehicle at the other end, substantially as set forth." "(4) The combination of a wheeled vehicle, an electro-dynamic motor, mounted upon and propelling the same, the field magnet of said motor being sleeved upon an axle of the vehicle, and the armature of said motor being supported upon the field magnet, and gearing between the armature shaft and the driving wheels of the vehicle, substantially as set forth." "(6) The combination with a wheeled vehicle, supported upon its axles by springs, of an electro-dynamic motor flexibly supported from such vehicle, and centered upon the driving axle thereof, substantially as set forth."

Frederic H. Betts, for complainant.

William H. Kenyon, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The patent in suit, so far as claims 2, 6, and 9 are concerned, was examined by this court in the case of the present complainant against the Union Railway Company (31 C. C. A. 391, 88 Fed. 82), and the subject of the described improvement was fully considered by the circuit court of appeals for the Eighth circuit in *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 40 U. S. App. 482, 23 C. C. A. 223, 77 Fed. 432. Upon an appeal from an order for a preliminary injunction in favor of the present complainant, restraining the present defendant from the infringement of claims 2 and 6, and a cross appeal from an order denying a motion for an injunction against infringement of claim 4, this court was of opinion that claim 4 had never been adjudicated, and that the affidavits did not sufficiently manifest an infringement of the other claims. 37 C. C. A. 286, 95 Fed. 821. The alleged infringement in the present case is by means of a different construction from the one in the last-mentioned case. In the opinion of this court in the *Union Case*, 31 C. C. A. 391, 88 Fed. 82, the patented invention then and now in suit was described as follows:

"As soon as the use of an electric motor for the propulsion of cars upon a street railway was thought to be attainable, divers methods were invented which were intended to enable the motor to act efficiently, economically, and

certainly upon the car axle. At first the motor was supported by or on the car body, and afterwards it was upheld upon a separate platform. The state of the art upon the subject is so fully stated by Judge Sanborn in *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 23 C. C. A. 223, 77 Fed. 432, 40 U. S. App. 482, that it need not be restated here. Sprague hung the motor under the car body, directly upon the axle of one of the pairs of wheels, by an extension or solid bearing attached directly to the motor. He used a magnet having a yoke and pole pieces, and by sleeving one end upon the axle he caused the armature, which was carried between the poles of the magnet, to be held with firmness, and the armature shaft to be held in alignment with the car axle. The opposite end of the motor was upheld by springs extending to a crossbar on the truck frame. He also relieved the weight upon the axle by a spring support from the truck of the vehicle. The motor was thus hung below the car, one end being centered upon the axle, and the other end being flexibly attached by springs to the truck frame. The effect of the mode of construction is explained in the specification as follows: 'The armature being carried rigidly by the field magnet, these two parts must always maintain precisely the same relative position under every vertical or lateral movement of the wheels or of the car body; and, as the wheel magnet which carries the armature is itself centered by the axle of the wheels to which the armature shaft is geared, the engaging gears also must always maintain precisely the same relative position. At the same time the connection of the entire motor with the truck is through springs, so that its position is not affected by the movements of the truck on its springs.' The simplicity and comparative lightness of the general plan upon which this motor was constructed, and the adaptability of the means to the required result, made the motor successful, and other pre-existing methods of construction disappeared to a great extent. The question of anticipation by a pre-existing electric railway motor may be laid out of the case, for it is not asserted that any patent prior to the date of the patent in suit described an electric motor geared to and propelling a vehicle, and supported at one end by sleeving extension pieces from the field magnet upon the driven axle, and at the other end by a flexible connection with the truck or body of the vehicle. * * * The Sprague invention was not a pioneer, and was not of a broad character, but it was a distinct and clearly-defined invention in the method of hanging electric motors for vehicles, and its gist consisted in the utilization of the frame of the motor itself with the necessary extension, and the centering of the motor on the driven axle by extension pieces from the field magnet at one end, and in its flexible suspension at the other end to the car truck, the armature being carried rigidly by the field magnet."

No objection was apparently relied upon in addition to those heretofore urged against the validity of the patent or the soundness of the patentable character of the invention as thus described. The point of the defense which is pressed is that the defendant's motor as mounted upon its railway car does not infringe either of the three claims, because it is not flexibly supported at its off end from the body of the vehicle or from the truck. If claim 4 does not necessarily include such support, its validity is denied. The proposition in regard to infringement is that the Sprague invention is limited to a combination in which the car body or car truck which supports the nose end of the motor is itself supported upon the car springs of the vehicle, and that a substantial portion of the invention consisted in supporting the nose end of the motor directly from the spring-supported car body or spring-supported car truck, whereas the defendant does not thus suspend its motor. It sleeves the other end of its motor upon the driven axle, in accordance with the Sprague invention.

It is conceded that the structure in the *Union Railway Case*, which

was held to infringe claims 2 and 6, was substantially the same in principle of construction, though not in detail, as the defendant's structure in the present suit, and it is a fact that the able solicitors of the Union Railway Company did not make the present defendant's point of noninfringement, while they vigorously defended themselves against the charge of infringement, and attacked in like manner the validity of the patent. The present defendant takes up a defense which was disregarded by its energetic predecessor in the litigation. Sprague says that the yoke of his field magnet was hung from a cross-piece of the truck by heavy springs, and the truck was evidently the old form which was in use on ordinary cars in 1885. The defendant uses what is known as the "Dupont Truck," one of the forms of modern trucks which consists of two parts. The lower part of this compound truck, which the defendant calls a "motor truck frame," consists, in general, of the equalizing bars and cross frame which carry the wheel bearings and wheels, and the upper part, resting upon the lower part by springs, consists of two longitudinal plates, while springs resting upon these plates uphold the car body. The lower part is a part of the car truck. The nose end of the motor is spring-supported from a crossbar which connects the opposite sides of the lower part of the truck. The Sprague motor was hung from the cross-piece of the truck by springs, if a truck existed, and in the Dupont truck the off end of the motor is not incorporated with or fastened into a frame, but is flexibly connected by springs with the crossbar of the lower part of the truck, which, in its turn, flexibly supports the car body. That a spring in the defendant's structure intervenes between the off end of the motor and what is called the motor truck frame, and that the motor is not fastened to this frame, as in the Finney patent, are not denied, but the spring is styled a "cushioning spring," connected with a rigid frame, which gives a degree of independent vertical movement to the motor, but without the Sprague flexibility between the motor and the car truck. It is manifest that in the Dupont truck there is not the degree of flexibility which is apparent in the Sprague specification and drawings, but an intentional flexibility was imparted to the spring-supported motor which was denied in the Finney invention, and which the Dupont truck preserved.

In view of the fact that the invention was the hanging of the motor below the car, one end being centered upon the axle, and the other end being flexibly attached by springs to the truck frame, it cannot be subdivided, and claim 4 must be construed to include the flexible support of the off end of the motor from an independent structure which is the truck frame, or from the independently mounted body of the vehicle.

The decree of the circuit court is affirmed, without costs of this court, as the appeal of neither party is sustained.

WALLACE, Circuit Judge. I am unable to concur in so much of the opinion of Judge SHIPMAN as sustains the validity of claim 4 by reading into it the flexible supporting devices at the end opposite the driving wheels. Construed as I think the claim should be, with

this feature eliminated, I think it is void for want of patentable novelty, in view of the prior state of the art, if not in view of the prior patent to Finney alone.

In other respects I concur.

JEFFRIES et al. v. DE HART.

(Circuit Court of Appeals, Third Circuit. June 1, 1900.)

No. 6.

1. ADMIRALTY—ACTION FOR TORT—PRINCIPLES GOVERNING.

A suit in admiralty against a shipowner to recover for the death of a stevedore, resulting from an injury received on board the ship, is governed by the same principles that would be applicable had the accident occurred on land, and recovery been sought in a common-law action; and the defendant's liability must rest on some act of negligence, or the violation of some duty he owed to the deceased, which proximately caused the injury.

2. NEGLIGENCE—OMISSION OF DUTY—INJURY OF STEVEDORE.

A ship contracted with a company, as master stevedores, for the loading of the vessel; agreeing to furnish "all necessary steam, slings, and rope for falls." The tackle used was selected by the stevedores themselves, with the consent of the officers of the ship, from a large quantity on board owned by the ship, and suitable for the purpose. *Held*, that the shipowner owed no duty to a stevedore-employed by the contractor, to supervise or control such selection, and that he was not liable for the death of the stevedore, caused by the giving way of such tackle.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

J. Warren Coulston and John G. Johnson, for appellants.

J. Parker Kirlin, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. This was a suit in admiralty, in which a libel in personam was filed against M. J. De Hart, owner of the steamship Henrietta H., by the widow and children of Thomas Jeffries, to recover damages for his death, which resulted from an accident that occurred on that vessel while he was at work as a stevedore. The fact that the accident happened on board a ship is, however, of no significance. The same principles apply as would have been applicable if it had happened upon the land and recovery had been sought in a common-law action. The necessary condition of the defendant's liability is that he owed to Jeffries a duty of care, in violation whereof he negligently committed or omitted some act, and thereby proximately caused the fatal catastrophe. *Bragdon v. Perkins-Campbell Co.*, 30 C. C. A. 568, 87 Fed. 109. Jeffries was not employed by De Hart nor by any one representing him, but by the G. P. Cronise Company, the master stevedores, who were loading the ship under an agreement in writing which contained this provision: "The ship to furnish all necessary steam, slings, and rope for falls. All other gear to be furnished by the G. P. Cronise Company." It

may be assumed that this provision imposed upon the owner of the ship the duty to exercise reasonable care to assure the safety of any appliances which in pursuance thereof he might actually specify or point out for use in doing the work; but the evidence has convinced us, as it did the court below, that the gear which broke and permitted the chute to fall upon or against Jeffries was not selected by De Hart, or by any person acting on his behalf, but by the stevedores themselves, who in choosing this particular tackle relied upon their own judgment as to its fitness, and who, in using it as they did, were not pursuing the contract with the owner, but were acting independently of it, and therefore upon their own responsibility. All that the mate of the vessel, or any other agent of De Hart, really did, was to passively permit the workmen of the Cronise Company to employ such part of the vessel's tackle as they saw proper, instead of furnishing the gear which, under the agreement, the ship might have been required to furnish; but of this departure from the terms of the contract Jeffries could not have complained, for he was neither a party nor privy to it. Consequently, whatever duty of care was owing to him was, under the circumstances, due by his employer, the Cronise Company, and not by the ship or its owner. If the appliances were negligently selected, those who made the selection were at fault, and not the defendant in error, who neither by himself nor by any agent of his or of the ship participated in that selection, or was under any obligation to Jeffries to direct or control it. We do not think that any part of the answer can properly be said to be inconsistent with our understanding of the facts. It admits that the chute was supported by certain tackle, ropes, and gear, which belonged to, and were part of the outfit of, the steamship, but avers "that they were selected and chosen for the purpose by the stevedores loading the vessel, out of a large amount of other suitable tackle, ropes, and gear, which were on board, and available for use by said stevedores in loading." This averment is, in our opinion, precisely accordant with the proof; and the subsequent allegation which has been pressed upon our attention does not, when fairly considered, appear to present the matter differently. The general statement is, again, that "the stevedores who undertook the loading assumed full charge and control of the loading of said vessel, and all her gear, rope, and tackle"; and we do not perceive that this is in any way materially modified by the immediately following statement that the stevedores "signified to the officers of the ship what tackle, rope, and gear they required, and were furnished with the rope, tackle, and gear which they requested." The reasonable and natural meaning of this language as a whole, and as related to the context, is simply that the stevedores selected the gear they required, and that their request that they might be permitted to use it was acceded to; and this, we think, is the very truth of the matter.

Our conclusions of fact are founded solely upon the record before us, and therefore the motion which was made upon the argument, to strike out certain matter contained in an appendix to the appellee's brief, need not be considered. The decree of the district court (96 Fed. 494) is affirmed.

THE AMERICA.
THE INDIAN RIDGE.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 155.

1. COLLISION—TOW AND ANCHORED VESSEL—NEGLIGENCE OF TUG.

A tug having three tows, single file, on hawsers over 1,000 feet in length, failed to discover the lights of an anchored vessel until within 1,000 feet, although they could have been seen for a half mile or more; and then changed her course, but so late that she barely missed the anchored vessel, and the leading tow, under the influence of the tide, came in collision with it. *Held*, that the tug was in fault for the collision in not sooner seeing the lights and changing her course.

2. SAME—CONTRIBUTORY FAULT OF TOW—DUTY TO KEEP LOOKOUT.

Tows, like other vessels, must exercise ordinary skill and vigilance to avoid collision; and a tow being navigated in greatly-frequented waters, on a line 1,000 feet long, cannot safely depend entirely upon the tug, but it is her duty to keep a lookout, and to be prepared to cut her hawser if necessary to prevent a collision, and her failure to exercise such precautions, which would have enabled her to avoid a collision resulting from the negligent navigation of the tug, is a fault contributing to such collision.

Appeal from the District Court of the United States for the Eastern District of New York.

Samuel Park, for appellants.

James Armstrong, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. We are unable to accept the theory of the collision which is put forward in behalf of the America, and agree with the findings of the district judge that it was not caused by any deviation by the Indian Ridge in following the course of the tug, but was caused by the fault of the tug in not earlier changing her course towards the eastward, to avoid the Suzanne, then lying at anchor in a proper place. The collision took place in a clear evening. The ship Suzanne was within the anchorage grounds off Staten Island. Her bow pointed northward, and her anchor light was burning, and could have been seen by approaching vessels for a distance of half a mile or more. The tug America, with three barges in tow, single file, on hawsers of over 1,000 feet in length, the Indian Ridge being the barge nearest the tug, proceeded with her tows at a speed of seven or eight miles an hour on a course about S. W. by S., until she got within the anchorage grounds. She did not observe the Suzanne until she was within 1,000 feet of her. She then immediately changed her course two points or more to port, in the effort to get to the eastward, outside the anchorage grounds, and avoid the Suzanne. She passed quite near, but safely across, the bow of the Suzanne; but the ebb tide, which was running about three miles an hour, caused her tows to set towards the Suzanne. It is doubtful whether from the time the America changed her course to the eastward it would have been possible for the Indian Ridge to escape the Suzanne by any change of

course to port. The Indian Ridge had no lookout. Her master and one of her hands were on deck, but they were both in the pilot house steering after the tug, and were paying no attention to anything else. When the America changed to port, they changed the course of the Indian Ridge correspondingly, and the Indian Ridge followed the tug until her master saw the Suzanne, then not over a couple of hundred feet away, when, deeming collision to be inevitable, he hard ported the wheel of the Indian Ridge in the hope of lessening the shock.

With the two heavy barges pulling behind her, the Indian Ridge could not have materially changed her course in the short time which intervened between porting her wheel and the collision, and that maneuver, if an error at all, was harmless and in extremis. Nevertheless she cannot be exonerated from contributory fault. If she had maintained vigilant observation, she could have discovered the Suzanne before the tug changed her course to port, and there would have been time to permit her hawser to be cut, even if no other means of avoiding a collision were practicable. There would have been time to do this when the tug went to port. At that time it would have been apparent to those in charge of the Indian Ridge, if they had used their faculties, that unless some effective measure was immediately taken she would be carried by the tide and the course of the tug against the Suzanne. A tow on so long a hawser, navigating a much frequented channel, where water craft of all descriptions, moving and lying by, are liable to be encountered, should be provided with the means of severing her hawser in case of an emergency rendering that necessary. Whether the Indian Ridge was thus equipped does not appear. If she was not she should have been, and if she was she incapacitated herself from using them by her own neglect. She did not see the Suzanne until it was too late to cut a hawser or do anything else to avoid her. The failure to have a lookout by a tow may, under some circumstances, be culpable (*The Virginia Ehrman and The Agnese*, 97 U. S. 315, 24 L. Ed. 890), and we think the present to be one of the cases in which it should be held to be so. Tows, like other vessels, must exercise ordinary skill and vigilance, and, while being navigated in greatly frequented waters, are bound to use care and precautions commensurate with the increase of risk of collision from the greater number of craft likely to be met. A tow, using in such waters a hawser one-sixth of a mile long, ought to anticipate that contingencies of navigation may require her to rely on her own precautions for her own safety and the safety of other vessels, and not depend exclusively upon those which may be exercised by the tug. We think the court below should have apportioned the loss between the Indian Ridge and the America, and decreed in favor of the libellant against both.

The decree is accordingly reversed, with costs to the appellant as against the Indian Ridge, and with instructions to the court below to decree conformably with this opinion.

PORTAGE CITY WATER CO. v. CITY OF PORTAGE.

(Circuit Court, W. D. Wisconsin. July 2, 1900.)

No. 18.

1. JURISDICTION OF FEDERAL COURTS—ASSIGNEE OF CHOSE IN ACTION—CONSTRUCTION OF STATUTE.

Under the provision of section 1 of the judiciary act of 1887-88, that no federal court shall have cognizance of a suit to recover the contents of any promissory note or other chose in action "in favor of any assignee or any subsequent holder * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made," if the requisite diversity of citizenship existed between the original parties to a note or contract, and a suit between them might have been maintained thereon in a federal court, any subsequent assignee may maintain such action, provided he is also a resident of a state other than that in which the defendant resides; and it is immaterial that an intermediate assignee was a resident of the same state.

2. SAME—WHAT CONSTITUTES AN ASSIGNMENT.

A sale and conveyance under a decree of foreclosure of a waterworks plant, together with the rights of all the parties in the franchise and contract under which it was constructed, does not operate merely as an assignment of the contract, within the meaning of the provision of the judiciary act of 1887-88, which denies to federal courts jurisdiction of a suit by an assignee on a chose in action where such suit could not have been maintained if no assignment or transfer had been made; and such provision does not affect the right of the purchaser to maintain a suit in a federal court to enforce rights under such contract, where the requisite diversity of citizenship exists between the parties. In such case the conveyance vests the purchaser with rights in real property, to the full enjoyment of which the enforcement of the contract is a necessary incident.

On Demurrer to Complaint for Want of Jurisdiction.

Hume, Oellerich & Jackson, for plaintiff.

C. A. Fowler, City Atty., and Jones & Stevens, for defendant.

BUNN, District Judge. The demurrer to the complaint raises an important and interesting question of jurisdiction, under that clause of the jurisdiction act of 1887-88 providing as follows:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee or any subsequent holder * * * unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made." 25 Stat. 433, 434, c. 866, § 1.

It appears by the complaint that there was a contract or franchise granted by the city of Portage, Wis., the defendant, to three citizens of the state of New York, for the purpose of constructing a system of waterworks for the city. These New York men who held the contract assigned the same to the Portage City Waterworks Company, a corporation presumably organized under the laws of Wisconsin. Afterwards the plant constructed by the corporation went into the hands of a receiver of this court in a suit by the bondholders to foreclose. The action is brought by the Portage City Water Company, a corporation organized and existing under the laws of the state of Maine, and a citizen of that state, against the city of Portage, a municipal

corporation of Wisconsin, to recover the sum of \$3,457.50, with interest, being the aggregate of several sums claimed to be due upon a contract for supplying the city with water. The complaint alleges: That on April 8, 1887, the defendant passed an ordinance authorizing J. F. Moffett, H. C. Hodgkins, and J. V. Clarke, all citizens of the state of New York, and doing business under the firm name of Moffett, Hodgkins & Clarke, to construct, maintain, and operate a system of waterworks in the defendant city for the purpose of supplying the city and its inhabitants with water. That said ordinance was duly passed and accepted by Moffett, Hodgkins & Clarke, and became and is a binding contract. That Moffett, Hodgkins & Clarke proceeded with the work of putting in said waterworks plant pursuant to the contract, and began to erect and construct all necessary basins, filtering galleries, reservoirs, water towers, pump houses, buildings, engines, machinery, mains, pipes, etc., necessary for supplying the city with water. That thereafter, in the year 1887, they sold and assigned to the Portage City Waterworks Company all their right and title under the contract. The citizenship of the Portage City Waterworks Company is not averred, but presumably it was a Wisconsin corporation. By this assignment all the interest of said Moffett, Hodgkins & Clarke in the contract passed to the said last-named company. That said Portage City Waterworks Company went on and completed the waterworks as contemplated by the said contract and ordinance. That afterwards, in April, 1895, an action was commenced in this court by the owners of bonds issued by the Portage City Waterworks Company to foreclose a mortgage upon the water plant, securing payment of the bonds. That under that foreclosure one Warren G. Maxcy was appointed receiver of, and became vested with, the property. That in January, 1897, a sale of the plant was made by the marshal under the foreclosure proceedings, wherein one Theodore C. Woodbury purchased and became the owner of the plant and contract with the city. That this sale was confirmed by the court. That said Woodbury was then, and still is, a citizen of the state of Maine, and entitled to bring this action. That afterwards, on January 27, 1897, said Woodbury sold and transferred to the plaintiff, also a citizen of the state of Maine, all his interest in and to the contract and the waterworks plant constructed under it by successive owners, and that the plaintiff is now the lawful owner and holder of the same, and entitled to maintain the action.

Under this state of facts it is claimed by the defendant that under the above clause of the jurisdiction act this court has no jurisdiction, in that, though the requisite citizenship exists between the plaintiff and defendant, the transfer to the Portage City Waterworks Company, who were citizens of Wisconsin, prevented any subsequent holder, though a citizen of another state, from maintaining the action in the federal court, and that the case comes within the prohibition and exception of the statute. It is true that the Portage City Waterworks Company, as well as the receiver, was a citizen of Wisconsin, with the defendant, but the original contracting parties, who owned the franchise and contract, were citizens of New York, and competent to sue in the federal court. This being the case, the assignee of the

receiver, who was a citizen of Maine, and who purchased the property, could also bring action in the federal court. The statute says the court shall not have cognizance in favor of any assignee unless the suit might have been prosecuted in such court if no assignment had been made. Clearly, if no assignment had been made of the contract, the original contractees, who were citizens of New York, could have come into the federal court to sue upon the contract. That being the case, there is no reason why the present holders of the contract may not, so long as the requisite citizenship exists to give the federal court jurisdiction. This statute, or the ones of a like character preceding it, has been often before the courts for construction; and it has never yet been held, either by the supreme court, or, I think, by any circuit court, that if these conditions existed the action could not be maintained, because the plaintiff must trace his title through some intermediate assignee, who could not have maintained the action. All the cases go upon the assumption that the intention of the law was to deny jurisdiction only in case the original payee or contractee was a citizen of the same state with the defendant, and so could not maintain the action in the United States courts. If the requisite citizenship existed between the original parties to the note or contract, so that suit might be maintained by the payee in the federal court, any subsequent holder could maintain the action, provided he was also a resident of a state other than that where the party defendant resided. This, I think, is as far as the cases go. The purpose of the law was to prevent colorable assignments for the purpose of giving jurisdiction by payees or contractees who were citizens of the same state with the other contracting party. But this purpose does not hold when by the original contract the suit might be brought in the federal court.

The statute has been many times before the supreme court under a similar clause of the original judiciary act, as well as under the acts of 1875 and 1887-88. The first case was that of *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718, opinion by Chief Justice Ellsworth, in 1799. The action was brought by the bank, who was described as a citizen of Pennsylvania, against Turner and others, who were citizens of North Carolina, upon a note made by defendant, payable to Biddle & Co., and which was assigned to the plaintiff. There was judgment for the plaintiff, which was reversed because it nowhere appeared that Biddle & Co., who were the original payees, could have maintained the action. In *Montalet v. Murray*, 4 Cranch, 46, 2 L. Ed. 545, precisely the same question was again before the supreme court; and the court held (Chief Justice Marshall delivering the opinion) that, if it do not appear upon the record that a suit might have been maintained in the courts of the United States between the original parties to a promissory note, no suit can be maintained upon it in those courts by any subsequent holder. In *Gibson v. Chew*, 16 Pet. 315, 10 L. Ed. 977, the same question was again before the court, and in an opinion by Justice Wayne the same ruling was made. See, also, *Coffee v. Bank*, 13 How. 183, 14 L. Ed. 105, where the doctrine is again reaffirmed. The question was again before the court in *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654, the opinion

reviewing the previous cases. The doctrine, as there laid down by the court, speaking through Mr. Justice Harlan, is as follows:

"It was settled by many decisions under the act of 1789 that a circuit court of the United States had no jurisdiction of a suit brought against the maker by the assignee of a promissory note payable to order, unless it appeared affirmatively that it could have been maintained in that court in the name of the original payee."

There is no suggestion in the case of any other condition, as that the action must be one which might have been maintained by any of the intermediate assignees and holders, as well as the original payee. After citing the above authorities, and *Morgan's Ex'r v. Gay*, 19 Wall. 81, 22 L. Ed. 100, the court proceeds to say:

"The authorities we have cited are conclusive against the right of the plaintiff to maintain this suit in the court below, unless it appeared that the original payee, Lamb, could have maintained a suit in that court upon the note and coupons."

One of these cases so cited upon the one question decided was that of *Morgan's Ex'r v. Gay*, 19 Wall. 81, 22 L. Ed. 100, which is mainly relied upon in the case at bar for authority for a wholly different proposition. But that case, when properly considered, will not be found to be in conflict with the other cases cited. It is authority for just what it was cited for by Mr. Justice Harlan; and that is, in order to give jurisdiction to the United States circuit court, it should appear of record that the original payee might have maintained the action if no assignment had been made. The case was properly decided on that ground, and is in line with all the other cases; but Mr. Justice Strong, in writing the opinion, went further than was necessary in giving a reason for the decision, that the court had no jurisdiction, because there was no averment in the petition of the citizenship of the payees of the bills or that of the subsequent indorsees. No doubt, the real ground of the decision was the same as in all the other cases, that to give jurisdiction to the federal court it should appear that the original payee named in the note or contract was a citizen of a state other than that of the defendant, and so in a position to maintain the action if no assignment had been made. That had always been the ruling of the supreme court as well as the circuit courts from the earliest times, under the act of 1789. The exact question in issue in the case at bar was twice adjudged in the United States circuit court,—first in 1830, in the case of *Wilson v. Fisher*, Baldw. 133, Fed. Cas. No. 17,803, where a citizen of New York had obtained a judgment against a citizen of Pennsylvania in a court of that state, and which the plaintiff assigned to another citizen of Pennsylvania, whose executors assigned it to the complainant, who was an alien. Held, that he could sustain a bill in equity in the United States circuit court notwithstanding the intermediate assignment to a citizen of Pennsylvania. The decision, which was by *Hopkinson, J.*, seems to me to be well reasoned and well founded in principle. The court says:

"The suit cannot be maintained here unless it might have been prosecuted here if no assignment had been made; that is, as we understand it, if it had remained with the original parties to the transaction, contract, or cause of ac-

tion. The law does not declare that no assignee shall prosecute his suit in this court unless his assignor might have done so, but unless a recovery of the right claimed might have been had in this court if no assignment of it had been made; and, of course, in every case in which a recovery might have been prosecuted in the courts of the United States if no assignment had been made, it may be so prosecuted after such assignment to a party competent to sue here. The question now under consideration has received, as far as we can find, no direct adjudication, but the clause of the act of congress under which it arises has several times come under the notice of the courts. In the case of *Sere v. Pitot*, 6 Cranch, 332, 3 L. Ed. 240, the question turned on a distinction set up between an assignment made by operation of law and one by the act of the party, the plaintiff claiming by virtue of a general assignment of the effects of an insolvent. The chief justice states the objection to be 'that the suit was brought by the assignees of a chose in action, in a case where it could not have been prosecuted if no assignment had been made.' The terms in which the objection is taken and stated show a disposition to keep to the words of the law, and to oust the jurisdiction only in cases falling clearly, if not literally, within them. In *Montalet v. Murray*, 4 Cranch, 46, 2 L. Ed. 545, we come still nearer to the construction we have adopted. It is there said, 'If it did not appear upon the record that the character of the original parties would support the prosecution, the objection is fatal.' The court here seem to refer the question of jurisdiction to the character of the original parties to the contract or chose in action for the recovery of which the suit is prosecuted, without regarding any subsequent or intermediate holder, provided that the plaintiff himself is qualified to sue. The provisions of the act of congress are met if we have good parties on the record, and the right claimed to be recovered might have been prosecuted here if no assignment of it had been made. The parties to the contract or chose in action and the parties to the suit are looked to by the act of congress, and we may suggest many doubts and difficulties that would arise if the character of the various persons through whose hands the chose in action might have passed are to be inquired into. So far as we may speculate upon the intention and policy of the legislature in making this enactment, they will be fully answered by this construction."

The other case was *Milledollar v. Bell*, 2 Wall. Jr. 334, Fed. Cas. No. 9,549, decided in 1854, where the same question was decided by the circuit court in an opinion by Judge Grier, one of the associate justices of the supreme court. The court, in its opinion, says:

"The bill avers that Milledollar, the mortgagee, is a citizen of New York. He could, therefore, have brought his suit in this court for the contents of the bond and mortgage 'if no assignment had been made.' And, to sustain the jurisdiction of the court in his case, it would have been necessary only to aver that the mortgagors were citizens of New Jersey at the time suit was brought. The complainant's case is therefore within the strict letter of the law; nor can we discover anything in the spirit, equity, or policy of the act, or in adjudged cases, which would compel us to give it a construction such as the defendant asks. The statute does not take from the assignee of a chose in action his right to sue in the courts of the United States, unless his immediate assignor could have sustained such action; but only in case the court could have had no jurisdiction, as between the original parties to the instrument, if no assignment had been made. The situation or rights of temporary intermediate assignees, holders, or indorsers enter not into the conditions of the case. * * * We are of opinion, therefore, that as this bill shows that the complainant is a citizen of New York, and the defendants citizens of New Jersey, at the time the bill was filed, and that the original contractor or mortgagee is a citizen of the same state, and could, therefore, have sued these defendants at the time this bill was filed, in the circuit court of New Jersey, 'if no assignment had been made,' this court has jurisdiction of the case, and the citizenship of the intermediate holders, owners, or assignees is immaterial, and need not be averred."

These cases are not referred to in *Morgan's Ex'r v. Gay*, and there could have been no intention of overruling them. On the contrary, I

think the decisions of the supreme court are fully in accord with these early decisions of the circuit court. This provision of the statute is an exception and qualification of the general rule governing the jurisdiction in suits between citizens of different states, and should not be extended by construction.

But there is another—to my mind, cogent—reason why the provision of the statute in question has no application to a case like this. Allowing that such a contract as was made between Portage City and Moffett, Hodgkins & Clarke might fall within the purview of the statute which designates promissory notes and other choses in action, it does not follow that after the waterworks plant was erected, 10 miles of main laid, expensive buildings constructed, and other appliances created to facilitate the operation of a watering plant for the use of the city, the real estate which was the subject of the foreclosure would fall within that designation. To raise funds for the completion of the plant, the Portage City Waterworks Company issued its bonds to the Farmers' Loan & Trust Company, a corporation of New York, to the amount of \$150,000, secured by a mortgage upon the entire plant and franchise. It was to foreclose this mortgage that suit was commenced by the Farmers' Loan & Trust Company, and it was under this foreclosure that the property came into the hands of the receiver of this court, and was sold under the order of the court, and bid in by Theodore C. Woodbury, a citizen of the state of Maine. The foreclosure was a real-estate foreclosure. Of course, the defendant in that suit had an equity of redemption in the property, but the entire beneficial interest was already in the Farmers' Loan & Trust Company by virtue of the bonds and trust deed. The conveyance by the marshal under the receivership proceedings and the order of the court was a conveyance of the entire interest in the plant and franchise,—as well that of the defendant the Portage City Waterworks Company as that of the bondholders,—and can hardly be considered merely as an assignment of the original contract under which the plant was erected. It was a conveyance of real estate. The law required the property to be sold at auction to the highest bidder. Theodore C. Woodbury, who was a citizen of Maine, made the best bid, and the plant was conveyed to him by the deed of the marshal, and the sale confirmed by the court. Woodbury transferred the property and franchise to the plaintiff, also a citizen of Maine. There does not seem to be any likeness in the case to that of the assignee of a promissory note or other chose in action. The receiver, while the property was in his possession could, no doubt, have brought a similar action in this court, and I see no reason, upon any just ground, why the plaintiff may not. The demurrer to the jurisdiction of the court is overruled, and the defendant given until the first Monday in August next to answer the complaint.

MARRS v. FELTON et al.

(Circuit Court, D. Kentucky. June 23, 1900.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

An action in tort against two defendants to charge them with liability on the ground of the negligence of servants employed by them jointly, does not involve a separable controversy, so as to be removable by one defendant alone.¹

2. SAME—SUIT AGAINST FEDERAL RECEIVER—JOINDER WITH CO-DEFENDANT.

The real ground supporting the right of a receiver appointed by a federal court for a state corporation to remove a suit commenced against him in a state court appears to be the ancillary nature of such suit, and not that it is one arising under the constitution or laws of the United States, and the jurisdiction of the federal court rests ultimately upon the diversity of citizenship between the parties to the suit in which the receiver was appointed. Such being the case, where such a receiver is properly joined in the state court with a co-defendant who has no right of removal, and the suit does not involve a separable controversy, it cannot be removed by the receiver.

On Motion to Remand to State Court.

Matt O'Doherty, for plaintiff.

Simrall & Galvin, for defendant Felton.

A. P. Humphrey, for defendant Southern Railway of Kentucky.

EVANS, District Judge. The plaintiff, a citizen of Kentucky, has, in this action, sued jointly the Southern Railroad Company of Kentucky, a citizen of Kentucky, and S. M. Felton, the receiver of this court appointed in the suit of Samuel Thomas against the Cincinnati, New Orleans & Texas Pacific Railway Company, of which latter suit this court had jurisdiction solely upon the ground of diverse citizenship. The defendants here are charged with having, by their joint and concurrent negligence, caused the death of plaintiff's intestate in the yards at Lexington, Ky., used jointly by the defendants, and by an engine operated by, and in charge of, persons employed by them jointly. The receiver alone, a citizen of Ohio, removed the action to this court upon two grounds, viz.: First, that there is a separable controversy between him and plaintiff; and, second, upon the ground that as he is the court's receiver, and sued as such, it is a suit "arising under the constitution or laws of the United States." The plaintiff has moved to remand the case to the state court, and the very interesting questions arising on the motion, and growing out of the second ground for the removal, have received most careful consideration.

The first alleged ground of removal cannot be maintained, because there is no separable controversy. If the plaintiff and the receiver were the only parties to the action, the ruling made in *Tompkins v. MacLeod* (C. C.) 96 Fed. 927, would again be applied, even if the receiver were not a citizen of Ohio, not now so much because of the decision of Judge Taft in the case of *Gilmore v. Herrick* (C. C.) 93 Fed. 525, as upon the grounds presently indicated. However, in the absence of any other ruling in this circuit, and of any express decision on the exact point by the supreme court, I then felt bound by what Judge Taft had said. It is not altogether inadmissible, however,

¹ Separable controversy as ground for federal jurisdiction, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86, and *Mecke v. Mineral Co.*, 35 C. C. A. 155.

now to say that, upon further consideration, I am not altogether satisfied that the reasoning of the opinion in *Tompkins v. MacLeod* is entirely maintainable, although the result then reached was unavoidable, particularly as the necessary diverse citizenship of the parties to the suit in which the receivers had there been appointed was to be conclusively attributed to the parties to the suit then before me, and because the latter suit, being ancillary to the principal action, was controlled by cases like *Pope v. Railway Co.*, 173 U. S. 577, 19 Sup. Ct. 500, 43 L. Ed. 814, and by removal drew to this court jurisdiction on those grounds. So that the result in *Tompkins v. MacLeod* was inevitable, whatever error there might be in the reasons given. The adverse citizenship attributed to the parties there and the ancillary character of the suit upheld the right of removal. The cases in which it has been held by the supreme court that a suit against a receiver of a federal court was, per se, one "arising under the constitution or laws of the United States," within the meaning of the removal acts, were cases where the corporation for which the receiver was appointed was created under the laws of the United States; such, for example, as a soldiers' home (*Butler v. National Soldiers' Home*, 144 U. S. 66, 12 Sup. Ct. 581, 36 L. Ed. 346), or the *Texas & Pacific Railroad Company* (*Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Texas & P. Removal Cases*, 115 U. S. 2, 5 Sup. Ct. 1113, 29 L. Ed. 319). But there does not seem to have been any case decided by the supreme court in which that doctrine was announced where the receiver was of a state corporation, though in *Rouse v. Hornsby*, 161 U. S. 590, 16 Sup. Ct. 611, 40 L. Ed. 818, the court incidentally, and possibly not authoritatively, as the question was not involved, remarked that "if, as is said, the intervener, the railroad company, and the receivers were all citizens of Kansas, and this had been an action at law, and not a petition of intervention in the equity suit, the jurisdiction of the circuit court would nevertheless have been maintainable on the ground that it was one arising under the constitution and laws of the United States, in that the receivers were appointed by the circuit court, and derived their powers from, and discharged their duties subject to, those orders; and the right to sue them as such, without leave of the court which appointed them, was conferred by section 3 of the act of March 3, 1887, c. 373 (24 Stat. 552). *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Tennessee v. Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511."

An examination of the two cases last cited by the court will show that they do not in the slightest degree militate against what I have said, as in neither was there a receiver for a state corporation. Overlooking this fact, and the distinction which might thence arise, may have led to some uncertainty or misapprehension; and where, as in the case before us, the relief asked apparently depends upon principles of the general law, and not in any just sense upon the constitution or laws of the United States, it is quite difficult to see clearly how this suit is one which "arises" under the constitution or laws of the United States. If the receiver, actually operating the railroad long after his appointment, negligently kills a man, the cause of action for damages therefor seems to arise out of that negligence, and not, in

any easily perceived sense, to arise under the constitution or laws of the United States, even though previously thereto a federal court, in the exercise of its proper jurisdiction, had appointed the receiver, but the validity of whose appointment was not only not assailed, but, as here, was expressly recognized by the plaintiff in his pleading. It is true that the result of such action, if adverse to the receiver, must withdraw some of the assets from his hands as an officer of the court, and it is just at this point, of course, that the legal question involved has arisen, many circuit courts holding that the suit in such cases against the receiver arises under the constitution or laws of the United States, because the receiver owed his existence as such, and his possession of the assets, to orders of the federal court. *Landers v. Felton* (C. C.) 73 Fed. 311; *Sullivan v. Barnard* (C. C.) 81 Fed. 886; *Lund v. Railway Co.* (C. C.) 78 Fed. 385; *Gableman v. Railway Co.* (C. C.) 82 Fed. 790; *Gilmore v. Herrick* (C. C.) 93 Fed. 525. Other circuit courts hold that the suit arose alone out of the acts complained of by the plaintiff, and that they could not be brought within the provisions of the removal act merely on account of the federal appointment of the receiver. *Shearing v. Trumbull*, 75 Fed. 33.

It seems to me, for the reasons presently to be stated, that the supreme court must be regarded as quite certain to hold that such cases arise under the constitution or laws of the United States only where the receiver is appointed under a statute of the United States, as in cases of national banks, or for corporations created by the laws of the United States, such as soldiers' homes and Pacific Railroad Companies, and not where a federal court, merely in the exercise of its general jurisdiction, has appointed a receiver for a corporation not existing under federal law, or for a partnership composed of individuals who, under the fourteenth amendment of the constitution, are citizens of the United States, and who would seem, for that reason, to have as good basis for removing a cause as would a receiver made such by mere judicial appointment. Reasoning to support a claim to remove such a case would appear but little less artificial than that which supports the doctrine now invoked. It may illustrate the proposition to note that in *Society v. Ford*, 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. Ed. 261, it was held that the mere fact that a suit in a state court is brought on a judgment recovered in a federal court does not entitle the defendant to remove, and the inquiry might be suggestive as to what would give more potency in this connection to an order of appointment of a receiver than to a judgment of the same court. Neither one is a "law" of the United States. In *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 7 Sup. Ct. 260, 30 L. Ed. 461, it was held that a suit cannot be said to be one arising under the constitution or laws of the United States until it has in some way been made to appear on the face of the record that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by an opposite construction. It may well be supposed that the ultimate result upon the question of whether receivers for a state corporation appointed by a federal court stand upon the same footing as receivers of a corporation created by an act of con-

gress is foreshadowed by what is expressed obiter in *Pope v. Railway Co.*, 173 U. S. 578, 579, 19 Sup. Ct. 500, 43 L. Ed. 814, although in that case, as well as in the case of *Bausman v. Dixon*, 173 U. S. 113, 19 Sup. Ct. 316, 43 L. Ed. 633, the court, as pointed out in *Tompkins v. MacLeod*, did not decide any question growing out of the removal acts. In the *Pope Case* the chief justice, after deciding the questions involved, added some further observations, which he supposed might be "useful" possibly with reference to the question now before the court; and in *Bausman v. Dixon*, 173 U. S. 113, 19 Sup. Ct. 316, 43 L. Ed. 633, what was said by the court is quite as significant. In *Gableman v. Railway Co.*, 101 Fed. 1, the circuit court of appeals of the Seventh circuit, after reviewing all of the authorities, has expressly decided that a receiver of a federal court appointed for a state court corporation cannot, upon that ground alone, remove the case.

This state of the authorities leaves the question in much doubt, but if Judge Taft's views upon this phase of it, as expressed in *Gilmore v. Herrick*, are ultimately sustained by the supreme court, there is another question which, coupled with the uncertainty and possible weakness of the first proposition upon which the defendant relies, seems to me to be decisive against the jurisdiction of this court. It is true that Judge Taft in *Landers v. Felton* (C. C.) 73 Fed. 311, held adversely to the views I am about to express, and I should not decline to follow him, but for the new developments to which I have alluded. Ordinarily, the right of removal cannot be maintained by one only of two tort feorsors sued jointly. Under the rulings of the supreme court in a line of cases of which those of *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473, *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331, and *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, are types, there is not a separable controversy here, and that ground of removal relied upon cannot be maintained. In many decisions, of which those in the cases of *Railroad Co. v. Mills*, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949, and the *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593, are examples, all the defendants (there being no claim of collusive or fraudulent joinder) must be arranged upon the one side of the controversy, and no one defendant can remove unless all can do so. It may be that the reason upon which these rulings were made applies to this case, and there would seem to be quite as good basis therefor, especially as the true ground for removing a cause by a federal receiver of an ordinary state corporation is the imputed diverse citizenship of the parties to the suit in which he was appointed, and the ancillary character of litigation with him. The statute does not expressly provide for the exact case before us; that is to say, for a case in which one defendant may insist that the suit is one which arises under the constitution or laws of the United States, when the other defendant, sued in precisely the same way, cannot do so. This statement of the situation seems to reveal the absurd result that would follow a construction which would leave one defendant at liberty to say the case arose under the constitution or laws of the United States, when another defendant, jointly sued in

the same action, upon the same grounds, and for the same relief, cannot say so. In this case the relief sought is single against two persons sued jointly, and the basis of relief—the facts upon which it is asked—is precisely the same as against both defendants. There is no pretense that as to the defendant the Kentucky corporation the action arises under the constitution or laws of the United States. The case not being literally provided for by the removal act, can the statute be expanded, and the state court deprived of jurisdiction? Ordinarily, the answer must be in the negative. *Water Co. v. Keyes*, 96 U. S. 201, 24 L. Ed. 656. No case from the supreme court has been found where it was held that one defendant alone among several could remove, except where the statute expressly provided for it, as in case of a separable controversy, unless the case of *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442, is an exception. In a very recent case, however, the supreme court has shown that it is not an exception by explaining that that decision was at last based upon the ground of separable controversy. No case from that court has been found which holds that where the controversy, as here, was not separable, one defendant could remove, even upon the claim that as to him alone the action arose under the constitution or laws of the United States. This phrase is believed to have been intended to apply to the case as an entirety, and in such a way that each defendant could make the assertion upon the merits of the claim, and as applicable to the basis of the cause of action itself, and not merely by one defendant as to an outside circumstance (such as the origin of his appointment), having no real bearing upon the merits of the actual controversy involved in the plaintiff's suit. For that reason, the case of *Railroad Co. v. Mills*, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949, might have some special application in connection with the two cases cited from 173 U. S., 19 Sup. Ct. To cases where corporations created by federal statutes, or receivers for them, are litigants, different considerations apply, and the law is conclusively settled by an unbroken line of authorities, beginning with *Osborn v. Bank*, 9 Wheat. 738. The statute chartering the corporation is the law of the United States under which such cases arise, but a judicial order appointing a federal court receiver does not seem to me to be a law of the United States, within the meaning of the removal acts. While the right of one defendant to remove the action under such circumstances as this case presents is at least doubtful, it might be that the right of one to go to the supreme court from the highest court of the state would be clear under section 709, Rev. St. Many cases seem to indicate this. In the case of *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992, it was held that, in order to give jurisdiction to a circuit court of the United States of a cause upon removal from a state court, it is necessary that the construction, either of the constitution of the United States, or of some law or treaty of the United States, should be directly involved in the suit, but that the jurisdiction for review of the judgments of state courts extends to adverse decisions upon the rights and title claimed under some authority exercised under the laws of the United States.

To sum up the whole matter: The real ground of support of the right of a federal court receiver of a mere state corporation, or of a partnership composed of citizens of the United States, to remove a case against him to this court now appears to be that such a suit, being ancillary to the one in which the receiver was appointed, is capable of being drawn to the jurisdiction of the latter by reason of the imputed diverse citizenship of the parties to it. The right of removal in such cases appears to rest upon those grounds, and not upon the proposition (which does not seem now to be certainly true) that such a suit against such a receiver is one "arising under the constitution or laws of the United States." The right to remove in such case, therefore, ultimately rests alone upon the attributed, and not upon the actual, diverse citizenship of the parties. That being so, the unquestioned joinder in this case of a citizen of Kentucky and the receiver defeats the right to remove, as both defendants cannot join in the petition to do so, as could those in a dual receivership, as in *Tompkins v. MacLeod*, where one receiver was actually, in his private capacity, a citizen of Kentucky. This is particularly so, inasmuch as this case is not expressly covered by the language of the removal act, as already indicated, even if as to one defendant, sued alone, it could properly be held to be a suit "arising under the constitution or laws of the United States." In the absence of any claim that there was a collusive joinder of the defendants in this case, and in view of the great probability that the supreme court will hold that, even as to the receiver, this case is not one arising under the constitution or laws of the United States, and because it seems reasonably certain under the removal act that this inseparable controversy cannot be removed to this court by one only of the defendants, even upon the ground alleged, I think the case must be remanded; and it is so ordered.

NOTE BY THE COURT. Since the delivering of this opinion the decision of the supreme court in the case of *Railway Co. v. Martin*, made May 21, 1900, has appeared, which seems fully to support the conclusions reached in this case. 178 U. S. 245, 20 Sup. Ct. 854, Adv. S. U. S. 854, 44 L. Ed. —.

**RICHARDSON v. NEW ORLEANS DEBENTURE REDEMPTION CO.,
Limited.**

(Circuit Court of Appeals, Fifth Circuit. May 29, 1900.)

No. 930.

1. BANKS—RECEIVING DEPOSIT WHEN INSOLVENT—OWNERSHIP OF MONEY DEPOSITED.

When a bank receives a deposit after hopeless insolvency, the fraud avoids the implied contract between the parties by which the relation of debtor and creditor would ordinarily arise, and prevents the money deposited from becoming the property of the bank, and a trust is the equitable result.

2. SAME—RECOVERY FROM RECEIVER—TRACING MONEY DEPOSITED.

Where a bank receives a deposit on the day of its suspension, when it is known by its officers to be insolvent, and mingles the money with its own funds, which, to an amount larger than the deposit, pass into

the hands of a receiver, it is not essential to the right of the depositor to recover his deposit from the receiver that he should be able to trace the identical money deposited into the receiver's hands, but it is sufficient that the amount which went into his hands was increased by the amount of the deposit.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

W. C. Cochran (F. L. Richardson, on the brief), for appellant.

W. H. Rogers, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The bill in this case was filed by the New Orleans Debenture Redemption Company, Limited, against F. L. Richardson, as receiver of the American National Bank, to collect \$1,658.60, which the company had deposited in the bank. The bill also embraced a claim for \$1,152, the proceeds of certain collections made by the bank for the plaintiff, but that part of the claim has been settled since the suit was brought. The company bases its right to recover the money on the alleged fact that the bank had received it as a deposit when it was hopelessly insolvent, and under such circumstances as to make the receipt of it a fraud. The facts averred and proved may be briefly stated: The American National Bank, a banking corporation organized under the laws of the United States, was on August 5, 1896, and prior to that time, engaged in a general banking business in New Orleans. On that day the bank was hopelessly insolvent, and had been so for a long time. Its condition was well known to its officers and managers. The appellee did not have knowledge of its condition. The appellee was a regular customer and depositor of the bank. When the bank opened on the 5th of August, 1896, it had in cash on hand \$15,897.54. Just before 3 o'clock on the same day, the appellee deposited in the bank \$83.60 in silver and \$1,575 in currency, making a total of \$1,658.60. The entire cash deposits received by the bank on that day amounted to \$6,934.76. It paid out during that day \$13,610.24. Just after 3 o'clock the bank closed its doors, and never reopened for business. The whole amount of cash in the bank after its doors were closed was \$9,722, \$500 of which was paid to the bank's attorney, and \$9,222 turned over to the bank examiner, who subsequently turned over the same to the receiver. Before receiving these funds the appellant had been duly appointed receiver of the bank by the comptroller of the currency of the United States. It is agreed that the books of the bank do not show how much of the cash which was turned over to the receiver was received by the note and collection clerk, or how much cash was received and not paid out by the receiving and paying teller, or how much of the cash turned over to the receiver was part of the original funds in the bank on the morning of August 5, 1896. There was a special meeting of the directors of the bank at 8:30 p. m., Wednesday, August 5, 1896, at which meeting the president of the bank stated what had taken place during the day, and that the deposits received during the day had been set aside. The directors at this meeting approved of this action, and instructed the president to hold said de-

posits separate and apart from the banking funds, and to examine carefully into the condition of the bank, and report at the meeting to be held at 8:30 a. m. on the 6th of August. The evidence, however, showed that the deposits in cash received on the 5th of August were not really kept separate. All of the money in the bank which had been received as general deposits, and which had not been paid out, appears to have been handed to the receiver at the same time. Many depositions were offered in evidence in the case, but it is not deemed necessary to state the evidence further. The circuit court (Parlange, District Judge, presiding) granted the relief prayed for in the bill. The decree is to the effect that the appellee have and recover from the receiver the sum of \$1,658.60. The decree is given priority over the unsecured creditors of the bank. The receiver has appealed to this court, and the decree is assigned as error.

Ordinarily, when funds are deposited in a bank, the relation of debtor and creditor immediately arises between the banker and the depositor. The money deposited becomes the property of the banker. He has the right to use it, but must pay the debt to the depositor by cashing his checks. When the banker obtains the deposit by committing a fraud, as by receiving it after hopeless insolvency, the relation between the parties is very different. The fraud avoids the implied contract between the parties that would arise in its absence, and, having barred contract, a trust is the equitable result. The fraud itself gives no lien. The fraud prevents the money deposited from becoming the property of the banker, and thereby prevents the relation of debtor and creditor arising between the parties. As the money does not become the property of the banker, it, of course, remains the property of the depositor. In the banker's hands, therefore, it is a trust fund,—as much so as if it had been a special deposit. The money which the banker has received in due course of honorable business before insolvency has become his property, and he the debtor of those who deposited it. Now, if the banker, having money in his bank, fraudulently receives other money, and mingles it with the moneys on hand, can the defrauded depositor reclaim his money? That is the question presented by this case. The bank received \$1,658.60 of the appellee's money just before it closed. It was received under circumstances of fraud, so that it remained the property of the appellee. It passed with the other funds to the hands of the receiver; or, if the identical money did not so pass to the receiver, the sum turned over to the receiver was increased exactly \$1,658.60 by the appellee's deposit. This is clear, because if, after receiving the appellee's deposit and placing it with the general funds, payments were made out of the mass of money during the business of the day, it is immaterial whether the identical dollars deposited by the appellee were paid out or not. The amount that went into the hands of the receiver was, by the deposit of the appellee, increased to the amount of the deposit made by it. If we find that the transaction between the appellee and the bank created a trust or lien on the funds of the bank with which the appellee's deposit was mingled, the trust or lien extended to the whole mass of money, and the paying out of part of it would not remove the charge from the remainder. The question, then, is reduced to this:

If a banker takes \$1,000 not his own, and mixes the sum with \$10,000 of his own money, can the owner of the \$1,000 reclaim it? Has he, in equity, a charge on the whole to the amount of his money which has gone into it? Formerly, it was held that he had not. The equitable right of following misapplied money, it was said, depended on identifying it, the equity attaching to the very property misapplied. Money, it was said, had no earmarks, and the tracing of the fund would fail. This view was manifestly inequitable and unjust, and so, finally, it was held that confusion by commingling does not destroy the equity, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion of the fund a priority of right over the other creditors of the possessor and wrongdoer. This evolution of the doctrine of tracing trust funds is noticed incidentally by Mr. Justice Bradley in *Frelinghuysen v. Nugent*, 36 Fed. 229, 239. To create the trust it is not necessary to show that the identical money went into the hands of the receiver. It is sufficient if the funds in his hands are increased by the deposit. In *Bank v. Blackmore*, 21 C. C. A. 514, 516, 75 Fed. 771, 773, Judge Taft, delivering the opinion of the circuit court of appeals for the Sixth circuit, said:

"It may not be necessary to show earmarks upon the proceeds of the thing parted with, to justify such a remedy, but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds; and the recovery is limited to the extent of this increase or benefit."

In *Association v. Austin*, 100 Ala. 313, 321, 13 South. 908, 909. McClellan, J., delivering the opinion of the court, said:

"We will concede that, so far as the right of the complainants to fasten a preference lien in the nature of a trust on the assets of the bank depends upon the fraud of the bank and its officials, their cases are made out on the facts we have stated. And if they had further shown that the identical money which was deposited by and collected for them, respectively, had come to the hands of the receiver, and was held by him in specie at the time of bills filed, or that their funds had been mingled with the funds of the bank which came to the receiver's hands, and constituted, in part, the gross sum held by him, or that their identical money had been invested by the bank in tangible property, which came to the hands of the receiver and was held by him, they would have been entitled to the relief they seek."

The observations quoted from the last two cases cited show why, in those cases, the trust was not declared. In *Quin v. Earle* (C. C.) 95 Fed. 728, 731, Judge Gray presents a very interesting discussion of the question and an accurate statement of the correct rule:

"With regard to personal property other than money, the question of identification is generally easy of determination. Not so of money, and perhaps some personal property other than money. If these be confused in the mass of exactly similar things, specific identification becomes impossible. But the more modern doctrine has come to be that, where the fraudulent depository so mingles goods which he has obtained by fraud with the mass of like goods of his own, the whole may be seized, or considered as held in trust, until equitable separation of the property of the defrauded party is made. So, advancing one step further, where money thus obtained has gone to swell the aggregate in the possession of the fraudulent party, it may, under proper proceedings, be segregated in amount from such aggregate sum, and made the subject of a trust, in order to accomplish the ends of justice. If my bushel of corn be obtained from me by fraud, and be poured into the mass of similar grain in the bin of the party committing the fraud, justice is sat-

issed, and no one can be wronged, by my having restored to me a bushel of the same grain out of the bin, though the identical grains obtained from me are not restored. If, on the other hand, the funds in possession of the defrauding bank be not increased by the property or the money so obtained, so that the aggregate amount of assets for distribution among the general creditors is not made larger by reason of the plaintiff's contribution thereto, then this extension of the doctrine of identification will not apply, and the complainant cannot have remedy as for a preferred claim."

Sir George Jessel, master of the rolls, in the case of *Knatchbull v. Hallett*, 13 Ch. Div. 696, 707, reviewed the English cases on this subject. He shows the struggle of the able judges of the law courts over the earmarking of money, and that finally Lord Ellenborough throws over the doctrine as to money not earmarked not being followed. We cannot take space to cite and quote the many cases commented on by the master of the rolls. The opinion is marked by a keen sense of equity and strong common sense. On the direct point in question here he says:

"I have only to advert to one other point, and that is this: Supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the 'trustee,'—using the term again in its full sense, as including every person in a fiduciary relation. Does it make any difference according to the modern doctrine of equity? I say, none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the cestui que trust has a right to take 1,000 sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it."

The supreme court, in an opinion concurred in by all the justices, quotes with approval the doctrine enunciated by the master of the rolls. Mr. Justice Matthews, delivering the opinion, makes this indorsement of *Knatchbull v. Hallett*, *supra*, on the point here in question:

"But he [Sir George Jessel] dissents from the application of the rule made by Lord Ellenborough, when the latter added, 'which is the case when the subject is turned into money, and confounded in a general mass of the same description'; for equity will follow the money, even if put into a bag or an indistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule." *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 69, 26 L. Ed. 693, 700.

There should be no question about this doctrine on principle. If one's money is invested in land, the title being taken in another's name, equity creates a resulting trust in the land as against the wrongdoer. If an agent, bailee, or trustee invests another's money in personal property, a trust results. If one's money is lent, and a note or bond taken, the owner of the money can have a lien or trust declared on the note or bond to secure his money so used. Numerous cases show that money can be traced into other assets, notes, bonds, and stocks. There is no good reason for not applying the same doctrine to money, the measure and representative of all property. If one's money is used with other money in buying a bond, equity can fasten a lien on the bond, and sell it to reimburse the one whose money has

been so used. So, we think, if one's money is wrongfully mingled with a mass of money, that equity can direct the possessor and wrongdoer, or his successor, to take out of the mass a sum sufficient to make restitution. The decree of the circuit court is affirmed.

RICHARDSON v. NEW ORLEANS COFFEE CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1900.)

No. 931.

1. BANKS—DRAFTS DEPOSITED FOR COLLECTION—EFFECT OF BANK'S INSOLVENCY.

Checks and drafts delivered by a depositor to a bank for collection and deposit at a time when the bank was insolvent, and known to be so by its officers, and which had not been collected when the bank closed its doors, remain the property of the depositor, although they were indorsed to the bank without qualification, and on their subsequent collection by the receiver the proceeds may be recovered from him by the depositor.

2. SAME—RECEIVING DEPOSIT WHEN INSOLVENT—OWNERSHIP OF MONEY DEPOSITED.

Money deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor, and may be recovered by him from the receiver, where it is shown that it went to increase the sum which came into his hands.

3. SAME—RIGHT OF DEPOSITOR TO RECLAIM.

On the day a bank closed its doors, and when it was known by its officers to be insolvent, complainant, a customer, made a deposit of money, and also of certain checks and drafts for collection and credit, all of which were credited, at the time, to its account. During the day, it also purchased drafts from the bank, for which it gave checks about equal in amount to its entire deposit, but such drafts were returned unpaid, and were tendered back to the receiver. *Held*, that the purchase and sale of the drafts was a separate transaction, which, as it did not create any liability affecting the general creditors of the bank, and was in itself fraudulent on the part of the bank, did not affect complainant's right in equity to reclaim the deposits from the receiver.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The bill in this cause was filed in the circuit court of the United States for the Eastern district of Louisiana by the New Orleans Coffee Company, Limited, a Louisiana corporation, against Frank L. Richardson, as receiver of the American National Bank, a banking corporation organized under the laws of the United States. It is shown by the bill that Richardson had been appointed receiver of the bank by the comptroller of the currency of the United States. On the 5th of August, 1896, the bank was doing business in the city of New Orleans, and on that day the New Orleans Coffee Company, Limited, in the usual course of business, deposited in the bank drafts on banks outside of the city of New Orleans aggregating \$610.06, checks on banks in the city aggregating \$146.82, and \$172 in currency, and a check on the American National Bank for \$25.78. Each check and draft was indorsed, "Pay to the order of the American National Bank." The evidence in the case shows that the checks and drafts were deposited for collection. The deposits were all entered in the pass book of the complainant, the New Orleans Coffee Company, Limited,—the out-of-town checks in one item, and the cash and the checks on the New Orleans banks in another. On the morning of August 5, 1896, the complainant had a balance in the bank to its credit of \$1,136.79; adding the deposits made that day, it had a total to its credit of \$2,091.45. On the same day the complainant bought of the bank two New York drafts, one for \$2,000 and the other for \$50, and gave to the bank its check for

\$2,050. The complainant also drew checks on that day for \$10, \$47.05, and \$185. These drafts and checks were not paid. The bank closed its doors shortly after 3 o'clock that afternoon. The directors of the bank decided next morning not to reopen for business. The bank, at the time it received these deposits, was insolvent, and had been so for some days previous, and its condition was known to its officers. The cashier, at that time, was in New York trying to negotiate a loan to tide the bank over its difficulties. On the evening of August 5, 1896, at about 8 o'clock, the note and collection clerk of the bank received instructions to keep the drafts and checks received that day separate from the funds of the bank. The city checks so deposited were collected next morning. The out of town drafts and checks were afterwards collected by the bank examiner, who took charge of the bank before the receiver was appointed. After the receiver was appointed, the proceeds of all the checks and drafts and the cash in the bank were delivered to him. The currency so deposited was at once mingled with the funds of the bank at the bank teller's desk, and it served to increase the sum that went into the hands of the receiver. When the bank opened on the morning of August 5, 1896, it had on hand, as general deposits, \$15,897.54. The entire amount of cash deposited on that day—the last day the bank was open—was \$6,934.76, and the amount of cash on hand when the bank closed its doors, and which was afterwards delivered to the receiver, was \$9,222. This money is reserved, and is in the hands of the receiver. The check on the American National Bank for \$25.78 was charged to the account of J. W. Platt, and credited to the account of the complainant, and that transaction neither increased nor diminished the funds of the bank. After the return of the New York drafts for \$2,050 unpaid and dishonored, the complainant tendered them to the receiver, and demanded the return of his entire deposit of August 5th as a preferred creditor. The receiver refused to return the money, and the bill in this case was filed. The foregoing facts were alleged in the bill. It was also averred that the complainant was ignorant of the condition of the bank, and that the bank, in receiving the deposits when it was insolvent, perpetrated a fraud upon the complainant. The purpose of the bill is to rescind the purchase of the New York drafts, and to obtain a decree for the entire amount of the currency, checks, and drafts deposited by the complainant on August 5, 1896. The court below denied the claim for \$25.78, the amount of the check on the American National Bank, but entered a decree for the complainant in the sum of \$928.88, being the balance of the deposits made on August 5th, including the checks and the currency, and rescinded the transactions with reference to the New York drafts. From this decree, the receiver appealed to this court, and the decree, with the proper specifications, is assigned as error.

W. C. Cochran (F. L. Richardson, on the brief), for appellant.

Joseph P. Blair (Denégré, Blair & Denégré, on the brief), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

All the money in dispute in this case except \$172 was collected on checks and drafts which the appellee deposited with the American National Bank. The checks and drafts were entered on the appellee's pass book, each having been indorsed, "Pay to the order of the American National Bank." There is evidence in the case showing that the checks and drafts were deposited with the bank for collection. The bank was then about to close. Its insolvent condition was known to its officers. At about 8 o'clock in the evening of August 5, 1896, the day the deposits were made, the bank officers instructed the note and collection clerk to keep the drafts and checks received that day

separate from the funds of the bank. After receiving these checks and drafts, the bank closed its doors at about 3 o'clock on the same day, and was not again opened for business. The checks on the New Orleans banks were collected the next day, and later the drafts on the banks outside of the city were collected by the bank examiner, and the money was all placed in the hands of the receiver. The appellee claims that it has the right to recover this money because the absolute title to the checks and drafts did not, on the facts, pass to the bank; that, until they were collected, the relation between the bank and the depositor was that of principal and agent. The appellee also claims the right to recover the money because it was a fraud, on the part of the bank, to receive the drafts and checks as deposits in view of the hopeless insolvency of the bank, which was known to its officers. There is no trouble about tracing these funds. They were all collected after the bank closed its doors, and collected after the officers of the bank had given instructions that the checks and drafts received on August 5th should be kept separate from the general funds of the bank. The evidence shows that these funds went into the hands of the receiver, and are now held by him. We are therefore confronted with the plain question: Is the New Orleans Coffee Company, Limited, the depositor, equitably entitled to these funds, or is the receiver of the bank entitled to them? The receiver can, of course, only claim them for the benefit of the general creditors. His contention, then, is this: that although these checks and drafts were received after the bank was insolvent, and collected after its doors were closed, and the funds kept separate, he should now be permitted to take these funds, and mingle them with the other assets of the bank, and distribute them with the other assets among the general creditors. The argument is that this customer, the appellee, who dealt with the bank on the last day of its business existence, should fare no better than those who dealt with it previously. This view, however, cannot prevail, because the court must look at the special transaction between this appellee and the bank. If that transaction was such that the bank was only the agent of the depositor to make the collections, the funds, of course, never became the property of the bank, and they can therefore be reclaimed by the appellee. This comes from the fact that a fiduciary relation exists between the agent and the principal, making the former in equity a trustee, and the agent, of course, is not permitted to convert the funds of the principal. The principal is always permitted to recover his funds if they can be traced. It is equally true that a fraud on the part of the bank in procuring funds or in receiving checks and drafts for collection would have the effect of making the bank hold the checks or drafts or other proceeds in equity as trustee for the depositor. And, as in this case, when the funds can be traced, the depositor or owner of the drafts can recover. In *Richardson v. Denegre*, 35 C. C. A. 452, 93 Fed. 572, this court held that "checks delivered to a bank by a depositor for collection and deposit at a time when the bank was insolvent, as must have been known by its officers, and which had not been collected when the bank closed its doors, remain the property of the depositor, and may be recovered by him from the receiver." It is true that the checks in the case just

cited were indorsed "For deposit," and that in the instant case the indorsement was without qualification. The drafts and checks, however, were credited on the pass book of the appellee, and the evidence shows that they were delivered to the bank for collection. There was no intention by the transaction to create the relation of debtor and creditor before the bank made the collections. If there had been such intention, the fraud on the part of the bank would have defeated the intention, and preserved the fund for the depositor so long as it could be traced. The form of the indorsement, however, cannot be a matter of consequence or change the principles involved in a case where the litigation is between the original parties, no innocent holder of the paper having intervened. In *Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363, a bank holding paper for collection passed into the hands of a receiver. The court held that the relation between the bank and the depositor as to uncollected paper was that of principal and agent, and that the money collected on the paper after the bank had closed, which had not been commingled with the general funds of the bank, could be reclaimed. The principle announced in that case sustains the decree of the circuit court in this case, for the reason that the bank was the agent of the depositor, and that a trust obligation was created by such agency. Morse states the rule that should govern in such cases:

"After a bank has suspended, it ought not to receive payments upon business paper previously deposited with it for collection, or, at least, not in such a manner that the money so received by it will pass into its general assets, and the owner of the paper will be placed in the position of one of its creditors, entitled only to take his dividend. * * * Proceeds received after the bank becomes insolvent are held in trust, and may be recovered in full." 1 Morse, Banks (3d Ed.) § 248a.

This view is sustained by many authorities, the facts varying in each case, but the principle being the same. *Levi v. Bank*, 5 Dill. 104, Fed. Cas. No. 8,289; *In re Havens*, 8 Ben. 309, Fed. Cas. No. 6,230; *Richardson v. Banking Co.*, 36 C. C. A. 307, 94 Fed. 442; *Same v. Bank*, 36 C. C. A. 315, 94 Fed. 450.

The other point made by the appellee is equally as conclusive. The fraud of the bank would prevent its obtaining title to the checks and drafts and their proceeds. In *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, the court held:

"When a bank has become hopelessly insolvent, and its president knows that it is so, it is a fraud to receive deposits of checks from an innocent depositor, ignorant of its condition, and he can reclaim them or their proceeds."

There can now be no doubt about the fact that it is well settled by authority that a bank should not continue business when it is known to its officers that it is hopelessly insolvent. The relation between a bank and its customers is such that great confidence is asked and reposed. A banker who knows that he is hopelessly insolvent cannot honestly continue business, and receive money from his customers. He may not intend to defraud a particular customer, but he will be held, of course, to have intended the inevitable consequences of his act,—that is, to cheat and defraud all persons whose money he receives and whom he fails to pay before he stops business. A banker

who receives money or drafts for collection under such circumstances gets no title, legal or equitable, and the funds or proceeds can always be claimed and recovered by the owner when they can be traced and identified. On August 5, 1896, the day these drafts were placed in the hands of the bank, the appellee bought of the bank, drawing its check on the bank for the purpose, two New York drafts aggregating \$2,050. These drafts were worthless and were returned unpaid. The appellee also drew some small checks, which were also dishonored and unpaid. The appellant now insists that the purchase of these drafts and the drawing of these checks defeat the right of the appellee to recover the money sued for. The appellee offered to surrender the drafts to the receiver when it demanded the proceeds of its drafts and checks. The sale of these worthless drafts to the appellee was also a fraud. We cannot think that the perpetration of the latter fraud, the sale of the worthless drafts, can in any way relieve the bank of its liability for the perpetration of the first fraud, the receipt of the claims for collection. The evidence shows that the appellee had no contract to draw against the deposit of the checks and drafts. The appellee was solvent, and the bank had allowed it to overdraw. If the bank had been solvent and continued business, and had failed to collect the checks and drafts deposited with it, the appellee would have been required to pay for the New York drafts if they had been honored. The evidence shows that the purchase of the drafts was a transaction independent and separate from the deposit of the checks and drafts for collection. On the morning of August 5th, before the appellee made any deposits, it had to its credit in the bank \$1,136.79. This much more than covered the small checks drawn by the appellee on the bank, and leaves for consideration only the effect on this transaction of the purchase of the New York drafts, one for \$2,000 and the other for \$50. As these drafts were not paid, and as they did not diminish the funds in the bank or create any liability against it affecting the general creditors, we do not think it had any effect upon the equitable rights of the appellee. The entries on the books of the bank in reference to the purchase of these drafts was a mere matter of bookkeeping, and should not be permitted to affect the substantial rights of the parties.

The appellee was also entitled to recover the \$172 deposited in currency by it. The undisputed facts in the case show that this money, or its equivalent in cash, passed into the hands of the receiver. He either received the actual money deposited, or it served to increase the amount delivered to him. In the case of *Richardson v. Redemption Co.* (C. C. A.) 102 Fed. 780, we have recently handed down an opinion which deals with the question of tracing cash deposits. The case is, on its facts, almost identical with the instant case, so far as the deposit of cash is involved. It is sufficient to say that when a bank, on the eve of insolvency, by committing a fraud obtains the money of a customer, and mingles it with the general funds of the bank, the title to the money does not pass; and if the money is not expended, but kept in the bank and turned over to the receiver, the money, or a like amount, although mixed with the general funds of the bank, can be recovered in a suit against the receiver. The circuit

court was right in deciding that the appellee could recover the proceeds of the checks and drafts and the cash deposited. The decree of the circuit court is affirmed.

HALE v. ALLINSON et al.

(Circuit Court, E. D. Pennsylvania. June 11, 1900.)

No. 26.

EQUITY JURISDICTION—SUIT BY RECEIVER AGAINST STOCKHOLDERS—MULTIPLICITY OF SUITS.

Equity is without jurisdiction of a suit by the receiver of an insolvent corporation against numerous stockholders to recover an additional liability imposed by statute, on the single ground that a multitude of actions at law will thereby be avoided, where the amount of the assessment has been previously adjudicated in a general suit, and has been fixed at the full amount of the statutory liability, since no question remains in which the defendants have a common interest, and the suit is merely an aggregation of separate suits, each involving separate issues and having little relation to each other, except that there is a common plaintiff, and in each of which the remedy at law is adequate.

On Demurrer to Bill.

Charles C. Lister and M. H. Boutelle, for complainant.

John G. Johnson and Walter C. Rodman, for respondents.

MCPHERSON, District Judge. The complainant is the receiver of the Northwestern Guaranty Loan Company, a Minnesota corporation, and has been specially appointed by a court of that state to enforce the additional liability that is imposed upon stockholders of certain classes of corporations by the Minnesota constitution. The defendants are Pennsylvania stockholders, 47 in number, who were not served with process and did not appear in the proceeding by which the Minnesota court ascertained what debts were due by the corporation, and how large the assessment upon each stockholder should be. The assessment was fixed at 100 per cent., and recovery is therefore sought of the whole amount that each defendant can be called upon to pay. The demurrer attacks the bill upon several grounds, of which only one, in my opinion, is necessary to be considered, namely, that the complainant has an adequate remedy at law.

As it stands, the bill is brought by two complainants; one being the creditor that began the foregoing proceeding in Minnesota, and the other being the receiver that was thereupon specially appointed,—both professing to sue in this jurisdiction for the equal benefit of all the creditors of the company. The joinder of these two complainants is one of the grounds of demurrer; but as leave has been asked, and is now granted, to dismiss the creditor from the suit, I shall treat the bill as if it had been brought in the first instance by the receiver alone. But, even thus considered, I think it cannot be sustained, because the complainant's remedy is properly at law. I have heretofore had occasion to decide a similar question, in *Tompkins v. Craig*, 93 Fed. 885; and, without repeating the reasons there given

(to which I now take leave to refer), I adhere to that decision. It is, no doubt, true that the authorities are not uniform upon the point under consideration, but I think this much, at least, may be safely affirmed: Equity does not under all circumstances acquire jurisdiction of a controversy against numerous defendants upon the single ground that a multitude of suits at law might thereby be avoided. For example, if the receiver of an insolvent bank should come into possession of 50 promissory notes, apparently due to the bank from as many separate debtors, he certainly could not join these defendants in one equitable proceeding, based upon all the notes, merely because 50 suits at law might thereby be avoided. Neither would a court of equity acquire jurisdiction in such a case upon the additional ground that the money, when collected, would become part of a fund that would be distributed under the court's control. The principles that might govern the distribution would not change the character of the various liabilities sought to be enforced by the bill, and the receiver would be obliged to sue at law upon the separate legal obligation created by each contract, although the money realized by the suits might be afterwards distributed by a court of equity in accordance with equitable principles. Neither would the court acquire jurisdiction in such a case if the further ground be added, that the receiver's right of action against each defendant was similar to his right against every other; being a right in each case to sue upon a contract made with the same insolvent, and evidenced by a written instrument essentially of the same description. Moreover, if such a bill could be filed in equity merely because a multitude of suits at law would thereby be avoided, by what rule of computation should the objectionable multitude be determined? Would 2 suits be sufficiently numerous? Or 5? or 25? And, if one bill might be filed because there were 50 defendants, why might not two bills be filed, each selecting 25 defendants? I see no equitable principle, therefore, in the mere consideration that the receiver might have a legal right to sue many debtors separately upon obligations similar in kind, or in the additional fact that the money recovered upon such obligations might afterwards be distributed under the supervision of a court of equity.

Something more is necessary before the equitable jurisdiction will attach, and I think the needful something is this: Before a controversy between a receiver and numerous separate debtors of the corporation can be joined in one proceeding, there must be some common relation or common interest or common question to serve as a basis for the joinder. In the absence of such a relation or interest or question, as is said by Mr. Pomeroy in the first volume of his treatise on Equity Jurisprudence (section 251), "the decree of a court of equity, and the relief given by it in one judicial proceeding, could not by any possibility prevail to prevent the multiplicity of suits which is the very object of its interference." That is to say, the issues will still be actually numerous, and will still be essentially separate, although there is a formal pretense that one suit only is being carried on. In section 269 the rule is stated affirmatively in the following language:

"The weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate

claimants against a single party, or on behalf of a single party against such a numerous body, although there is no common title nor community of right or of interest in the subject-matter among those individuals, but where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."

And in section 274 a subdivision of the fourth class of such controversies is thus described:

"Suits by a single plaintiff against a numerous body of persons to establish his own right and defeat all their opposing claims, where the claims of these persons are legally separate, arose at different times, and from separate sources, and are common only with respect to their interest in the question involved, and in the kind of relief to be obtained by or against each."

These quotations state the rules that are relied on by the complainant to sustain the present bill, but, assuming them to be correct, —and I have no disposition to controvert them,—I do not think the facts bring the bill within the rules. Each case is to be considered upon its own circumstances, in order to determine whether the equitable jurisdiction exists (*Rich v. Braxton*, 158 U. S. 406, 15 Sup. Ct. 1006, 39 L. Ed. 1022); and, in my opinion, the circumstances of the case now before the court do not disclose a common interest between or among the parties, nor a common relation, nor a common interest in the questions involved or in the kind of relief to be obtained. The common interest of the stockholders in the question, how large the assessment should be, ceased when the decree of the Minnesota court upon that subject was entered. Thereafter a different question arose for determination, namely, can the assessment be lawfully enforced against the individuals charged therewith? And in this question the interest of each stockholder is separate and distinct. The bill asserts the conclusiveness of the Minnesota decree upon the defendants, so far as the necessity for the assessment and the amount charged against each stockholder are concerned. *Bank v. Farnum*, 20 Sup. Ct. 506, Adv. S. U. S. 506, 44 L. Ed. —. Assuming that position to be sound (and, if I do not so assume it; if these questions are still open for determination, so far as the Pennsylvania stockholders are to be affected,—the bill must fail for want of necessary parties), it is clear that only two classes of questions remain to be decided: The first is whether a given stockholder was ever liable as such; and the second is whether, if he were originally liable, his liability has ceased, either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims

against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A. to aver that his signature to the subscription list was a forgery; what connection has that averment with B.'s contention, that his subscription was made by an agent who had exceeded his powers? Or with C.'s defense, that his subscription was obtained by fraudulent representations? Or with D.'s defense, that he has discharged his full liability by a voluntary payment to the receiver himself? Or with E.'s defense, that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each, the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right.

But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law.

A final word may be added: If I am to follow as an authority a dictum of the supreme court of the United States in *Kennedy v. Gibson*, 8 Wall. 505, 19 L. Ed. 476, the bill might have been dismissed without any discussion of the subject on principle. That was a case in which a receiver was seeking to recover from stockholders of an insolvent national bank the additional liability imposed by the federal statute, and in the course of the opinion the court, holding that the liability was several, and not joint, distinctly declared:

"Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such a case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted."

No doubt, this was a dictum, but, as the circuit court of appeals of the Sixth circuit has recently pointed out in *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801, it has since been recognized in several cases without qualification; and the court of appeals approved it also, saying:

"Beyond doubt, the ruling that, where the whole amount of the liability is sought to be recovered, the suit must be at law, was based upon the fact that in such a case the remedy at law is adequate, and under the provision of section 723, Rev. St., the action must be brought there, and then the stockholder would be given the privilege of a trial by jury."

Where the whole amount is sued for, there seems to be nothing further for equity to do. No account needs to be taken, no ascertainment of liability is to be had. No adjustment of equities is to be made. Nothing is to be done, except to enforce a separate individual contract for an undivided sum. For such enforcement the legal remedy is adequate, even if the standard be applied, that "it is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity" (*Rich v. Braxton*, 158 U. S. 406, 15 Sup. Ct. 1017, 39 L. Ed. 1032),—or if the rule be remembered, that "the jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances" (*Kilbourn v. Sunderland*, 130 U. S. 514, 9 Sup. Ct. 596, 32 L. Ed. 1009).

I shall not extend this opinion by examining in detail the cases cited by the learned counsel for complainant in their very able brief. Some of these decisions are easily distinguishable from the case at bar, and if others seem, perhaps, to be at variance with the conclusion I have reached, I am content to have the subject reviewed in the light of the principles to which I have referred. Believing, therefore, that the complainant should sue at law,—following in this district the course that he seemed to regard as adequate in the district of Massachusetts (*Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747),—I sustain the seventh reason assigned by the demurrer.

TRAMMELL et al. v. DINSMORE et al.

DINSMORE et al. v. SOUTHERN EXP. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. June 7, 1900.)

No. 820.

1. CARRIERS—STATE REGULATION—GEORGIA STATUTES.

The provisions of the constitution of Georgia requiring the legislature to pass laws regulating freight and passenger tariffs within the state, and regulations adopted by the railroad commission established by the statutes passed in pursuance thereof, administered subject to the limitation that the carriage cannot be required without reward or upon conditions amounting to the taking of property for public use without just compensation, do not violate the constitution of the United States, but are within the powers of the state, and have full force as public law.

2. SAME—RATES ESTABLISHED BY COMMISSION—POWER OF COURTS TO REVIEW.

It is within the power and is the duty of the courts to inquire whether rates prescribed by a state railroad commission are unjust and unreasonable, such as to constitute an unconstitutional invasion of property rights, and, if so, to enjoin their enforcement; but they are not authorized to revise or change a body of rates, which is a legislative or administrative, rather than a judicial, function.

3. SAME—EXPRESS COMPANIES—INCREASE OF RATES TO COVER INTERNAL REVENUE TAX.

The provision of the war revenue act of 1898, imposing a stamp tax on express receipts, neither authorizes nor prohibits an increase of rates

by an express company to cover the cost of the stamp required; and the action of a state railroad commission authorized by statute to prescribe rates for carriage between points within the state, in prohibiting an express company from adding the cost of the revenue stamp to the maximum rates prescribed, is within its jurisdiction and powers, and can only be set aside by the courts on the ground that the rates so compelled are so low as to be violative of constitutional rights.

4. APPEAL.—ORDER ON REVERSAL.—DIRECTING DISMISSAL.

Where the record shows that, in a suit in equity in the circuit court, a general demurrer, also assigning special grounds, was filed, and that the cause was heard on bill, demurrer, and a motion for a preliminary injunction, and an order granting an injunction, but neither sustaining nor overruling the demurrer, was filed, the circuit court of appeals, on an appeal from the order made, cannot properly direct the dismissal of the suit on the ground that the facts stated in the bill were insufficient, and the demurrer should have been sustained, since, on sustaining the demurrer, it would be proper to permit the bill to be amended. Per Shelby, Circuit Judge, dissenting.

5. CARRIERS—EXPRESS COMPANIES—VALIDITY OF ORDERS OF STATE BOARD.

Where a state railroad commission, prior to the passage of the war revenue act, had fixed maximum charges for the carriage of express matter between points in the state, which were deemed reasonable, an order made by the commission after the passage of such act, prohibiting an express company from adding to the charges prescribed the cost of the revenue stamp required on receipts, cannot be justified on the ground that such addition, which merely covered the increased cost of the service caused by the tax, made the rates unreasonable; and where such order required the stamp in all cases "to be furnished, attached, canceled, and paid by the express company alone, and not by the shippers in whole or in part," it was not a regulation of rates, but, in effect, a construction of the federal revenue act requiring the tax to be borne by the company, and forbidding it to shift the burden on the shipper, and as such erroneous and beyond the powers or authority of the commission, and void. Per Shelby, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

The complainants, who are citizens of the state of New York, are shareholders in the Southern Express Company, a Georgia corporation, which has its principal office in the state of Georgia, and conducts the business of an express carrier in that state and in 10 of the neighboring states. The charging part of the bill in this suit avers, substantially: That the constitution of the state of Georgia, adopted December 21, 1877, expressly charges the legislature of that state with the duty to pass laws from time to time to regulate freight and passenger tariffs, to prevent unjust discrimination on the various railroads of the state, and to prohibit the same from charging other than just and reasonable rates, and to enforce the same by adequate penalties. That, acting under this constitutional provision, the general assembly of the state of Georgia passed an act on October 14, 1879, to carry the same into effect, the provisions of which act have been enlarged from time to time, and by an act approved October 21, 1891, the powers of the railroad commissioners were extended so as to give them authority to regulate charges for express companies for transportation from one point to another in the state of Georgia. That, pursuant to this authority, the railroad commissioners fixed and prescribed rules, tariffs, and classifications governing express companies plying between points within the state of Georgia, and published and distributed their report of same to which the bill refers. That from the date of the adoption of these measures the Southern Express Company conformed to the rules, orders, and tariffs so adopted by the railroad commission of Georgia, and were continuing to do so up to June 13, 1898,

when the congress of the United States passed the act commonly designated as the "War Revenue Act," by which it was made the duty of express companies on receiving a package for carriage to issue a receipt for such package, and providing that the receipt thus issued should bear a one cent stamp. That upon the taking effect of the war revenue act, July 1, 1898, the Southern Express Company asked and demanded the production by its customers of the stamp required to be attached under the provisions of the act at the issuing of its receipts or bills of lading, insisting that it should not carry any package or issue its receipt therefor until the sender or shipper furnished the necessary governmental stamp therefor. That certain citizens of Georgia refused to furnish these stamps, or to pay for the same if furnished by the express company, and thereupon complained to the railroad commission of the state of Georgia, to wit, the respondents Leander N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson, who as such commission, on July 11, 1898, issued an order as follows: "It being represented to the railroad commission of Georgia that the Southern Express Company, a corporation engaged as an express company in this state in the business of a common carrier of goods and merchandise for hire, since the passage by the federal congress of an act approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' has exacted, and continues to exact, from shippers, as a condition precedent to forwarding any goods tendered to it for transportation between points within this state, the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is ordered that the Southern Express Company do appear before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act." That the express company, in obedience to this order, appeared before the commission, and "cause was shown respectfully denying all jurisdiction in the premises on the part of said commission, who on August 2, 1898, ordered and directed said stamp tax to be furnished, attached, canceled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part." That on August 8, 1898, the complainants duly requested the Southern Express Company and its directors, and each of them, in writing, to omit and refuse to pay, and to refrain from paying, the said tax, and to test the constitutionality of the said action, and to refrain from voluntarily placing stamps upon its said receipts, and canceling the same, before delivery, and to apply to a court of competent jurisdiction to determine the liability of the company under the said act, in the mode and manner as required by the said railroad commission. That on the same day (August 8, 1898) the board of directors replied to this request, stating that they deemed it inexpedient to comply with it, on the ground that the failure to comply with the requirements of the order of the Georgia railroad commissioners of August 2, 1898, would subject the company to litigation with the authorities of the state of Georgia and the said railway commission, and the company would thereby run the risk of incurring penalties under the laws of Georgia, and of so clouding the title to its corporate franchise and rights as to embarrass its action. It replied, further, that the company "will notify the railroad commission of Georgia that, while respectfully protesting against the legality and validity of its order of August 2, 1898, the company will abide by and perform the same, and also that the company will file its application to said commission to be allowed to collect from the shipper, in addition to the existing rates sanctioned by the commission, the amount of war revenue tax held by the commission to be payable by the company, and in aid thereof will present to the commission a renewed request for the suspension of the order of August 2, 1898, until decision has been rendered on such application." On August 29, 1898, the board of directors notified the complainants that the railroad commission of Georgia had denied the application of the company to be allowed to collect from the

shipper, in addition to the existing rates sanctioned by the commission, the amount of the war revenue tax held by the commission to be payable by the company, and that the company was then observing the Georgia railroad commission's rates on intrastate business in Georgia, and was as to such business paying the amount of the war revenue tax, without charging the same to the shipper, or endeavoring to collect the same from the shipper.

Thereafter (October 27, 1898) the bill in this suit was filed, from which we make the following literal excerpts: "And the complainants aver that there is no reason to believe that there can be and will be an increase of complainants' local and intrastate business; that the cost of conducting said business has been fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted, and by which the public can be satisfactorily served, by said express company; that the charges fixed by the said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate, and pay a fair dividend or return to its owners for the money and property embarked in the said business, and that the order of the said commissioners requiring the payment by the said company of the said one cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by the said commissioners illegally and arbitrarily, and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust, and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said service will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under which it must do business by the order of said commission, will result in irreparable damage and injury, and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars (\$40,000) per annum, and a loss to complainants, in a decreased value of their shares, of ten thousand dollars or other large sum. * * * Your orators further show that the said Southern Express Company and its directors, having declared their intention to do so, will now pay the said revenue tax out of the income and profits of the company, and will thereby diminish the assets of the company, and lessen the dividends thereon, and the value of its shares, and will also pay the tax to the state on its gross income, without any deductions therefrom of the revenue tax so imposed; that the voluntary compliance with the provisions of the said order of the railroad commission will expose the express company to a multiplicity of suits by and on behalf of its numerous shareholders, which will work irreparable injury to the business of the company, and involve it in great and irreparable damage to your orators and of all the other shareholders. * * * Your orators pray: (1) That it may be adjudged and decreed that the order of the railroad commission of the state of Georgia of August 2, 1898, requiring the Southern Express Company to pay the amount of the war revenue tax on business from one point to another in the state of Georgia without endeavoring to collect the same from the shippers, or requiring them to make the payment thereof before the issuing of the said receipts or bills of lading, to be without jurisdiction on the part of the said commission, unconstitutional, null, and void. (2) That the Southern Express Company, its officers and agents, be restrained from voluntarily complying with the provisions of the said order of the said railroad commission of August 2, 1898, and paying the said war revenue tax as aforesaid. (3) That the attorney general of the state of Georgia be restrained from instituting any suit of any sort against the Southern Express Company for the purpose of enforcing the provisions of the said order of the said railroad commission of August 2, 1898. (4) That a writ of provisional and perpetual injunction, of the same purport, tenor, and effect as hereinbefore set forth, be granted to complainants. (5) That your orators may have such other and further relief in the premises as the nature of the case shall require and to a court of equity may seem meet."

The respondents submitted a general demurrer to the bill, assigning for cause thereof that it appeared by the bill and amendment that the com-

plainants were not entitled to the relief prayed for, and that there was no equity in the bill and amendment; and, for special cause of demurrer (besides others not necessary to state), showed that the court had no jurisdiction of the matters set forth in the complainants' bill to grant relief in the premises, "(b) because the acts complained of against these defendants, as set forth in said bill, are clearly within the jurisdiction and discretion of the railroad commission of Georgia, under the constitution and laws of said state, and the courts have no jurisdiction to control said commission in such matters, nor to restrain by injunction the exercise of such discretion, it not appearing from the allegations in said bill that there was any denial of the constitutional rights of complainants, or of the Southern Express Company, or of any gross abuse of discretion; (c) because the power to prescribe just and reasonable rates is legislative, and not judicial, and therefore the courts have no jurisdiction to inquire whether such power were well and properly exercised by the said commission,—especially is this true on the presentation of the facts as set out in complainants' bill."

The record shows that certain extracts from the Twenty-Sixth Annual Report of the Railroad Commission of Georgia, for 1898, to which the bill had referred, were offered in evidence by the railroad commissioners, and admitted; the extracts being Tariff A, Tariff B, Tariff E, and rules from one to 11, inclusive, applicable thereto. From the supplemental brief submitted in this court by counsel for the complainants (appellees and cross appellants here), it appears that on the hearing in the circuit court "the commission stood upon its demurrer with its evidences of rates taken from their annual report to the executive of the state." From the original brief submitted by counsel for Dinsmore and others, the complainants, we learn:

"The order complained of is as follows:

"Office of the Railroad Commission of Georgia.

"Atlanta, Ga., August 2, 1898.

"In re complaint against the Southern Express Company for overcharge in demanding that shippers furnish revenue stamps to affix to bills of lading or receipts: On motion of Commissioner Crenshaw, it is ordered that the report and opinion this day filed by Commissioner Atkinson, to whom the above-entitled matter was referred, be, and the same is hereby, adopted as the opinion and judgment of this commission. And it is further ordered that unless within five days from this date this commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

"By order of the board.

L. N. Trammell, Chairman.

"J. D. Massey, Secretary."

"The foregoing order, and the report and opinion of Commissioner Atkinson therein referred to, are attached to the brief submitted by counsel for the railroad commission of Georgia. In that report and opinion two questions are considered: (1) Does the act of the federal congress in question impose upon the express company the duty of furnishing the requisite revenue stamp to be affixed to the bill of lading required in the case of each consignment to be issued by the carrier? (2) If so, is the refusal to accept and forward such goods, except upon the condition that the shipper shall bear the burden of the carrying to the extent of providing such stamp in addition to the payment of the regular rate prescribed by this commission for the transportation of such goods, a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate so prescribed?"

The result of the consideration of the first question is thus expressed in the report: "The better conclusion is that when the congress required carriers to issue a bill of lading to every shipper its purpose was to require the issue of such evidence of contract of affreightment as would enable the

shipper to enforce the duty of carriers; and, since affixing the stamp was necessary to the completion of such a bill of lading, the duty was, by necessary implication, imposed upon the carrier of furnishing and canceling it."

In answer to the second question, namely, whether or not the exaction of the cost of a revenue stamp from a shipper amounts to a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate prescribed, and hence an "extortion," within the meaning of that term as employed in section 2187 of the Civil Code of Georgia, which provides: "If any railroad corporation organized or doing business in this state under any act of incorporation or general law of this state now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other state, and doing business in this state, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this state which it has the right, license or permission to use, operate or control the same shall be guilty of extortion, and upon conviction thereof, shall be dealt with as hereinafter provided,"—the conclusion is reached that the Southern Express Company, "in refusing to accept for shipment goods tendered to it without the prepayment by the shipper of the revenue tax required by it to be affixed to its bill of lading, violates the provisions of the act hereinbefore referred to, and incurs the penalties which are therein prescribed."

The first prayer of the bill was granted, and a provisional injunction against the railroad commission was also granted. The second and third prayers were refused.

J. M. Terrell, for appellants Trammell et al.

F. H. Miller and W. K. Miller, for appellees Dinsmore et al.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Subject to the limitation that the carriage cannot be required without reward, or upon conditions amounting to the taking of property for public use without just compensation, a state has power to prescribe the charges of public carriers for the carriage of persons and merchandise within its limits. The acts of the legislature of Georgia constituting the railroad commission, and prescribing its powers and duties, do not violate the provisions of the Georgia constitution. And the provisions of that constitution, and of the statutes passed in pursuance thereof, administered subject to the limitation that the carriage cannot be required without reward, do not violate the constitution of the United States, and have full force as public law. *Railroad Commission v. Smith*, 70 Ga. 694, affirmed by the supreme court of the United States, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; *Railroad Commission Cases*, 116 U. S. 307-331, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, 29 L. Ed. 636; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Road Co. v. Sandford*, 164 U. S. 578-598, 17 Sup. Ct. 198, 41 L. Ed. 560; *Smyth v. Ames*, 169 U. S. 466-550, 18 Sup. Ct. 418, 42 L. Ed. 819; *Houston & T. C. R. Co. v. Metropolitan Trust Co. of City of New York* (C. C.) 90 Fed. 683.

The Southern Express Company, as to its business conducted between points within the state of Georgia, is bound to receive for car-

riage, and to carry, express matter properly tendered to it by any person for transportation, provided the person so tendering such goods offers to pay its charges, not to exceed the maximum rates fixed by the railroad commission, so long as the body of the rates, or the system of maximum charges, prescribed by the commission, are not unjust and unreasonable, and such as to work a practical destruction to the rights of property of the shareholders in the corporation thus acting as a common carrier. The formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial, function. The courts are not authorized to revise or change the body of rates imposed by the commission. They do not determine whether one rate is preferable to another, or what, under all the circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. There can be no doubt of their power and duty to inquire whether a body of rates prescribed is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. *Reagan v. Trust Co.*, 154 U. S. 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014. "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter cannot be the subject of judicial inquiry." *Smyth v. Ames*, 169 U. S. 526, 18 Sup. Ct. 426, 42 L. Ed. 842.

It seems clear to us, from the statement of the case which we have digested from the record, that the issue between the railroad commission of Georgia and the Southern Express Company was, had that company the right to add to the maximum charges prescribed by the commission the cost of the one cent revenue stamp required by the act of congress to be attached to a receipt issued in each case of shipment? As the act of congress in question does not purport to fix or affect the rates which carriers may charge for transportation, its construction is not necessarily involved in the solution of this issue. In the circuit court counsel for the complainants submitted that the construction of the revenue act is not involved in this case, and the judge of that court who passed the decree from which this appeal is taken so held, and in the opinion which he delivered said: The issues presented by the pleadings do not render necessary a construction by the court of the act of congress imposing the war stamp tax, nor any clause of it. The shippers who refused to furnish the stamp or pay the cost of it did so on the ground that the demand thereof was an unlawful increase of the maximum rates prescribed by the commission. On this ground the complaint was made to the commission, and in its notice to the carrier the express company's action is referred to as "thus indirectly increasing the cost of transportation beyond the rate fixed therefor by the commission." When the carrier appeared before the commission in obedience to the notice, it showed cause, etc., respectfully, as the

bill avers, by "denying all jurisdiction in the premises on the part of the said commissioners"; from which it is evident that the carrier relied on the act of congress to support its action. Thus challenged, the commission proceeded to discuss and construe the act, and, in effect, held that it did not affect their power and duty to enforce the observance of the rates which they had prescribed. And later, when the carrier, still protesting, applied for leave to increase its rates, the commission refused the leave, and adhered to its judgment that the maximum rates which it had prescribed were just and reasonable, and should be enforced. It is true, but wholly immaterial, that the commissioners held and expressed the view that the war revenue act imposes the tax in question exclusively upon the carrier, and precludes it from relieving itself of the expense of affixing and canceling the stamp required to be attached to each bill of lading, manifest, or other evidence of receipt, by passing that expense on to the shipper, and requiring him to submit to an increased rate to that extent. This construction is unsound, but, as we have just said, it is wholly immaterial; for the act of congress neither prohibits nor authorizes such an increase in rates. Neither expressly nor by implication does it contain any provision on that subject. *Crawford v. Hubbell* (April 16, 1900) 20 Sup. Ct. 701, Adv. S. U. S. 701, 44 L. Ed. —; *Express Co. v. Maynard* (April 16, 1900) 20 Sup. Ct. 695, Adv. S. U. S. 695, 44 L. Ed. —. But the laws of Georgia, and the requirements of the railroad commission in pursuance thereof and in accord therewith, while the limitations of the fourteenth amendment of the constitution of the United States are observed, not only affect, but control, this carrier as to its Georgia business, and prohibit it from increasing its charges beyond the maximum rates prescribed by the commission.

There is nothing in the bill in this case that tends to show that the tariffs of rates and classification, and the rules prescribed by the commission, and now sought to be enforced by it, do not observe the limitations of the constitution of the United States. The one substantive fact which the bill with reasonable accuracy states is that the payment of the tax imposed by the war revenue law, as required by the order of the railroad commission, will aggregate to the Southern Express Company in the state of Georgia annually the sum of \$42,000, which is repeated further on in this language: "That the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under which it must do business, by the order of said commission, will result in irreparable damage and injury, and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars per annum, and a loss to complainants, in a decreased value of their shares, of ten thousand dollars." And further on still the complainants again repeat, and "show that the said Southern Express Company, and its directors, having declared their intention to do so, will now pay the said revenue tax out of the income and profits of the company, and will thereby diminish the assets of the company, and lessen the dividends thereof, and the value of its shares." There is no statement whatever of the amount of income of the company from its Georgia business (intrastate business), nor from its other

business (interstate business), nor from both together, either gross income or net income, or profits of the company. It is stated simply that the tax will aggregate in the state of Georgia annually the sum of \$42,000, and that this will cause a diminution of the income,—an obvious result as to the net income. But neither the substantive fact averred nor the obvious conclusion tends to show that the commission has hitherto trenched upon, or is about to trench upon, the limitations of the constitution, and thus present a case within the remedial jurisdiction of a court of equity. The aggregate amount in the state of Georgia annually of the war revenue tax, as stated, namely, \$42,000, shows the number of shipments by that carrier in that state (whether intrastate alone does not appear) of 4,200,000 annually. The argument of the pleader proceeds and shows that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroads is 50 per cent. of the express company's gross receipts; that it costs the express company 43 per cent. of its receipts to do its business, and this, added to the average of 50 per cent. which must be paid to the railroads, makes the total cost to the express company 93 per cent. of its receipts; that considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. "Taking ninety-three per cent. from these charges, and there is left a margin of seven-tenths of a cent on the 10 cent packages, and one and three-quarters of a cent on the 25 cent packages. If the express company is compelled to pay one cent each on the receipts, it loses three-tenths of a cent on every 10 cent package, and makes only three-quarters of a cent on the 25 cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders, like the complainants." The argument proceeds, further, that in section 9 of the act of the general assembly of the state of Georgia approved December 24, 1896 (Pub. Laws, p. 28), to levy and collect a tax for the support of the state government for the years 1897 and 1898, all persons and companies doing an express business, and charging the public therefor, in the state of Georgia, were required to pay $2\frac{1}{2}$ per cent. on their gross receipts, and all persons, or the superintendent or general agent of each express company, were required to make a quarterly return, under oath, in the form therein prescribed, under the penalty of indictment, conviction, and punishment, pursuant to section 1039 of volume 3 of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter. We notice this argument only to say that the "considerable express business done at a charge of 10 cents per package" is not affected by the action of the commission, because a reference to the tariffs prescribed by it, referred to in the bill and made a part of the record, shows that the lowest maximum rate prescribed therein is 25 cents, and the adding of one cent to the 10 cent rate would not make a rate in excess of that allowed by the commission's

tariff. We suggest, further, that the argument shows no reason why the tax imposed by the government of the United States should be added to the commission's rates that does not apply with at least equal force to the tax of 2½ per cent. on their gross receipts which the state government is shown to have levied. We say with at least equal force; we think with greater force, because this last tax would adjust itself to the shipments uniformly, and one who shipped a small package, or a package for a short distance, for the rate of 10 cents, would not be required to pay as much as one who shipped a larger package for a longer distance at the maximum rate shown in the commission's tariffs of \$1.40 per hundred pounds. The increase made on this basis would be uniform, and not unjustly discriminative between shippers; while the increase which the carrier proposes to make by adding the tax imposed by the war revenue act does manifestly discriminate, largely and unjustly, between the shipper of a small package for a short distance at a low rate and the shipper of a larger package the longer distance at the larger rate. Though each shipper is charged one cent, the relation of this charge to the service is unequal. Further, it does not appear but that the 50 per cent. of the express company's gross receipts which the railroads impose upon it by negotiation, and which charge more largely diminishes the revenues of the express carrier, should not, with equal justice and reason, be added to the maximum rates prescribed by the commission. This is absurd, and is suggested only to illustrate the utter want of force in the argumentative pleading which the bill attempts to put in the place of a showing of substantive facts.

It seems clear to us that the bill makes no case for the interference of a court of equity to restrain the action of the railroad commission of Georgia, and that the demurrer, though some of its special grounds which we have not recited may have been not well taken, should have been sustained. This disposes of the appeal and of the cross appeal.

It is therefore ordered that the decree of the circuit court be, and the same is hereby, reversed, and that the suit be, and it is hereby, dismissed, at the costs of the complainants.

(June 16, 1900.)

SHELBY, Circuit Judge. I respectfully dissent from the opinion of the court in this case. The opinion concludes with the proposition that the demurrer to the bill should have been sustained. No decree was rendered by the circuit court either overruling or sustaining the demurrer. It is true that errors are assigned predicated upon the failure of the circuit court to sustain the demurrer to the bill, but, in advance of a decree on the demurrer, no question, I think, is raised in that regard for review here. The court, after holding in the opinion that the demurrer should have been sustained, directs that the bill be dismissed. If the bill, on a hearing on the special demurrers, had been found deficient in its statement of facts, it is usual, and it would have been proper, to allow amendment. The bill should not, I think, be dismissed by this court for defects in the statement of facts, pointed out by special demurrers, before the demurrers are decided by the

circuit court.¹ The decree appealed from, rendered on March 7, 1899, is given in the footnote.¹ Judge Speer's opinion is reported in 92 Fed. 714. I think the decree is sustained by the authorities cited in the opinion, and that it should be affirmed.

The seventh paragraph of the bill shows the order made by the railroad commission, and why it was made:

"That certain citizens of Georgia refused to furnish the stamps to be attached to the receipts or bills of lading, or to pay for the same, if furnished by the express company, and thereupon complained to the railroad commission of the state of Georgia, to wit, the said Trammell, Crenshaw, and Atkinson, who on July 11, 1898, issued an order as follows: 'It being represented to the railroad commission of Georgia that the Southern Express Company, a corporation engaged as an express company within this state in the business of a common carrier of goods and merchandise for hire, since the passage by the federal congress of an act approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," has exacted, and continues to exact, from the shippers, as a condition precedent to forwarding any goods tendered to it for transportation between points within this state, the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is ordered that the Southern Express Company do appear before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act.' Cause was shown respectfully denying all jurisdiction in the premises on the part of said commission, who on August 2, 1898, ordered and directed the said stamp tax to be furnished, attached, canceled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part."

The purport and effect of the order is to so construe the act of congress of July 13, 1898, as to make it incumbent on the express company to pay the tax therein prescribed, and to hold that the express company cannot cast the burden of the tax on the shipper without making the rates unreasonable, and exceeding the rate of charges previously fixed by the railroad commission. In the case of *Express Co. v. Maynard* (decided April 16, 1900) 20 Sup. Ct. 695, Adv. S. U. S. 695, 44 L. Ed. —, the supreme court holds that there is nothing in the act

¹ SPEER, District Judge. The above-stated cause having been duly assigned for hearing on the application for temporary injunction at Augusta, in said district, on the 10th day of February, 1899, and the parties having been fully heard on the bill and the demurrer thereto, and the court having taken time for advisement, it is now, upon consideration, ordered, adjudged, and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war stamp tax in question be, and the same is hereby, denied. Ordered, adjudged, and decreed, further, that the defendant the railroad commission of Georgia, and each member thereof, to wit, the individual defendants, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer B. Atkinson, be, and the same are hereby, enjoined from any and all order, direction, action, or legal steps instituting, or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said commission dated August 2, 1898, for the reason that said order is null and void, and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax. Ordered, further, that the cause proceed as usual in equity.

of congress levying the tax that prevents the express company from adding the tax to the charges made by it.

The order was unquestionably made by the railroad commission on the theory that the act of congress required the Southern Express Company to pay the tax, and that it forbade the company to shift the burden on the shipper. The supreme court in the case cited has not construed the act of congress on the question as to who is required to pay the tax, but it has decided that, conceding that the act requires the express company to pay it, there is nothing in the act to prevent the company from casting the burden of the tax on the shipper. The rates charged by the express company were prescribed as reasonable by the railroad commission of Georgia. The complaint in the order of July 11, 1898, is that the express company has required the shippers to pay the special tax, "thus indirectly increasing the cost of transportation beyond the rate therefor fixed by the commission." The authority conferred on the railroad commission is to fix reasonable rates. The order of the commission cannot be justified on the theory that the charges of the express company, with the taxes added, are unreasonable. If the rate which the commission has fixed was reasonable, it certainly does not make it unreasonable to add to it the increased cost of transportation caused by the act of congress. As the commission fixed the rate, the order complained of must have been made on the assumption that the act of congress places the tax on the express company, and deprives it of the right to shift the burden by contract.

In *Express Co. v. Maynard*, supra, the supreme court said:

"As there was no allegation that the rates existing prior to the imposition of the one cent stamp tax were unreasonable, it would follow that the rates which were otherwise reasonable were decided not to be so solely because there was added to the charge for each package the exact amount of the increased cost for transporting the package, occasioned as to each package by the specific imposition on each by the act of congress of the one cent stamp tax. But, to cause rates which were conceded to be reasonable to become unreasonable because alone of such increased charge, the assumption must be made that the act of congress not only imposed the burden of the tax solely on the express company, but also forbade its shifting the same by any and every method."

The order of the railroad commission prescribes who shall pay the tax and who shall not pay it, and, in effect, prevents any contract between the shipper and the carrier in reference to the payment of the tax. This order is evidently based on an erroneous construction of the act of congress. It is assumed by the commission that the act requires the express company to pay the tax, and forbids the express company from making any agreement which shifts the burden upon the shipper. A brief quotation from the case last cited will show the conclusion of the supreme court on this point:

"A tax rests upon real estate. Can it be said that by the law imposing such a tax it was intended to prevent the owner of real property from taking into consideration the amount of a tax thereon, in determining the rent which is to be exacted by him? A tax is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold, and restrain the merchant, therefore, from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burden of taxes may be shifted are as multiform and as vari-

ous as is the power to contract itself, it follows that the argument relied on, if adopted, would control almost every conceivable form of contract, and render them void if they had the result stated. Thus, the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes, if such a law forbade a shifting of the burden of the tax, and avoided all acts which brought about that result. It cannot be doubted that to adopt, by implication, the view pressed upon us, would be to virtually destroy all freedom of contract, and its final analysis would deny the existence of all rights of property."

The order made by the commission and enjoined by the circuit court cannot be held to be one fixing reasonable rates to be charged by the express company. The commission had already performed that duty. If, in view of changed conditions, the commission had made a new schedule of charges, and in doing so had not exceeded its authority, there would be no cause of complaint. But the order cannot be treated as one fixing a new schedule of charges. The one formerly fixed remains unchanged, and the present order, in effect, says to the express company: "You shall not require the shipper of packages to pay the one cent tax. You shall not contract with him to secure its payment by him. You shall furnish, attach, and cancel the stamp. The shipper shall not do it, in whole or in part." The order is one forbidding certain contracts prior to the shipment of the goods by the express company. The express company is to be subjected to the suits and penalties, not for violating any new schedule prescribed, but for the making of contracts which shift the burden of the tax. The railroad commission seeks to accomplish by its order what was done by the writ of mandamus by the state courts in Michigan. But the supreme court, in reversing the decree of the supreme court of Michigan, has, it seems to me, established a construction of the act of congress in direct conflict with the theory on which the railroad commission of Georgia acted. *Express Co. v. Maynard*, supra.

I think that the circuit court was right in holding that the "railroad commission had no jurisdiction to adjudge and designate the party who shall pay the tax." The order made by the commission requires "the stamp tax to be furnished, attached, canceled, and paid by the Southern Express Company alone, and not by the shippers, in whole or in part." In effect, the command is that the express company shall pay it, and that the shipper shall pay no part of it, and that the shipper and the carrier shall not be permitted to make any contract for its payment, in whole or in part, by the shipper.

I concur in the views expressed by the court that a state has power to prescribe the charges of public carriers for the carriage within the state of persons and merchandise. This power is, of course, subject to the limitation that the carriage cannot be required without reward, or upon conditions amounting to the taking of property for public use without just compensation. I do not deny or question the right of the state to tax, control, and regulate, subject to constitutional limitations, any business carried on by corporations or individuals within its limits. Conceding all this, where does the commission get the right to say who shall and who shall not pay a federal tax? It is the theory of our system of government that the state and the nation alike are to exercise their powers, respectively, each without hin-

drance from the other. This theory, by necessary implication, excludes wholly any interference by either with an independent exercise by the other of its constitutional powers. *Cooley, Tax'n* (2d Ed.) 83. The state tribunals must, in proper cases, construe federal laws, subject to the final decision of the supreme court; but neither the legislature of a state, nor a commission created by it, has authority to make laws or orders directing who shall or shall not pay a tax constitutionally levied by the United States. Surely, such orders cannot be valid in cases where they would tend to embarrass the government in the collection of the tax. The order in question does not purport to be one regulating the charges to be made by the express company. It is, in terms, one laying down a rule as to who shall and who shall not pay a stamp tax to the United States. It is applicable to all packages, whether or not the stamp, if treated as an additional charge, makes the whole charge exceed the rates previously fixed by the commission. The order, it seems to me, not only embodies an erroneous construction of the revenue law, but its enforcement may materially interfere with the collection of the tax. The question of the taxing powers of the states, as their exercise has affected the functions of the federal government, has often been considered by the supreme court, and the right of the states to impede or embarrass the constitutional operations of the general government, or the rights of its citizens, by levying taxes, has been always denied. *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 744. If the states can interfere by prescribing regulations as to the collection of the revenues of the federal government, and can say who shall and who shall not pay a prescribed tax, and forbid contracts between citizens in reference to it which are permissible under the statute creating the tax, then the states have the right and power to embarrass and impede at a vital point the operations of the general government. The same policy and law which forbids the states to tax the instrumentalities of the federal government should deprive them of the power to embarrass, prevent, or regulate the collection of revenues levied under its constitutional powers.

The supreme court has said on two occasions, Chief Justice Marshall delivering the opinions, that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Weston v. City Council of Charleston*, 2 Pet. 449, 7 L. Ed. 481. Is it not clear that the order of the railroad commission seeks "to control the operation" of the law enacted by congress? It pointedly says who shall and who shall not pay the tax levied by the act. It forbids lawful contracts on the subject. It impedes the collection of the tax by saying that it shall not be paid by certain persons who otherwise might pay it. If the state can create a commission to make the order in question, has it not equal authority to regulate by statutes and commissions the attaching, canceling, and furnishing of the stamps on checks, conveyances, leases, and other instruments, and on patent medicines, matches, and other articles taxed by the statute?

If the administration of the United States revenue laws is subject to

state supervision, is there any reason why the post offices within the state and the stamps there used should escape the same jurisdiction? If, for some reason not apparent to me, it be true that the commission may control and regulate the payment of the tax, it must be done within legal restrictions. The commission cannot be permitted to make orders construing the federal statute which, in effect, deprive the express company of its property without due process of law, or which force it to carry without compensation. In other words, when the commission fixes rates by regulating federal taxation, it must keep within the same limits that would govern if it sought to perform its functions by direct action. The bill in this case shows that reasonable rates had been previously fixed. It shows that the subsequent order complained of will cause loss to the express company of \$42,000 annually on its business in Georgia; that is, that the express company must do business receiving \$42,000 less each year than it would receive if paid at the reasonable rates fixed by the commission. The bill also shows that, applying the last order of the commission to the rates now charged by the express company, some of which are below the schedule of the commission, part of the express company's business will be done at an actual loss. The demurrers, if we are to consider them before a decree on them by the circuit court, admit the averments of the bill. These averments, I think, are sufficient to sustain and authorize the preliminary injunction. I am of opinion, therefore, that the bill should not be dismissed.

In re WORCESTER COUNTY. DERBY v. WORCESTER COUNTY. In re DERBY.

(Circuit Court of Appeals, First Circuit. April 20, 1900.)

Nos. 308, 312, 318.

1. APPEAL—TIME FOR TAKING—REHEARING.

Where a circuit or district court permits the filing of a petition for rehearing during the term at which the order or decree sought to be reviewed was entered, it retains jurisdiction to act upon such petition at a succeeding term, and the time for appeal does not begin to run until such action is taken.

2. BANKRUPTCY—REVISION BY CIRCUIT COURT OF APPEALS—TIME FOR FILING PETITION.

A petition for revision of the proceedings of a court of bankruptcy in matter of law, under Bankr. Act 1898, § 24b, may be filed in the circuit court of appeals at any time within six months from the ruling, order, or decree sought to be revised.

3. SAME—REVIEW OF ORDERS—PROCEDURE.

A party who is in doubt as to his right of appeal from an order in bankruptcy may, in addition to taking an appeal, file a petition for revision, under section 24b of the bankruptcy act; and the circuit court of appeals may determine the matters complained of in either or both proceedings, as it shall determine to be appropriate.

4. SAME.

Congress having specifically provided, in Bankr. Act 1898, § 25, for an appeal with reference to proofs of debts exceeding \$500, on which appeal all questions are open to the appellate tribunal, and having also provided (section 24b) that, for all matters of administration which concern the relations to each other of the different interests in the estate, the action

of the bankruptcy court shall be revised only in matters of law, the courts are not at liberty to disregard the distinction so created; and, where an order allowing the proving of a claim also determines its priority, the former part of the order is appealable, but the latter part can only be reviewed on a petition for revision.

5. **SAME—PARTY ENTITLED TO PROVE DEBT—ACTUAL OWNER.**

A county owning an account against a bankrupt, for which a note was taken prior to the bankruptcy, payable to another, but for the use of the county, may prove the debt against the bankrupt in its own name, as the actual owner either by claiming and proving the note, or surrendering it and proving the account.

6. **SAME—PRIORITY OF CLAIM—EFFECT OF TAKING NOTE.**

Taking a note does not discharge an original debt having any privileges under the bankruptcy law, and either may be proved.

7. **MUNICIPAL CORPORATIONS—CONTRACTS—VALIDITY.**

The violation of statutory provisions in regard to the mode of making contracts by counties, designed for their protection, may be waived by a county, and cannot be urged by the other party to defeat the contract.

8. **BANKRUPTCY—CLAIMS IN FAVOR OF COUNTY—RIGHT TO PRIORITY.**

Under Bankr. Act 1898, § 64, providing for priority of payment of "debts owing to any persons who by the laws of the state or the United States are entitled to priority," and the provision of section 1 that "persons shall include corporations except when otherwise specified" a county in Massachusetts, which by the insolvency laws of the state (Pub. St. c. 157, § 104) is made a preferred creditor of an insolvent, is entitled to priority as to a claim due the county from a bankrupt.

9. **SAME—EFFECT OF ACT ON STATE—INSOLVENCY LAWS.**

The insolvency laws of a state were not annulled by the bankruptcy law, but continue operative, although within a limited range.

10. **SAME—DEBTS DUE COUNTY—CLAIM FOR PRISON LABOR.**

Under the General Statutes of Massachusetts, which provide that houses of correction shall be built, equipped, and maintained by the several counties, and by which the county makes direct and specific payment for every article of every nature used in connection with the industries carried on in the house of correction which are to be established by the county commissioners, and receives all proceeds of the labor and earnings of the prisoners, the master, who is a deputy sheriff, being required to deposit such proceeds as trustee, and pay the same at stated intervals into the county treasury, a claim for the labor of prisoners in such a house of correction is a debt due the county, within the meaning of Pub. St. c. 157, § 104, which gives such debts priority against the estates of insolvents, and such a claim may be proved by the county, as owner in bankruptcy, and is entitled to priority, under Bankr. Act 1898, § 64.

Appeal from the District Court of the United States for the District of Massachusetts.

Thatcher B. Dunn and James A. Stiles, for appellant.

George S. Taft, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The underlying questions involved in these three cases are the right of the county of Worcester to prove a claim in bankruptcy, and to have priority for the claim if allowed, all under the bankruptcy act of July 1, 1898, c. 541 (30 Stat. 544). The referee allowed the claim, but refused it priority. On appeal to the district court, that court, on the 21st day of July, 1899, entered an order as follows: "It is hereby ordered and decreed that the debt may

be proved by the county and is entitled to priority, and that the decree of the referee be modified accordingly." Derby, the trustee in bankruptcy, desired to appeal, but he failed to do so within the 10 days limited by the statute for appeals. Thereupon, on the 30th day of August, 1899, he filed a petition for rehearing. It is apparent that the purpose was to revive the right of appeal. The court treated the petition for the rehearing as a petition for a review, and on the 4th of October, 1899, granted it, and on the 10th entered an order as follows: "It is hereby ordered and decreed that the proof of the county of Worcester be allowed as a debt entitled to priority." It will be noticed that the order thus entered departed literally from that of the 21st day of July, but we assume that the second was intended to be substantially the same as the earlier one, and to have effect both to allow the proof and to establish its priority. Derby, as trustee, thereupon appealed, and his appeal is the subject-matter of "Derby, Trustee, v. County Worcester." The grounds of his appeal are two: First, that the district court erred in allowing the proof; and, second, that it erred in allowing it as a debt entitled to priority.

The order of July 21st was entered during the term of the district court which commenced on the fourth Tuesday of June, 1899, and the petition for rehearing was filed at the same term. The order granting the rehearing, however, was entered at the term commencing on the second Tuesday of September, 1899. Inasmuch as the petition was filed during the June term, and was not stricken out, but was heard and its merits acted on at the September term, it must be accepted that the petition was filed at the June term with the consent of the court, and that the court thus held its control over the proceeding. In *Andrews v. Thum*, 12 C. C. A. 77, 64 Fed. 149, decided by this court, the facts were as follows: A petition, which we held to be, in substance, a petition for a rehearing, was seasonably filed in an equity cause at the October term of the circuit court for the district of Massachusetts. There was nothing in the case to show that the petition was brought to the attention of that court until the succeeding May term, when it heard it on its merits and denied it. We held that the proceeding was effective, and that the time for appeal did not begin to run until the petition was denied. This decision was cited, without disapproval, in *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 679, 18 Sup. Ct. 786, 42 L. Ed. 1192. We relied on *Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986, an examination of which will show that it fully supports the proposition we now make. Thus, it appears thoroughly settled by authority that, under the circumstances, the district court retained its control over the proceedings, and granted a rehearing and entered a new decree, with the same effect as though the whole had occurred during the June term. During that term the court had, of course, entire control over the decree entered on July 21st, and might at any time vacate it and enter a new decree. It is of no consequence whether the petition was regarded by the district court as a petition for a rehearing or for a review, as the power of the court in this particular is regardless of forms, and may be exercised even in a summary manner. A striking illustration of this is found in *Bank of Commerce v. Tennessee*, 163 U. S. 416, 16 Sup. Ct. 1113, 41 L. Ed.

211, where the court, after a mandate issued, recalled it and modified its judgment.

The district court therefore had power during the term at which the decree was entered to vacate it and enter a new decree, and retained this power over the case by permitting the filing of the petition for a rehearing, as we have already shown, so that the result is in all respects the same as though all the proceedings had occurred at the June term. Nevertheless, under the jurisdiction vested in the several circuit courts of appeals to superintend, in matters of law, the proceedings of the several courts of bankruptcy within their jurisdiction, the county filed its petition to revise the action of the district court in reopening its decree and entering a later one. This is the subject-matter of the case entitled "County of Worcester, Petitioner," which, for the reasons given, need not be further considered.

We will add that, in view of what we have said, we have no occasion to consider whether or not the organization of the district court, sitting in bankruptcy, is, by the statute, of a continuous nature, so that, according to the expressions in *Sandusky v. Bank*, 23 Wall. 289, 292, 293, 23 L. Ed. 155, and in *Stickney v. Wilt*, 23 Wall. 150, 164, 23 L. Ed. 50, its proceedings are not subject to the ordinary rule that rehearings must be asked for at the term at which the judgment is entered, or to the other rule that bills of review for matters appearing on the face of the record must ordinarily be brought within the time limited by statute for taking appeals, as shown in *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 227, 10 Sup. Ct. 736, 34 L. Ed. 97, and in *Reed v. Stanley*, 38 C. C. A. 331, 97 Fed. 521, decided by the circuit court of appeals for the Ninth circuit.

The subject-matter of the remaining case, "Derby, Trustee, Petitioner," is in all respects the same as the subject-matter of "Derby, Trustee, Appellant, v. County of Worcester." The statute of bankruptcy (section 24b, 30 Stat. 553) establishes the jurisdiction of this court to superintend and revise in the following language:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise, in matter of law, the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

Section 25 of the same act (30 Stat. 553), providing for appeals, enacts that "appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals * * * from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." In *Re Good* (C. C. A.) 99 Fed. 389, the circuit court of appeals for the Eighth circuit determined that what is matter of appeal under section 25 is not matter for revision under section 24. This is undoubtedly correct; yet it appears that Derby, being doubtful whether his remedy was under section 24 or section 25, undertook to avail himself of both until the question of procedure was determined. The county urges on us that the two proceedings neutralize each other, or that one of them, at least, operates to annul the other. We see no necessity for a conclusion of this nature. It has never been held by the supreme court in any of the several cases where parties have been doubtful whether their remedy was by error or appeal, and have therefore taken both, that one of them

nullified the other; but instances are reported where the court has heard both the writ of error and the appeal, acting on each by the dismissal of one, and giving a judgment on the merits of the other, according as the law requires. *Improvement Co. v. Bradbury*, 132 U. S. 509, 515, 10 Sup. Ct. 177, 33 L. Ed. 433. There is nothing in the fact that Derby instituted both of these proceedings which lays any equitable basis for this proposition of the county, because, in contemplation of law, no substantial injury was thereby done it.

In any view of the dates of proceedings, Derby's petition was seasonable. The original decree was entered, as we have already said, on July 21, 1899. The petition to review was filed in this court on December 7, 1899; that is, within six months. The statute fixes no time within which a petition of this nature must be filed, so that unless some time is fixed by rule, as was the case in *Re Hien*, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. Ed. 1066, or by following some analogous provision of statute, petitions of this character can be filed with reference to any proceeding in bankruptcy so long as the decree is executory, or the case has not been closed. The bankruptcy act of 1867 in like manner omitted any limitation on the exercise of the revisory power of the circuit court, so that, in this circuit a rule was entered on September 15, 1870, requiring that the petition should be filed within 15 days after the ruling, order, or decree appealed from. Inasmuch as there is no statutory limitation fixing the time for filing bills for review for matters arising on the face of the record, *Central Trust Co. v. Grant Locomotive Works*, already referred to, determined that the time must be limited to that given by statute for taking an appeal from the decree sought to be reviewed. After a careful consideration of the question, the circuit court of appeals for the Ninth circuit, in *Reed v. Stanley*, *ubi supra*, held that, on the same rule, the time within which a bill of review might be filed, since the act establishing the circuit court of appeals was passed, is limited by analogy to the six months allowed by statute for taking appeals to the last-named court. By parity of reasoning, it would seem to follow that the time for filing a petition for revision under section 24 must be limited to six months. Certainly it can be no shorter, and we have already shown that the petition was filed within that period.

Whether or not we shall take jurisdiction of the matters now before us on a petition for revision or on appeal is a substantial question, because on a petition for revision we are limited to matters of law, while on appeal the whole record is open. The right of appeal is applied, so far as the amount is concerned, to debts of \$500 or over; thus indicating a settled determination on the part of congress not to leave the final decision of a right to prove a considerable claim in the power of a single judge in any part. It becomes at once apparent that this substantial right of appeal ought not to be taken away merely because the party who proves a debt also claims a priority in connection therewith.

It becomes necessary in this connection to examine somewhat further the provisions of the statute of 1898 with reference to the method of proving claims, and also the general orders and forms in bankruptcy relating thereto. Nothing is found in the orders giving any special

direction with reference to the manner of proving claims in connection with which a priority is asserted. Neither do the prescribed forms for proofs of debts contain anything of that character, although the form of the proof of a secured debt requires that it shall enumerate the securities held by the creditor. Neither is there anything in the statute giving any direction as to the method of proving a debt in reference to a priority. The topic is covered by section 57 (30 Stat. 560). The first paragraph of that section ("a") gives detailed directions for the proof, but it omits any reference to the matter of priority, although it is express about proofs by creditors holding securities. Paragraph "e" provides that the claims of secured creditors and of those who have priorities may be allowed, in order to enable such creditors to participate at meetings held prior to the determination of the value of their securities or priorities, but they are thus to be allowed for such sums only as to the court seems to be owing over and above the value of their securities or priority. This, however, concerns only the preliminary determination in a preliminary way of the franchise rights of creditors.

Section 64 (30 Stat. 563), which fixes priorities, commences with a direction that the court shall order the trustee to pay taxes due various enumerated entities in advance of the payment of dividends. It proceeds, in the next paragraph, that the "debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be: [Then comes the enumeration of the various classes of debts, 1 to 5, which we need not repeat.]" There is nothing in this section to indicate that the question of priority is essentially involved in the mere matter of proving a debt, or even that a claim to priority should appear in the formal proof. In the act of 1867, afterwards found in section 5101 of the Revised Statutes, which covered the entire matter of priority, the matter was put clearly as follows: "In the order for a dividend, the following claims shall be entitled to priority and are to be first paid in full in the following manner." Then is given a schedule of the different classes of priority claims. We can conveniently place our hands on only two cases showing the method of proceeding under that statute, which are *In re Handell*, 15 N. B. R. 71, Fed. Cas. No. 6,017, and in *Ex parte Rockett*, 15 N. B. R. 95, Fed. Cas. No. 11,977, in each of which the question of priority was treated purely as one of administration, and was not connected with the proofs of debts.

On the whole, congress having provided specifically in the act of 1898 for an appeal with reference to proofs of debts exceeding \$500, on which appeals all questions are open to the appellate tribunal, and having also provided that, for all matters of administration which concern the relations to each other of the different interests in the estate, the action of the bankruptcy court shall be revised only in matters of law, it is plain that congress insisted on a distinction of a substantial nature, which we are not at liberty to disregard. Whether or not the county of Worcester has any debt provable belongs in the first class. Whether or not it has any debt as to which it is entitled to priority is a question of administration, which can ordinarily present no question of importance, except of law, arising from facts which can rarely be disputed. Therefore it belongs of right to the

second class. The fact that, for convenience, the learned judge of the district court combined both questions in one decree, can in no way affect the substantial distinctions which congress has made between the mere power to revise and a full appeal. We therefore must sever what the district court has apparently combined. Inasmuch as the trustee maintains that the county of Worcester has no debt which it can prove for any purpose against the bankrupt estate, we must dispose of that question on the appeal; and, inasmuch as he also claims that, even if the county has a provable debt, it is not entitled to any priority, we must dispose of that question on the petition for revision. The circuit court of appeals for the Seventh circuit had this topic under consideration in *Re Rouse, Hazard & Co.*, 33 C. C. A. 356, 91 Fed. 96, although not before it in the precise form in which it comes before us. The only question there was that of priority, and the court held that this was not governed by the provisions of section 25 granting appeals. The opinion observed, however, at the foot of page 98, 91 Fed., and page 358, 33 C. C. A., that, if the controversy had been in respect to the merits of the claims, the court would have been without jurisdiction on a petition for revision. The line of reasoning would have led to the same result which we have reached, if the matter had come up in the same form.

This brings us to the merits of the controversy. The claim in issue is a balance due for labor of prisoners confined in the house of correction at Fitchburg, in the county of Worcester. A preliminary objection is made by the appellant that the claim proved was represented originally by an account, and that for a part of the claim a note was given, signed by the bankrupts, payable to the order of Benjamin D. Dwinell, the master of the house of correction. This note was dated October 1, 1898, which was after the approval of the bankruptcy act, and it bears the blank indorsement of Dwinell. This indorsement was made after the adjudication of bankruptcy. The proof is made up of this note and of so much of the account as the note does not cover. Accompanying the note was a mortgage, which, we understand from the record, the county offered to surrender, proving its claim as entirely unsecured. In bankruptcy, it is of no consequence whether proof was made of the original account or of the note. There is no evidence that the parties had any intention, except to take and give a note for an account in the usual way. Taking a note does not discharge an original debt which has any privileges, and either might be proved. Such is the law of the federal courts, which would govern us on this particular question, if it became important. The local decisions seem to be the same. *The Kimball*, 3 Wall. 37, 46, 18 L. Ed. 50. If the county was the owner of the original debt, and the note was taken on account of that debt by the master of the house of correction, the county would be entitled to demand the note as its property if it saw fit so to do. In that event, at the common law, the note, unless indorsed before suit by the payee, would necessarily be sued in the name of the payee, but the litigation would be controlled by the county. Bankruptcy, however, is governed by the rules of equity proceedings, and takes no cognizance of the technical rules of the common law with reference to parties to litigation, and, like

equity, it acts in the names of the parties substantially interested. So that, whether or not the note was indorsed by Dwinell, the debt could be proved by the county, if it owned it (as it was proved), and in no other way. The indorsement by Dwinell was of no effect, except as a matter of convenience, as affording uncontroverted evidence that it belonged to the county. Even claims assigned before bankruptcy must be proved by the assignee. This was so determined by Judge Lowell in *Re Fortune*, 1 Low. 384, Fed. Cas. No. 3,586,—a decision which was never controverted, and which, on fundamental principles of equity rules of proceeding, cannot be. In case of a debt assigned before bankruptcy, the original assignor is not entitled to be recognized, either in a petition for an adjudication of bankruptcy, or in a proof of debt; and the assignee necessarily comes in his own name as the only party to the record. All the discussion and doubt about the method of proceeding with assigned debts, whether under the present statute or previous ones, relate to those assigned after the proceedings in bankruptcy are commenced. Paragraph 3 of general orders in bankruptcy No. 21 (32 C. C. A. xxii., 89 Fed. ix.), by its very terms, implies that it is limited to assignments of this character. Therefore, if the original account belonged to the county, so, at its option, did the note, and the county, claiming the note, might prove it, or, repudiating it, it might prove the original account. In either case the law of priorities applies with the same effect, if it applies at all.

The appellant maintains that, by reason of certain facts which he has stated, the contract between the master of the house of correction and the bankrupts was violative of certain statutory directions as to method and form, and therefore in no event could it accrue to the county. This, however, is met by the well-known principle of law that, inasmuch as the statutory directions about the method of making such contracts are for the protection of the county, it could waive any noncompliance with them. The contrary view would impose a punishment in lieu of the protection which it is the purpose of the statutes to give. This particular case is clearly within the line of decisions with reference to transactions by national banks in violation of statutory regulations. *Thompson v. Bank*, 146 U. S. 240, 251, 13 Sup. Ct. 66, 36 L. Ed. 956.

Also, assuming that this claim was provable by the county, we agree entirely with the judge of the district court that it is entitled to priority. Claims of this character were given priority under the act of 1867. In *re Mellor*, 10 Ben. 58, Fed. Cas. No. 9,401; In *re Southwestern Car Co.*, 9 Biss. 76, Fed. Cas. No. 13,192; In *re Dodge*, 4 Dill. 532, Fed. Cas. No. 3,949. Among the debts entitled to priority under section 64 of the bankruptcy act of 1898, to which we have referred, are "debts owing to any person who, by the laws of the state or the United States, is entitled to priority." The first section of the act provides that "persons shall include corporations, except when otherwise specified." The county of Worcester is acknowledged to be a corporation, although in the class often called "quasi corporations." The provision of section 64 to which we have referred is claimed by the county to relate to that in the insolvency

laws of Massachusetts found in Pub. St. c. 157, § 104, which awards priority "to all debts due to the United States, and all debts due to and taxes assessed by this state, or any county, city or town therein." We are unable to conceive of any priority to which any one may be entitled by the laws of a state, under section 64 of the bankruptcy act, unless it be a priority created by insolvent laws of that character. It is true that priorities are often created by state statutes relating to the administration of estates of deceased persons, and also to proceedings for winding up corporations, but such laws are not of that general character which can be supposed to be within the purview of the provision of the bankruptcy act which is concerned here. Of course, statutes touching assignments for the benefit of creditors must be classed with insolvency laws, strictly so called. It is settled that state insolvency laws are not annulled by the enactment of a bankruptcy act, and that the only effect of such enactment is to suspend their operation, so that they become operative again, without re-enactment, when the bankruptcy act is repealed. *Butler v. Goreley*, 146 U. S. 303, 314, 13 Sup. Ct. 84, 36 L. Ed. 981. Moreover, the last paragraph of the bankruptcy act of 1898 (30 Stat. 566) enacts that "proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it." Consequently the insolvency law of Massachusetts was not only not annulled, but it continued an operative law after the bankruptcy act was approved, though within a limited range. Moreover, it was the law of the state in force the instant the bankrupt statute was approved. However all this may be, section 64, as we have said, necessarily refers to the class of laws which we have cited from the Public Statutes, because on no practical, sensible theory could it refer to any other. We fully agree with the conclusions of the learned judge of the district court in this particular.

The troublesome question remains to be disposed of, whether the debt proved in this case was one due the county, within the meaning of the provisions of the insolvency laws of Massachusetts which we have cited. Whether or not the claim may be proved by the county, if it is the substantial owner of it, depends on the rules of administration of the bankruptcy act as determined by the federal courts. These we have substantially pointed out. But its ownership and consequent right of priority depend on the construction of the statutes of Massachusetts. Certain moneys due the warden of the state prison were held by the supreme judicial court of Massachusetts, in *Com. v. Phoenix Bank*, 11 Metc. (Mass.) 129, not entitled to priority as moneys due the state. Unless the cases can be properly distinguished, *Com. v. Phoenix Bank* must control.

The state statutes applicable, so far as they have been cited to us, are Rev. St. 1836, c. 144, which was the statute under consideration in *Com. v. Phoenix Bank*; Pub. St. 1882, c. 220, §§ 7 to 26, each inclusive; Acts 1887, c. 447; Acts 1888, c. 403; Acts 1890, c. 215; Acts 1891, c. 228; Acts 1898, c. 277. The first question arising is whether or not the house of correction for the county of Worcester has any special relations to the county. Is it simply an instrument of government, the cost of which, on account of its somewhat local relations,

the legislature may properly direct to be borne by the county? Or does it bear a more intimate relation to the county, like, say, a turn-pike or bridge which the legislature might require to be constructed by the county, although for the uses of the entire public, but for which the county might be authorized to reimburse itself by receiving the tolls? That, like many institutions of its class, it is an instrument of the state sovereignty, connected with the state administration of justice, there can be no question. This is made especially clear by *Lane v. Com.*, 161 Mass. 120, 36 N. E. 755, showing that, to a certain extent, persons convicted of crime may be punished in the state prison, jail, or house of correction, and by the act of 1890, c. 278, providing for the removal of prisoners from a state farm to any house of correction in the county where such prisoner was convicted. In this aspect the house of correction stands, in all particulars, under the same well-known rules as the county court house in *Morse v. Norfolk Co.*, 170 Mass. 555, 556, 49 N. E. 925. This, it was stated, the county might be required to construct, although its control, and, indeed, the persons who should construct it, may be selected as the legislature might see fit. Nevertheless, an examination of the statutes to which we have referred will show that the house of correction acquired peculiar relations to the county, which have never been abrogated, and especially that the entire beneficial interest in contracts made by its master reverts to the county, and money received thereon directly aids to reduce the burden of taxation otherwise resting on its inhabitants.

According to the provisions of Pub. St. c. 220, § 23, the sheriff had the custody, rule, and charge of the house of correction in his county, and of all prisoners therein, except in the county of Suffolk; and he was directed to keep the same by himself, or by his deputy as master, for whom he was made responsible. It was also directed that the master should appoint subordinates, for whom he (the master) should be responsible. By section 26, the county commissioners in each county fixed the salaries for all officers, assistants, and employes of the house of correction. Section 7 directed that there should be provided by the county commissioners in each county, with two exceptions, "at the charge of said counties, a fit and convenient house or houses of correction," "with convenient yards, workshops, and other suitable accommodations adjoining or appurtenant thereto." Section 11, also, required that the county commissioners in the several counties should cause to be provided, "at the expense of said counties," "suitable materials and implements sufficient to keep at work all the prisoners committed to the house of correction." Section 13 provided that the commissioners might make contracts for work to be done in the house; section 14, that they might make contracts for letting out to hire persons confined therein; section 53, that they should procure all necessary supplies for the house, to be furnished and purchased under their direction, at the expense of the county; and section 54, also, provided that all charges and expenses of safe-keeping, maintaining, and employing convicts therein, and the safe-keeping of all other persons therein, should be paid from the county treasury. Section 55 enacted that the county commission-

ers might order sums of money to be advanced out of the treasuries of the counties to the master of the house of correction for the purpose of providing tools, materials, and other things required for the employment, restraint, and safe-keeping of the convicts. Section 56 provided that the master should pay to the treasurer of the county, at such times as the officers of the county might direct, the amounts of sales and other proceeds of the labor and earnings of the prisoners in his custody.

Other provisions of this character might be cited from the Public Statutes, but we have given enough to show beyond question that the title to the house of correction, and all its appurtenances, materials, tools, and supplies, of every character, and consequently to the product thereof, including whatever might result from the labor of the prisoners, was, under that system of legislation, vested in the county, as its absolute property. There was no provision in the Public Statutes that any of the property, real or personal, or any contract for the labor of the prisoners, should vest elsewhere than in the county, either nominally or substantially. There was none that the master of the house of correction or the sheriff might bring suit in his own name for the recovery of any matter connected with, or concerning, the house, although it is not impossible that as the sheriff, under that system, was in the custody of the supplies, materials, and tools, he might have had sufficient qualified property or possession to enable him to maintain an action of trover; or, under some circumstances, of trespass. Nevertheless, the right of action for all sums due, as well as the substantial property right to all such sums, clearly vested in the county.

We are unable to discover anything in the subsequent legislation which changes substantially the property rights of the county as they were under the Public Statutes. The first was that constituting the state office of general superintendent of prisons. His duties, as given by the act of 1887, c. 447, § 7, are to establish and maintain such industries as may, from time to time, be determined upon by him and the master. So far as we have been able to discover, with that exception, the relations of the county commissioners and the sheriff to the house of correction remain substantially unchanged. The act of 1887 provided, in section 11, that the master should make payment into the treasury of the county whenever he had in his possession as great a sum as \$5,000, and at least as often as once in each month. This related to all moneys received under the provisions of the act, whether for hire of labor or for the manufactures sold. The act also provided, in section 4, that the bills for tools, implements, and materials purchased, with the salaries of the persons employed under the act in the house of correction, should be paid monthly from the county treasury on schedules prepared and approved by the master and the general superintendent. This direction that bills should be paid from the county treasury was never changed, while the direction to the master to make payment of his entire receipts into that treasury was re-enforced by the act of 1898, c. 277, which emphasized that all receipts be paid into the county treasury each month, and that the expense of maintaining industries in houses of correction be paid

by the county treasurers, as required by chapter 447 of the act of 1887 and the acts in amendment thereof. This did not change the prior law, but it was probably enacted in order to rebuke certain loose practices which had grown up. The system was also re-enforced by the act of 1891, c. 228, authorizing the purchase of machinery for houses of correction, under certain circumstances, with the direction that the bills should be paid as provided in the act of 1887; and the nature of the agency of the master of the house of correction was also emphasized by the act of 1890, c. 215, requiring him to make deposits, "as trustee," of the moneys held in the interim of the monthly payments to be made into the county treasury.

It will thus be seen that the county makes direct and specific payment for every article of every nature used in connection with the industries in the house of correction; and, of course, it is a recognized rule of law that whoever pays for anything is presumed to be the owner of it. Therefore, as we have already said, there is nothing in the legislation subsequent to the Public Statutes to change the equitable and legal title to the house of correction, or to anything contained in it; but all such legislation leaves both the equitable and legal title in the county, while emphasizing the fact that it vests there. It necessarily follows that the results of the property thus owned by the county, whether it is in contracts for labor, receipts for labor hired out, or contracts or receipts for merchandise sold, vest where the principal matters from which they flow also vest; that is, in the county. The provision found in the act of 1887, § 12, that certain suits may be brought in the name of the master, is in terms permissive, and probably, at the most, a mere matter of convenience. There is nothing to preclude suits in the name of the county, or to change the results of litigation when judgments are obtained against the master. In that case they would undoubtedly be payable, not from his personal assets, but from the county treasury; and, if not paid, the remedy would be precisely the same in favor of the holders of the judgments as it would be to the holders of accounts for supplies not contested,—that is, mandamus to the county treasurer to pay them. Everything flows through the county treasury. Not a dollar can be expended except from it, and a county is a corporation liable to suit at common law. In this respect the house of correction stands in an essentially different relation from that of the state prison, as pointed out in *Com. v. Phoenix Bank*. The state was itself not suable, and therefore there was a necessity that its warden should be made suable, and that he should have assets in his hands to meet whatever judgments might be obtained against him. Consequently, as said by Chief Justice Shaw, at pages 138 and 139 of *Com. v. Phoenix Bank*, the state prison and its officers were constituted a separate and distinct establishment, and the revenues received by the warden were entirely under his control, to be applied by him to the purposes of the institution. He was expressly made the treasurer of the prison, and he was expressly directed to receive and pay out all moneys granted by the legislature for the support thereof; and the commonwealth had only an equitable interest in the residue, when there was any.

In these particulars the distinctions between the two institutions are of a marked and substantial character. *Com. v. Phoenix Bank* was against substantial underlying equity, and also against the ordinary principles of judicial equity which control proceedings in insolvency and bankruptcy. It must be held to be purely exceptional, and no case can be fairly brought within its rulings which does not conform to it in all substantial particulars. Therefore we are free to apply to the case at bar the same broad rules of equity which we would apply elsewhere under the bankruptcy statutes of the United States.

In 308 (County of Worcester, Petitioner), the proceedings of the court below are affirmed, and the costs of this court are awarded to Derby, Trustee, and there will be a decree accordingly.

In 318 (Derby, Trustee, Petitioner), the proceedings of the court below decreeing priority are affirmed, and the costs of this court are awarded to the county of Worcester, and there will be a decree accordingly.

In 312 (Derby, Trustee, v. County of Worcester), the decree of the court below, allowing the proof of the county of Worcester, is affirmed, and the costs of appeal are awarded to the appellee.

DUFFIELD et al. v. MICHAELS et al.

(Circuit Court of Appeals, Fourth Circuit. July 9, 1900.)

No. 348.

1. MINING LEASE—FORFEITURE—CONSTRUCTION OF CONTRACT.

A lease of lands for oil and gas purposes provided that same should be void if a well was not completed on the premises by lessee within two months from the date thereof, unless the lessee should thereafter pay monthly to the lessor \$10 for each month's delay in completing said well. It was further provided that, if operations upon the well were not commenced in 30 days from the date of the lease, \$10 extra should be paid for the second month. Work on the well was not commenced for over a month after the date of the lease, nor complete within 2 months and 8 days. After the expiration of the second month, the lessee paid the lessor the sum of \$10, and again, 12 days after the expiration of the third month, the lessor tendered a similar payment, which was refused. *Held*, that the first \$10 payment by the lessee could not be claimed by the lessor as on account of the money to be paid extra for the second month, and that a lease made by the lessor to another party after the expiration of the third month, and when the well had not been completed, under the claim that the first lease had been forfeited for nonpayment of the sum agreed to be paid for delay, was void.

2. SAME—PERFORMANCE BY LESSEE.

The payments to be made "for each month's delay in completing said well" not being made payable in advance by the terms of the lease, the lessor was not entitled to claim a forfeiture of the lease five days after the close of the third month, because the well was not then completed, and the lessee had failed to make payment for delay for the fourth month.

3. SAME—WAIVER OF PERFORMANCE.

The lessor having permitted the lessee to locate a well under the lease, and himself constructed a dam to obtain water with which to drill it, sold and delivered wood for fuel to the contractor employed by the lessee to drill the well, and lodged and fed the men who were doing the work, after

three months from the date of the lease had expired, and down to the very day that he made a new lease to another party, thus inducing the lessee and those claiming under him to believe that he was satisfied with their efforts at development, and that it was not his intention to claim a forfeiture, he will not be permitted, in equity, to insist that the first lease was forfeited at the time the second was executed, even though grounds to declare a forfeiture existed.

Appeal from the Circuit Court of the United States for the District of West Virginia.

J. W. Lee and B. M. Ambler (John B. Chapman and A. M. Campbell, on the brief), for appellants.

John A. Howard and W. P. Hubbard, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

GOFF, Circuit Judge. The appellants filed their bill in equity in the court below, the object of which was to have declared void a lease for oil and gas purposes made by Lewis Virgin of a certain tract of land in Pleasants county, W. Va., to A. A. Michaels, dated June 21, 1898, and also to restrain the defendants from removing and selling the oil produced from a well that had been drilled on said land. The case was duly matured and came on to be heard, when the court below entered a decree in favor of the defendants, by which the relief asked for by the appellants (the plaintiffs below) was refused, and their bill dismissed. 97 Fed. 825. From that decree this appeal was prosecuted.

The facts necessary to be stated are as follows:

On March 16, 1898, Lewis Virgin, the owner of a tract of 92 acres of land situated in Pleasants county, W. Va., leased the same for oil and gas purposes to A. Learn; and he on the 23d of that month assigned said lease to C. C. Duffield, in trust for W. H. Roessle, C. C. Duffield, and himself. Said trustee subsequently sold certain interests in said lease to other parties, who were also plaintiffs below. The lessee was to deliver to the lessor one-eighth of all the petroleum produced from said land, and was to pay \$200 per annum for each gas well from which gas was sold for consumption. Among other provisions in said contract were the following:

"This lease to be null and void, and no longer binding on either party, if a well is not completed on the premises within two months from this date, unless the lessee shall thereafter pay monthly to lessor ten dollars per month for each month's delay in completing said well. Each payment to extend the time for completion for one month, and no longer. A deposit to credit of lessor in Pleasants County Bank, St. Mary's, W. Va., by check. The said to be a good payment of any moneys on this lease. * * * If operations are not commenced in thirty days from this date, ten (\$10.00) dollars extra to be paid for the second month. The well to be completed must be through the first Cow Run sand."

Duffield, as trustee, entered into negotiations with one H. E. Morris for the drilling of a well on said land; preparing, signing, and sending to him an agreement, by which, as trustee, he agreed to pay said Morris 80 cents per foot for the drilling of said well; he (Morris) to furnish all the tools, rig, boiler, engine, water, and fuel required for

said work. Duffield, as trustee, was to furnish the conductor and all the casing necessary for the well, and the labor to tube it, while Morris was to give one day to cleaning the well, should it be shot, and to plug the same as required by law if it was dry. It was set forth in the writing so signed by Duffield and sent to Morris that when the contract was completed all money should be due. Morris refused to sign it, and declined to do the work. On the 9th of June, 1898, he assigned, by writing of that date, all his interest in said contract to the defendant A. A. Michaels, who took said paper so assigned him and proceeded with the work. The rig was completed under his direction on the 16th of June, 1898, the boiler was placed in position on the 17th, the drilling commenced on the 18th, and was continued until the 28th of that month, when, as the sand was drilled through, the work stopped. Under Michaels' directions the well was plugged and the tools removed on the 28th of June, 1898. In August, 1898, Michaels returned to the well, rebuilt the derrick, removed the plugs, had the well shot, and found that it was a good producer. After the drilling had been commenced, and during the progress of the same, Virgin, on the 21st of June, 1898, executed another lease, conveying the same land to the said Michaels; reserving the same royalties to himself, and with conditions virtually the same. This second lease was made on the claim of Virgin that the contract of March 16th with Learn was forfeited. Michaels informed the appellants of the execution of this new lease; stating to them that he took it as an additional security to himself for the payment of the work he was doing, and offering to turn it over to them if they would refund the money he had paid for it, and make certain changes in the agreement made with Morris under which he was drilling. This the appellants declined to do, insisting that the lease to them was not forfeited, and declaring their willingness and ability to pay for the well when it was completed. On the evening of the 27th of June Michaels telegraphed Duffield as follows: "Well shut down top of sand. Come immediately, as want to get matters straightened up. Answer." That message was answered by Duffield on the morning of the 28th in these words: "Roessle leaves this evening, and will see you in the morning." When Roessle reached the locality of the well, on the 29th of June, the work had ceased, and Michaels had removed his machinery and tools from it.

The claim of the appellants rests on the lease of March 16, 1898, made by Virgin to Learn, which the appellees insist was forfeited for the failure to pay rental; and they claim that the lease of June 21, 1898, made by Virgin to Michaels, vests them with title to the property in controversy. The lease to Michaels was void unless the contract with Learn had been forfeited. Under the lease of March 16, 1898, the lessee had two months from that date in which to complete a well on the land described therein, and then such further time as he might secure by the payment of \$10 per month for each month of delay. A well was not completed by May 16th, when the two months expired, but the lessee on the 24th of that month deposited a check for \$10 on account of said rental in the Pleasants County Bank, which was duly paid, and received by Virgin. After his acceptance of that money, he was estopped from declaring a forfeiture on account of the

nonpayment of rent, at least, until after the 16th of June, 1898. The contention of the defendants below that the \$10 so received by Virgin was on account of the money to be paid "extra" for the second month, because operations had not been commenced in 30 days from the date of the lease, is without merit, as the nonpayment of that sum was not ground for forfeiture, but the lessor could have proceeded to collect it in any proper manner. There was to be no forfeiture unless there was a failure to complete a well in two months, and then, also, a failure to pay a monthly rental of \$10 thereafter. Two months from the date of the lease expired on the 16th day of May, 1898, and the one month delay expiring on the 16th of June, 1898, was paid for by the deposit made on the 24th of May. There was no requirement that the payment for monthly delay should be made in advance. The payment of \$10 at any time before the 16th day of July, 1898, would have prevented a forfeiture because of the nonpayment of the sum required for the second month's delay. But on June 21st Virgin, after consultation with Michaels and his attorney, concluded that the lease to Learn was forfeited, and immediately executed another to said Michaels. After that, on June 28th, the lessee, Learn, deposited an additional check for \$10 in the Pleasants County Bank for the payment of the sum due for the month commencing on the 16th day of July, 1898; but this sum Virgin refused to accept, as he had theretofore executed the second lease.

In this case the only claim for forfeiture of the lease to Learn was because of the nonpayment of the money due for the first month's delay after the expiration of two months from the date of the lease, and the testimony is clear that said money was both deposited by Learn and received by Virgin before it was really due. If the insistence now made for Virgin is correct (that the \$10 due for the first month's delay was payable with the beginning of that month, and that payment received was on account of the extra to be paid for the second month's delay, thereby causing ground for forfeiture), then, so far as the appellants are concerned, the answer is that Virgin, by his own conduct, words, and action, misled and deceived them. He permitted the well to be located, he constructed a dam to obtain water with which to drill it, he sold and delivered to the contractor wood for fuel, and he lodged and fed the men who were doing the work; and all this not only after the expiration of two months from the date of the lease, but after three months from that date had expired,—in fact, down to the date of the lease to Michaels. Under the facts of this case, it would be unconscionable to permit Virgin on June 21, 1898, to declare a forfeiture of the lease to Learn, even had grounds for the same existed prior to that date; for he had induced the lessee and those claiming under him to believe that he was satisfied with their efforts at development, and that it was not his intention to claim a forfeiture. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *Gas Co. v. De Witt*, 130 Pa. St. 254, 18 Atl. 724, 5 L. R. A. 731; *Thompson v. Christie*, 138 Pa. St. 249, 20 Atl. 934, 11 L. R. A. 236. We are forced to the conclusion that Virgin, for reasons well known to himself, to Michaels, and likely to others, concluded suddenly, when the drilling of the well was near completion, to declare a forfeiture of the lease

to Learn, and to endeavor to vest the title to the oil and gas in Michaels, subject to his royalties. It is certainly true that for some reason the lessor of Learn and the contractor of his assignee, without notice to the parties in interest, and unexpectedly to them, changed their plans and their methods of procedure. Virgin, who had theretofore freely acquiesced in all that the appellants had done in connection with the drilling of the well, without notice to them and seemingly without cause, actively opposed and repudiated them; and Michaels, who had gone upon the land as their representative, who had endeavored to carry out the provisions of the arrangement first made with Morris, from whom he held its assignment, who had used the material provided by the appellants, and who had furnished the rig and tools as stipulated for, without warning disavows the terms of his contract, admits the weakness of the appellants' title, and secures from their lessor the property they had placed him in possession of. The statement made by Michaels at the time he took the lease from Virgin (in substance, that he so acted in order to obtain additional security for the money that would be due him on the completion of the well) is at least weakened by his subsequent conduct in hurriedly closing the well before it was completed, shot, and measured, and in not calling on the appellants for the sum due him for drilling the well, as he would have done had he been acting in good faith. Likely some light can be thrown on the reasons that so actuated them, when we recall that the testimony shows that Virgin admitted after the well was plugged, and before it was opened in August following, that he had claimed the forfeiture of the lease to Learn because Michaels insisted that he should, and threatened to move his rig and tools unless he did, thereby stopping the work; that they both admitted that oil had been found, and that in due time the rig would be brought back and the well opened up; that Michaels admitted that he was present and running the screw when the oil was drilled into during the night of June 27th, and that the fluid "showed up over the tools," and that then he had it plugged; that the drillers of the well, the men who handled the tools, admitted that oil was found in the well the night preceding the day it was plugged and abandoned; that all of the defendants were fully advised of the existence of the lease to Learn, although they claim under the lease to Michaels, and that after they purchased their interests of Michaels he still telegraphed Duffield to come on and close matters up, thereby recognizing his claim to the property; and also that the lease is a very valuable one now, as it also was at the time it was abandoned. It is clear that Michaels concealed from the appellants the fact that oil had been found in the well he drilled for them. They were entitled to all the information he had on that subject, but they were misinformed,—in fact, advised by him that it was a dry hole. It is also clear that it was the intention of Virgin and Michaels, at the time the well was plugged and abandoned, to not only deceive the appellants and deprive them of their property, but then to return to it, reopen and further develop it. Such conduct cannot have the approval of honest men, and must not have the sanction of a court of equity. There is error in the decree appealed from, and the same will be reversed, the cause being remanded with directions to the court below

to proceed further with the same in the manner indicated by this opinion. The lease made by Virgin to Michaels, dated June 21, 1898, is fraudulent and void. The lease made by said Virgin to Learn, dated March 16, 1898, is valid and in full force. Reversed.

TERRE HAUTE & I. R. CO. et al. v. COX et al.

(Circuit Court of Appeals, Seventh Circuit. May 18, 1900.)

No. 509.

1. RAILROADS—CONSTRUCTION OF LEASE—DIVISION OF EARNINGS.

A provision of a lease, by which one railroad company leased its road to another, that the lessee "shall, in each and every year of the term demised, pay or cause to be paid to said [lessor], in the manner and at the times hereinafter specified, thirty per centum of the gross earnings of the demised property," is not one for the payment of rental, but for the division of the earnings of the property, as earnings; and under it 30 per cent. of such earnings become, in equity, the property of the lessor at once on their receipt, being held by the lessee in trust for the purpose specified in the lease.

2. SAME—LESSOR'S SHARE OF EARNINGS—RIGHT TO RECOVER AS TRUST FUND.

The lessee in such lease having failed for six months before the time its property went into the hands of a receiver to pay over the lessor's share of the earnings of the leased road, and having mingled the same with its own funds, bondholders of the lessor, the interest on whose bonds the lessee was required by the terms of the lease to pay from such funds, were entitled to have the amount so misapplied to the benefit of the lessee restored by the receiver from the subsequent earnings of the leased road under the receivership, and paid to them in accordance with the contract, as against the lessee company or its bondholders or general creditors; and it is immaterial that the lessee may have operated the road at a loss.

3. SAME—LEASE ULTRA VIRES—EFFECT OF CURATIVE STATUTE.

A lease by a railroad company of a line of road in another state, although unauthorized when made by the company's articles of incorporation or by statute, is rendered valid as to the future by an act of the legislature subsequently passed conferring such authority, where the company continues for years thereafter to operate the road thereunder, and thereby impliedly readopts the contract.

4. STATUTE—CONSTITUTIONALITY—SPECIAL LAWS.

The Indiana act of February 20, 1893, legalizing all leases theretofore made within a specified time by any railroad company of the state authorized to construct and operate a railroad to its western boundary, by which such company contracted to operate the road of an Illinois company authorized to construct and operate a road to such boundary, is not in contravention of article 4, § 23, of the state constitution, which provides that laws shall be general and of uniform operation in all cases where a general law can be made applicable.

Appeal from the Circuit Court of the United States for the District of Indiana.

On and before October 30, 1896, the Terre Haute and Indianapolis Railroad Company owned and operated a line of railroad extending from Indianapolis to the state line between the states of Indiana and Illinois, and as lessee operated the St. Louis, Vandalia and Terre Haute Railroad, extending from a junction with the Terre Haute and Indianapolis Railroad at said state line to

East St Louis; the Terre Haute and Peoria Railroad, extending from a junction with the St. Louis, Vandalia and Terre Haute Railroad near said state line to Peoria, Illinois; the Terre Haute and Logansport Railroad, extending from Terre Haute to South Bend, Indiana; and the Indiana and Lake Michigan Railroad, extending from a junction with the Terre Haute and Logansport Railroad at South Bend to St. Joseph, Michigan.

Among the provisions in the lease from the Terre Haute and Peoria Railroad to the Terre Haute and Indianapolis Railroad Company, dated October 1, 1892, was the following: "The said Terre Haute and Indianapolis Railroad Company shall in each and every year of the term demised, pay or cause to be paid to said Terre Haute and Peoria Railroad Company, in the manner and at the times hereinafter specified, thirty per centum of the gross earnings of the demised property and such percentage of the gross earnings shall be paid without any deduction, abatement or diminution for any cause whatever; and it is expressly agreed that there shall be paid out of the aforesaid thirty per centum the interest as it matures on the bonds of the Terre Haute and Peoria Railroad Company of the issue of \$1,800,000 of March 1, 1887, which shall be outstanding, and of the issue of \$2,500,000 of September 1, 1892, at any time outstanding; all federal, state and municipal taxes and assessments imposed upon the demised estate; all rentals for the use of the tracks of the Toledo, Peoria and Western Railroad, Illinois Central Railroad and Terre Haute and Indianapolis Railroad, which are now used by the party of the first part.

"It is agreed that the second party may and shall pay the interest on the said bonds as the same mature, the said taxes, assessments and rentals as they respectively become payable, and such payments shall be held to be a discharge and payment by the party of the second part on account of said thirty per centum of gross earnings. If the aggregate amount of said interest, taxes and rentals shall be less than the total amount of said thirty per centum of the gross earnings, the residue shall be paid in cash to the first party; should the amount of such interest, taxes and rentals be in excess of the total amount of said thirty per centum of gross earnings in any year, such excess shall be paid by and be held and retained by the said second party as a charge against the party of the first part to be repaid or retained by it out of any future excess, but without interest.

"The manner and times of payment herein provided for are as follows:

"Within sixty days after the close of each year ending on the last day of October, the aggregate gross earnings for the whole year shall be ascertained, and the residue, if any, of the thirty per centum of said gross earnings remaining after the payment of said interest, taxes, assessments and rentals by the party of the second part, as herein provided, shall be paid to the party of the first part."

A provision in the lease under which the Indianapolis Company was operating the St. Louis, Vandalia and Terre Haute Railroad provides that the lessees shall receive seventy per centum of the gross receipts derived from the operation of the demised property as a consideration for working and maintenance expenses, the remaining thirty per centum to be appropriated, (1) to the payment of interest on the first and second mortgage bonds of the lessor company; and (2) the surplus of said thirty per centum to be paid over to the lessor company semi-annually, to be disposed of by it for the benefit of its stockholders.

There is a further provision that if the thirty per centum shall not be sufficient in amount to protect the interest on the mortgage bonds, and the sinking fund therefor as they mature from time to time, together with the payment of taxes and proper cost of maintaining organizations, the lessee shall advance for the lessor whatever amount may be needed to be accounted for under the yearly averages of the lease during its existence.

October 30, 1896, the appellees, Cox and Blair, citizens of the State of New Jersey, and appellee, Paul, a citizen of the State of Pennsylvania, in behalf of themselves and all other holders of bonds issued under and secured by two deeds of trust executed by the Peoria Company under dates respectively of March 1, 1887, and September 1, 1892, who should come in and contribute to the expense of the suit, brought their bill in the Circuit Court of the United States for the District of Indiana against the Indianapolis Company, a cor-

poration of Indiana, for specific performance of the foregoing provision of the lease of the Peoria Company requiring the lessee to apply thirty per centum of the gross earnings of the demised property to the payment of interest on the lessor company's bonds, and enjoining lessee from appropriating such thirty per centum of the gross earnings, except as in the lease specified; and if necessary for the appointment of a receiver of the funds received by the lessee arising from the operation of the various lines leased, or if the lessee be insolvent, for the appointment of a receiver to operate the lessee's road, and the leased lines. Before answer the bill was amended by averring the insolvency of the lessee railroad.

November 13, 1896, the Indianapolis Company answered admitting insolvency.

On the same day the cause was heard upon the bill and answer, and the lessee railroad united in the motion for the appointment of a receiver. Volney T. Malott was appointed receiver of the lessee railroad and of its leased lines situated in the states of Indiana, Illinois and Michigan.

The decree appointing the receiver contains the following provisions:

"And it is further ordered, adjudged and decreed that the said receiver shall keep true and accurate books of account showing the receipts derived from the operation of the said railroads, and the manner and purpose of the expenditures thereof, and that in said books of account he keep separate and distinct accounts showing the amount of the gross earnings derived from the operation of the Terre Haute and Peoria Railroad Company, and in like manner separate accounts showing the gross earnings derived from the operation of each of the other railroads leased by the said defendant company, and separate accounts showing the gross earnings derived from the operation of the railroad of the defendant company itself. That thirty per cent. of the gross earnings derived from the operation of the said Terre Haute and Peoria Railroad Company, and twenty-five per cent. of the gross earnings derived from the operation of the Terre Haute and Logansport Railroad Company, and of the Indiana and Lake Michigan Railroad Company, respectively, and thirty per cent. of the gross earnings derived from the operation of the St. Louis, Vandalia and Terre Haute Railroad Company, be respectively set apart and held by the said receiver, as a separate and distinct fund in each case, be deposited by him in separate bank accounts, specially designated so as to indicate the property from which such deposits are derived in each case, and that no part of such percentage so set apart and deposited be paid out or applied except on the special order of this court, made upon notice to the complainants herein or their solicitors, and such other parties as may hereafter appear in this cause.

"And said receiver shall make monthly reports to this court showing the receipts aforesaid, and the cost of operation of each of the said leased lines and of the main line of railroad, and also showing the method by which the incomes and expenses of said lines are respectively ascertained, and in case the balance of the gross earnings derived from the operation of any of the said leased lines shall be insufficient to meet the expenses of the same, then the said receiver shall advance and meet any such deficiency out of the gross earnings of the main line of railroad of the said defendant company if the same shall be sufficient therefor, and if not sufficient, he shall report the matter to this court, and apply for instructions in the premises, having first given notice to all parties to this suit of the time and place of such application."

The receiver's report for the month of October, 1897, shows that "he has kept separate and distinct accounts showing the amount of the gross earnings derived from the operation of the Terre Haute and Peoria Railroad property, of the St. Louis, Vandalia and Terre Haute Railroad property, of the Terre Haute and Logansport Railroad property and of the Indiana and Lake Michigan Railway property, and has set apart to the separate and distinct funds the required percentages of the gross earnings of each of said properties; that under the direction of this court * * * he has paid out of the said funds the amounts for purposes hereinafter shown, and after making the deductions of those amounts the several funds stand as follows, to wit: Vandalia fund, \$119,468.54; Logansport fund, \$53,831.48; Lake Michigan fund, \$14,692.47; Peoria fund, \$68,971.45."

In the receiver's report the Peoria fund, in detail, is arrived at as follows:

"Balance forward.....	\$57,752.38
30% October, 1897, earnings.....	13,202.40
	<hr/>
	\$70,954.78
Less track rentals for October, 1897, T. H. & I. R.	
R. Co.....	250.00
Illinois Central R. R. Co.....	1,083.33
T. P. & W. R. R. Co.....	650.00
	<hr/>
	1,983.33
Balance on hand.....	<hr/>
	\$68,971.45."

The lease of the Terre Haute and Peoria Railroad Company to the Terre Haute and Indianapolis Railroad Company further provides that the lessee should by suitable indorsement guarantee the payment of the principal and interest of said bonds. Pursuant to this provision the guarantee of the lessee was indorsed upon the bonds.

It appears that for the year ending October 31, 1893, the gross earnings of the Peoria Company were \$449,520.33; for the year ending October 31, 1894, \$404,914.69; and for the year ending October 31, 1895, \$445,483.00.

It is averred in the bill upon which the receiver was appointed, and nowhere denied, that the amount of gross earnings received from the Peoria Railroad by the Indianapolis Company from the 31st of October, 1895, to September 1, 1896, was about \$340,000.00, and that said earnings would, on October 31, 1896, be about \$400,000.00; but that the said earnings so received by the said Indianapolis Company were by it paid into its treasury, and mingled with any and all of its other moneys, and that no part was, in any way, specifically set aside as a special fund for the payment of the sums provided for in the lease.

It is averred, also, and not denied, that thirty per centum of the gross earnings of the Peoria Railroad, from the first of October, 1892, were appropriated by the Indianapolis Company; and that the payments of the purposes provided for in the lease include interest on the bonds of the Peoria Railroad to and including March 1, 1896. The first failure to make such appropriation was upon the interest coupons falling due September 1, 1896.

The Acts of the General Assembly of the State of Indiana relating to the power of railway companies to guarantee the bonds of other railway companies are as follows: "That the board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so endorsing or guaranteeing such bonds." Act March 8, 1883, § 1.

Also, "That any and all leases or operating agreements entered into since the first day of June, A. D. 1892, by and between a railroad company under the laws of the state of Illinois, with authority to construct and operate a railroad to the western boundary line of the state of Indiana, and a railroad company organized under the laws of the state of Indiana, with authority to construct its railroad to the boundary line aforesaid, by the terms of which the railroad company of this state is to take possession of and operate the railroad and property of said company of the state of Illinois upon terms and conditions in any such lease or operating contract specified are hereby made of the same force and effect as if the authority on the part of the Indiana company to make and perform a lease or operating contract of a railroad in the state of Illinois had at the date thereof been fully conferred and granted under the laws of the state of Indiana." Act Feb. 20, 1893, § 1.

January 6, 1898, the appellees filed their petition in the court below praying for an order directing the receiver to pay the interest on the bonds of the Peoria Company falling due September 1, 1896, out of the balance to the credit of the Peoria fund.

This petition the Indianapolis Company answered, averring that it was indebted to sundry unsecured creditors in the sum of \$726,074.94 with interest; \$154,766 of which was for supplies purchased within six months prior to the appointment of the receiver; and \$213,522 for cars purchased of and delivered to it by the Pittsburg Locomotive and Car Works, also within six months prior to the appointment of the receiver; and that a suit was pending in the Superior Court of Marion County, Indiana, on behalf of the State of Indiana against the railroad company, to recover two millions of dollars claimed to be due under its original charter.

The answer further averred that the receiver had not realized any net earnings from the operation of the Peoria Railroad, but had operated it at a loss amounting on October 31, 1897, to \$13,692.75; that the money known as the Peoria fund did not represent the earnings of the receiver from the Peoria Railroad, but was earned by the receiver in the operation of the Indianapolis Railroad; that the appellees had no lien on said fund; that if the receiver were to pay the rentals as stipulated in the lease, the loss in the operation of the Peoria Railroad up to October 31, 1897, would amount to \$82,644.20, as shown by the receiver's report on file; that the loss of the defendant in operating the Peoria Railroad under said lease amounts to \$380,145.83 up to October 31, 1896; that the Peoria Company is indebted to the Indianapolis Company for sundry sums of money amounting to \$7,267.91 for betterments accruing prior to the appointment of the receiver.

The answer challenges the guarantee of the bonds of the Peoria Company by the Indianapolis Company as ultra vires; insists that the money in the hands of the receiver should be distributed first among the company's creditors who furnished supplies and equipments within six months prior to the appointment of the receiver, and that the residue should be paid ratably to the unsecured creditors; and prays for a direction by the court relieving the receiver from any obligation to the Peoria Company beyond the net earnings of said road.

The Pennsylvania Company filed an intervening petition, showing that within six months prior to the appointment of the receiver the Pittsburg Locomotive and Car Works sold and delivered to the Indianapolis Company for use upon the line between Indianapolis and St. Louis twenty-two locomotives, for the purchase price of which the Indianapolis Company executed its notes amounting in the aggregate to \$215,522, bearing interest at the rate of five per centum, one falling due December 1, 1896, and one on the first day of each succeeding month; that the petitioner is the owner of seventeen of such notes on which there was due from the Indianapolis Company for principal and interest \$90,595.87; that the petitioner has no security for said debt. The petition, in effect, adopts the averments of the answer respecting the indebtedness of the Indianapolis Company, the losses from the operation of the Peoria Railroad, and the manner in which the Peoria fund is computed, and charges that the guarantee provided for in the lease is ultra vires, and prays for a distribution of the fund ratably between the petitioner and other creditors falling within the six months' rule.

The Vandalla Company also intervened, filing its petition, averring that there is due to it from the Indianapolis Company for rentals up to November 14, 1896, under the lease of February 10, 1868, the sum of \$63,989.15 with interest; that there is also due a balance of \$119,396.04 on account of rentals due to it under said lease from the time of the appointment of the receiver to October 31, 1897; and praying that the \$119,396.04 to the credit of the Vandalla fund be paid to the petitioner on account of rentals, and that the railroad company be also required to pay to the petitioner the further sum of \$63,989.15 with interest thereon.

March 19, 1898, the following order was entered by the Circuit Court: "And the court having fully considered the matters and things set forth in said petition and in the answer thereto of said The Terre Haute and Indianapolis Railroad Company, defendant herein, and being fully advised in the premises, finds that the prayer of the said petition should be granted.

"It is therefore ordered by the court that Volney T. Malott, receiver herein, be and he is hereby directed to apply the sum of \$55,750, and in addition so much as may be necessary, of the fund now in his possession arising from set-

ting apart thirty per cent. of the gross earnings of the Terre Haute and Peoria Railroad property, known and designated as the Peoria Fund, to the payment of the coupons which fell due September 1, 1896, on all the outstanding mortgage bonds of the Terre Haute and Peoria Railroad Company, together with interest on said coupons at the rate of six per cent. per annum, from September 1, 1896, until the amount necessary to pay said coupons is deposited for that purpose in the City of New York, State of New York."

From this order each of the appellants prosecutes its several appeal to this court.

Lawrence Maxwell, for appellants.

John G. Williams and George W. Wickersham, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

After stating the facts as above, GROSSCUP, Circuit Judge, delivered the opinion of the court.

The lease, whereby the Indianapolis Company obtained possession of the Peoria Railroad, entered into October 1, 1892, in effect provides, that out of the gross earnings received by the former company from the operation of the latter railroad, thirty per centum shall be set apart, to be applied, (a) to the payment of interest as it matures upon the bonds of the Peoria Company, (b) to the payment of all the Peoria Company's taxes and assessments, federal, state and municipal, (c) to the payment of rentals for the use of the tracks of other roads which, under an existing arrangement, were used by the Peoria Company; and (e) the residue, if any, to be paid to the Peoria Company.

From the date of this lease until September 1, 1896, a period of nearly four years, the Peoria Railroad was operated by the Indianapolis Company, and the sums contemplated—thirty per centum of the gross earnings—were, from time to time, set apart and applied, as provided for in the lease. March 1, 1896, the last appropriation, in pursuance of this provision of the lease, was made. September 1, 1896, the Indianapolis Company, for the first time, refused to set any sum apart from the gross earnings of the Peoria Railroad for the payment of interest on the Peoria Company's bonds. This refusal, covering the earnings of the road from March 1, 1896, until September 1, 1896, is the occasion of the controversy before the court.

It is apparent from the record that if the Indianapolis Company is under obligation, under the terms of the lease, to hold thirty per centum of the gross earnings of the Peoria Railroad as a fund out of which to pay the Peoria Company's interest coupons, the mingling of this thirty per centum with the other moneys in the company's treasury was a violation of its duty, as trustee, to the Peoria Company and its bondholders. Counsel for the appellant, however, challenge the proposition that the provisions of the lease amount to an appropriation in presenti of the earnings of the Peoria Railroad, and that the Indianapolis Company stands in the attitude of a trustee to the Peoria Company and its bondholders. The contention thus raised lies at the threshold of this case.

In Bradley's Case, Ridg. t. Hardw. 194, a promise had been made by the debtor to pay the creditor out of a specific debt due to the debtor from another. The bill was to stay the money in the hands

of the third person (the debtor's debtor), for fear that the debtor, upon receiving it, would misapply it. The bill was dismissed by Lord Hardwicke, who said:

"If a debtor promises to pay his creditors out of the money to be recovered in a certain suit, and on the faith of this promise the creditor forbears to sue him, this creates no specific lien on the money recovered."

In *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623, the defendant had a claim against the United States government out of which, when collected, he promised to pay the plaintiff twenty-five per centum. The claim having been allowed, a bill was filed to enjoin the defendant from withdrawing the money from the Treasury until he had complied with his agreement to pay the plaintiff. The plaintiff's contention was that, under the circumstances, he had a lien upon the fund. In disposing of this contention, the court said:

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor."

Dillon v. Barnard, 21 Wall. 430, 22 L. Ed. 673, was a case in which a contractor was engaged in the construction of a portion of a railroad, under a contract with the railroad company assented to by two of the trustees under the railway's mortgage, whereby payments were to be made monthly of ninety per centum of the work done, and the remaining ten per centum to be paid after the completion of the work.

The object of the railway mortgage was to provide for, and retire all, the then existing mortgage debts and prior liens upon the line of road, and to complete and equip the road, the latter including the complaining contractor's work. Before the payment of the ten per centum the railroad company became bankrupt. The contractor contended that, under the purpose, object, intention, and understanding of the parties, the railway company's obligation to the contractor for the work done became a charge upon the proceeds of the sales of the bonds; and that the money thus realized became appropriated to, and ought to have been used for, the discharge of the debt due to the contractor.

In deciding the case, Justice Field said:

"In support of his pretension he insists that under the indenture his contract, when it obtained the assent of two of the trustees, became a charge upon the moneys received by the corporation from the sale of the bonds; that the trustees under the mortgage and the corporation thereupon became trustees for his benefit of the proceeds thus received, and were bound to apply them to pay his debt; that by their failure to have the proceeds thus applied, and by expending them in acquiring new property and improving that already possessed, the charge upon the proceeds became attached to the property in the hands of the trustees thus added to and improved; and that this charge is entitled to preference over the lien of the bondholders.

"The positions thus asserted must find their support, if at all, in the provisions of the indenture of mortgage. If not sustained there they are not sus-

tained anywhere. * * * The instrument was executed to secure the payment of the mortgage bonds; it so declares on its face. It nowhere indicates any design to secure the contractors; its language is, 'that for the better securing and more sure payment of the sums of money mentioned in the said mortgage bonds, and each of them,' the indenture is executed. * * * The contractors are not parties to the indenture, and are not entitled to claim as against those parties any benefit under its provisions, except that upon the assent being given to their contracts the use of the moneys for their payment is permissible. They are, so far as the agreement is concerned, strangers to the instrument. The written assent to contracts on the part of one of the trustees, was not required for their protection, but as an additional safeguard to the bondholders against an improvident use of the funds of the corporation. * * * The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor, that funds of his employer derived from specific sources will be devoted to the payment of his services or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment by the employer of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is completed."

In *Rogers v. Hosack's Adm'r*, 18 Wend. 319, cited with approval in *Trist v. Child*, supra, there was a covenant on the part of one Gracie to pay Rogers & Sons "out of any moneys received from the French government, on account of certain large claims and demands which Gracie had against the French government," and that the same should "be paid out of said moneys when and as soon as the same should be received by said Archibald Gracie, his executors, administrators or assigns." This was held to create no equitable assignment or trust, the court saying:

"Here is no assignment, no mortgage or pledge, no order, or any other specific appropriation of the French funds, but a mere covenant to pay them over on their being obtained by the covenantor."

It is needless to pursue this class of cases further. Those already cited illustrate, with sufficient definiteness, the lines pursued by the courts in denying claims for liens in cases of that character. The doctrine on which they go may be summed up in the following paragraph from 2 Hare & W. Lead. Cas. p. 233:

"A covenant on the part of the debtor to apply a particular fund in payment of the debt as soon as he receives it, will not operate as an assignment, for it does not give the covenantee a right to the fund, save through the covenantor, and looks to a future act on his part as the means of rendering it effectual."

In none of these cases did the party claiming the lien contribute any property to a common undertaking; in none of them was the fund under consideration the fruit of a joinder of property interests. In each, the fund in question arose out of property rights that belonged solely to the party resisting the claim of lien, and that, but for his promise to set apart a portion of the fund, remained his sole property. There was no change of dominion, no setting apart of a portion,

no present act of appropriation, as distinguished from a mere promise to that end. A lien of the character claimed can not rest in a mere personal promise; it must grow out of some circumstance or act entering into the creation of the fund—some equity founded in facts—other than the mere word of the party that a trust will be observed.

The case we are now considering is clearly distinguished, in this controlling respect, from those cited. Two railroad companies, each possessing, and separately operating, a railroad, found it advisable to unify the operation of their roads. They chose, in the execution of the project, that one company should operate, as one line, both roads. The undertaking was, in a certain sense, a joint one; each contributed a part of the means whereby it should be carried out. It certainly was within legal competency, either that the operating company should pay a strict rental for the use of the other's property, or that the earnings of the road, gross or net, as an entirety—the fruit of the joint enterprise—should be divided according to the agreement of the parties.

An inspection of the lease shows that the rental alternative was not adopted. The language is:

"The said Terre Haute and Indianapolis Railroad Company shall in each and every year of the term demised, pay or cause to be paid to said Terre Haute and Peoria Railroad Company, in the manner and at the times hereinafter specified, thirty per centum of the gross earnings of the demised property."

There is no word respecting rentals; there is no plain inference that the thirty per centum thus agreed upon shall be a mere measure of rentals. It is, as indisputably as language can make it, a plain division of the earnings between the parties whose properties, taken together, produce the earnings. Unless an arrangement for division of earnings, as earnings, is in law an impossibility, the language employed can bear no interpretation, other than a contemplated division of earnings, as earnings. It is framed to exactly fit the expression of such a purpose.

It is not insisted that this agreement amounted, at law, to an assignment of the moneys to be earned in futuro; but we are unable to see why, in equity, upon the interpretation we have given to the lease, the thirty per centum is not, immediately upon receipt, already set apart and appropriated to the obligations of the Peoria Company named in the lease. What dominion in equity does the Indianapolis Company possess, except to apply this portion to the objects set forth? The money constituting the thirty per centum, as well as the remaining seventy per centum, is, it is true, physically in possession of the Indianapolis Company, but equitably and beneficially becomes, the moment it is earned, the property of the Peoria Company, for the purpose of paying interest on its bonds, its taxes, rentals, etc.

It is clear to us, then, that in the case under consideration the duty of the Indianapolis Company, in respect to the thirty per centum of gross earnings, does not arise out of its mere promise; it is an equity growing out of the conditions from which the unified railway lines arose. The division of the earnings does not rest in an intention merely to be executed in the future; it is to be re-

garded, in equity, as a present fact, made so by the circumstances, together with the agreement that brought about the means creating such earnings. We have no license to make a contract between the parties; and a holding different from the one here indicated would, in effect, substitute a contract conceived by us for the contract assented to by the parties.

The case is, in this respect, different from *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* (C. C.) 58 Fed. 268. In that case the language of the lease was as follows:

"As rental for the said demised premises the Erie Company agrees that whenever the annual gross earnings of the demised premises, ascertained as herein provided, are less than or equal to six million of dollars (\$6,000,000), the Erie Company shall retain sixty-eight (68) per centum thereof, and pay to the Ohio Company the remaining thirty-two (32) per centum thereof."

In interpreting this language the court, through Lurton, Circuit Judge, said:

"The rental is determined by the amount of gross earnings. These earnings belong to the lessee company. The complainant has no right to any specific dollar or part of a dollar. The rent is simply measured by the earnings."

We are of the opinion that the case of *Bank v. Smith*, 30 C. C. A. 133, 86 Fed. 398, is more nearly in point. In that case the Central Vermont Railroad Company operated the Ogdensburg & Lake Champlain Railroad under an agreement containing the following provisions: "That all the gross earnings, income, and receipts of and from the business traffic and rentals of said railroad and other property, and referred to in article second of this agreement, shall in each year and annually during the continuance of this agreement be applied and disposed of by the party of the second part as follows," in substance, first, toward the expense of operation and maintenance of the railroad, including taxes and repairs, of the Ogdensburg & Lake Champlain Railroad Company; secondly, to the payment of interest upon the consolidated mortgage bonds of the Ogdensburg & Lake Champlain Railroad Company; and thirdly, to the payment or adjustment of the liabilities of the Ogdensburg & Lake Champlain Railroad Company upon bonds of the Lamoille Valley Extension Railroad Company; the residue to be divided between the Central Vermont Railroad Company and the Ogdensburg & Lake Champlain Railroad Company.

In disposing of the question raised, the court, through Wallace, Circuit Judge, says:

"It is conceded by all parties that the fund should be distributed according to the terms of the lease. The lease is the origin of the funds in the hands of the receivers, and they acquire the fund cum onere. * * * The covenant to pay interest upon the bonds was one which could have been enforced by the trustees of the bondholders in an action against the lessee. * * * The former" (the covenant to pay interest upon the bonds) "gave to the bondholders an equitable lien upon the earnings, because the trustee could have compelled the lessee to apply the earnings to the payment of interest."

The doctrine we adopt in the disposal of this question is summed up in *Pomeroy's Equity Jurisprudence* as follows:

"The doctrine is carried still further and applied to property not yet in being at the time when the contract is made. It is well settled that an agreement

to charge, or to assign, or to give security upon, or to affect property not yet in existence, or in the ownership of the party making the contract, or property to be acquired by him in the future, although, with the exception of one particular species of things, it creates no legal estate or interest in the things when they afterwards come into existence or are acquired by the promisor, does constitute an equitable lien upon the property so existing, or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specified things existing and owned by the contracting party at the date of the contract." Volume 3 (2d Ed.) § 1236.

Assuming, then, that the Indianapolis Company held the thirty per centum of the gross earnings in trust for the Peoria Company and its bondholders, and that the intermingling of this trust money with its general moneys was a violation of its duty, as such trustee, the inquiry arises, should the receiver be ordered, out of the so-called Peoria Fund, to make good the loss to the Peoria Company's bondholders?

It will be observed that this question does not necessarily involve the inquiry whether the receivers have adopted the lease, or whether, since obtaining possession of the road by the appointment of the court, the receivers should continue to divide the gross earnings according to the terms of the lease. The whole question as to the receivers' liability to the Peoria bondholders for sums earned after the first of September, 1896, is still in abeyance.

But any uncertainty of this kind can not affect the right of the court to fulfill, out of the subsequent earnings, the obligation of the Indianapolis Company arising from its misappropriation of the funds during the six months immediately preceding the appointment of the receivers—funds of which the estate has received the benefit. Unquestionably the circuit court, as successor, through its receivers, to the Indianapolis Company, ought to return to the Peoria Company and its bondholders any moneys belonging to the Peoria Company and its bondholders that have come into its hands as a part of the assets of the Indianapolis Company. To such moneys the receivers have no better title than had the company whom they succeeded, and an equitable obligation resting upon the company, in respect thereto, comes over to the receivers.

The record does not show that the Peoria earnings for the preceding six months, withheld by the Indianapolis Company, came, in specie, into the possession of the receivers, nor does it show, with directness, that these moneys were spent upon the general operating expenses of the Indianapolis Company. But it is insisted, by the Indianapolis Company, that the excess of operating expenses over the earnings of the Peoria Railroad necessitated and justified the withholding of the thirty per centum; and the record shows that a large sum of money came into the hands of the receivers, as a part of the estate, at the time of their appointment. We may, therefore, we think, safely assume that that portion of the earnings which, otherwise, would have gone to the Peoria Company, came into the hands of the receivers, either as money, at the time they took possession of the road, or as a benefit, in virtue of the fact that they were consumed in the general operating expenses of the Indianapolis Company.

Indisputably the availability of these moneys for operating purposes saved the Indianapolis Company from taking a like sum from its other resources; and it is of no moment, in the disposition of this case, whether the assets coming to the receivers were actually increased by that amount coming in specie. It is enough that, in its outcome, the estate has received the benefit of this increment to its income. The estate, as an entirety, has been, to that extent, enlarged.

The principle is stated by Mr. Justice Bradley, in *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696, as follows:

"Formerly the equitable right of following misapplied money or other property into the hands of parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."

See, also, *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693; *Oil Co. v. Hawkins*, 46 U. S. App. 115, 20 C. C. A. 468, 74 Fed. 395.

Clearly, then, the Indianapolis Company, in its own right, could not oppose the restoration of these moneys to the Peoria Company. Can there be more effective opposition from the intervening general creditors whose claims are for supplies furnished within six months prior to the receivership? We think not. The terms of the lease, as we have interpreted it, were on public record, and creditors dealing with the Indianapolis Company must presumably have taken notice of the limitations imposed upon its right to the whole of the gross earnings. There is no warrant in equity for a disregard, in favor of creditors so dealing, of this cardinal provision of the arrangement between the parties.

No better equity exists in favor of the bondholders of the Indianapolis Company. It is averred that during the whole period of the lease the Peoria Railroad was operated at a loss, to meet which the funds were taken from the earnings of other branches of the general system; and it is contended that the order of the court appealed from, in effect, uses the moneys of the Indianapolis Company, earned in its other branches, to pay off the interest coupons due to the Peoria bondholders.

But it will not be insisted, we think, that the bondholders of the Indianapolis Company are entitled to the moneys equitably belonging to the Peoria bondholders, even though the arrangement under which they were earned was a losing one to the Indianapolis Company. The thirty per centum embraced in the order of the court, though mingled with the funds of the Indianapolis Company, never belonged equitably to that company, either in its own right, or in the right of its bondholders. In equity the moneys were always, notwithstanding the intermingling, the moneys of the Peoria Company. In view of these facts, the court clearly had the power, after the ap-

pointment of the receivers, to recognize the provisions of the lease, to the extent of restoring these moneys; and, in our opinion, it was the duty of the court to go at least to that extent.

This brings us, then, to the inquiry whether the Indiana Act of 1893 effectually validates the lease between the two companies. The act was evidently framed to cover that purpose. Its language aptly expresses the intention of the legislature to that end. What forbids its having the proposed effect?

It is said that a railroad corporation, unless authorized by its act of incorporation, or by other statutes, to so do, has no power to enter into a lease of this character; and that such a lease, if unauthorized by statute, is strictly *ultra vires*, unlawful, void, and incapable of being made good by ratification or estoppel. *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 567, 19 Sup. Ct. 817, 43 L. Ed. 1130.

But the Act of 1893 is not wholly retrospective; it is prospective as well. With the proportion of gross earnings paid to the Peoria Company prior to the passage of this act this case has no concern; it deals only with the thirty per centum of gross earnings withheld, during a period of six months, beginning three years after the passage of the act.

From the moment the act was passed the two railway companies had the power to enter into a lease containing provisions such as are here sought to be enforced. Thenceforth such power existed under the laws of Indiana. Had the two companies, at any time thereafter, formally adopted the lease, under the act, giving authority, no one would insist that the lease was *ultra vires*.

An adoption of the lease, otherwise unauthorized, under an act conferring authority, must be distinguished from an attempted ratification without any new statutory authority. In the one case the law is changed, so that the contemplated agreement is no longer unlawful; in the other the contemplated ratification, if held valid, would, in effect, substitute, on the question of power, the will of the corporation for the will of the legislature.

But an adoption of the agreement embodied in the lease, in the light of the new power conferred, may be implied from conduct, as well as from a formal act of readoption. Three years of operation of the Peoria Railroad by the Indianapolis Company in accordance with the terms of this agreement leaves no doubt that the lease was consented to by the parties after they had the power to so consent. It is, in effect, especially in the absence of any averment to the contrary, as if the lease had been formally renewed after the passage of the Act of 1893. It is not an attempted overreaching of the law, by ratification of an unauthorized act; but is in effect a readjustment of the companies' relations to the powers conferred by the new legislative authority.

We do not think the act to be in contravention of the Constitution of Indiana. The case of *Mitchell v. McCorkle*, 69 Ind. 184, is not in point. The Constitution of Indiana (section 22, art. 4) provides that:

"The general assembly shall not pass local or special laws in any of the following enumerated cases: Regulating the jurisdiction and duties of justices

of the peace and of constables; for the punishment of crimes and misdemeanors; regulating the practice in courts of justice; providing for changing the venue in civil and criminal cases; granting divorces; * * *

Section 23 of the same article provides:

"In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state."

The act under consideration in *Mitchell v. McCorkle*, supra, was a curative one relating to the regulation of practice in certain circuit courts of the state. It fell, therefore, within the enumerated cases in which the general assembly was prohibited from passing local or special laws.

But the Act of 1893 under consideration relates to no matter mentioned in section 22, art. 4; nor is it a case presenting an opportunity for the enactment of a more general law. Its purpose was to authorize the railroads organized under the laws of Indiana, and running to the western boundary thereof, to lease and operate roads lying outside of the state. Sufficient reason might exist for the giving of such authority to west-bound roads, as distinguished from north, east and south-bound roads. As the state is situated, west-bound roads may, standing apart, be the legitimate subject matter of legislation; and an act applying to them, as a separate subject matter, could not have been more general than the Act of 1893.

For the foregoing reasons, we are of the opinion that the order appealed from should be affirmed.

PHILLIPS & BUTTORFF MFG. CO. v. WHITNEY.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1900.)

No. 904.

ASSIGNMENT FOR BENEFIT OF CREDITORS—TITLE OF ASSIGNEE—UNENUMERATED PROPERTY.

A citizen and resident of Iowa, owning real property in Alabama, which he had leased for a term of years, taking notes for the rent, made a general assignment for the equal benefit of all his creditors in accordance with the statutes of Iowa, and at the same time conveyed his real estate in other states (including that in Alabama) to the assignee upon the same trust. The lease and notes were delivered to the assignee as a part of the assigned estate. *Held*, that he was vested with the legal title thereto, and he or his successor in the trust, appointed on his resignation by the district court of Iowa, as authorized by statute, might maintain an action on such notes in his own name, and that such right was not affected by the fact that the notes were not enumerated in the schedule of property attached to the deed of assignment.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

The following statement, taken from the briefs of counsel, is substantially correct:

In 1886 Franklin H. Whitney, the assignor of defendant in error, purchased the S. ½ of lot 10, block 101, in Birmingham, Ala. One Elliott was then tenant under Whitney's vendor, and became Whitney's tenant, paying him rent after his purchase. About November, 1886, Elliott transferred his lease to the

plaintiff in error, which was then doing business in Birmingham under the assumed name and style of James B. Hopkins & Co., and none other; the business being carried on entirely by one James B. Hopkins, as general manager and vice principal for the plaintiff in error, itself a Tennessee corporation, located and doing its chief business in Nashville, Tenn. From November, 1886, to October, 1888, the plaintiff in error, under its assumed name of James B. Hopkins & Co., continued to pay rents under Elliott's unexpired lease to Whitney, who knew the concern only by its fictitious name, and had dealings only with James B. Hopkins. On the 25th of August, 1888, after occupying Whitney's premises nearly two years, the plaintiff in error, still calling itself James B. Hopkins & Co., and still acting and doing business in Birmingham altogether by and under that name alone, and through the said James B. Hopkins only, who was clothed by the plaintiff in error with full authority to execute a lease and notes, and was the sole party known to Whitney in the matter, rented the same property from the same landlord for a term of three years, ending October 1, 1891, at \$125 monthly, or \$1,500 per annum, and executed, by signing the same fictitious name, a lease, and 36 notes of \$125 each for the rent. Under the same name, and by drafts of the same James B. Hopkins, it paid most of these rent notes; but those for the last few months were paid under a new assumed name, of Hopkins Stove & Roofing Company, and some notes through one Frank Hopkins. Early in January, 1891, the defendant's then manager, one Frank Hopkins, proposed to Whitney, who still knew nothing of plaintiff in error's connection with the concern, to rent the premises for five years from October 1, 1891. The plaintiff in error claims that these negotiations for a new lease were unauthorized, and in fact forbidden, by it, but, if so, Whitney knew nothing of it, and it is not pretended that he did. The negotiations went on, at first through Frank Hopkins, and later through his successor, James B. Hopkins, Whitney making expensive repairs and improvements in view and consideration of the proposed renting and lease, which was actually made and executed on August 19, 1891, for the plaintiff in error by the same James B. Hopkins, its manager or vice principal, who signed duplicate leases and 60 rent notes, mentioned and described in the lease, for \$150 each, in the third fictitious name, recently assumed, under which the plaintiff in error was then doing business on the premises leased from Whitney, namely, "Hopkins Stove & Tinware Company, J. B. H., Man'g'r." These 60 notes were to mature monthly, beginning on November 1, 1891. The plaintiff in error continued its business on the same premises, with James B. Hopkins still its manager and vice principal; the home officials of the plaintiff in error knowing this, and coming frequently from Nashville and exercising active oversight of the business, but making no objections as to the last lease, and not even, as they profess, asking about it. Of this supervision, however, the landlord, Whitney, living several hundred miles away, was entirely ignorant. The rent notes for the premises up to February 1, 1892, were promptly paid by plaintiff in error, still through drafts drawn by said James B. Hopkins. The fifth note was paid in part only; the rest of it not being exacted, because of a fire in the building, rendering it untenable, on the 12th of February, 1892, for which reason, also, the sixth and a part of the seventh rent notes were not attempted to be collected. The fire above mentioned, on February 12, 1892, rendered the leased premises untenable. While Whitney's building on the rented premises was still burning, the plaintiff in error notified him by telegraph of the fire, demanding cancellation of the lease and answer by wire. Whitney refused to cancel the lease, and informed the plaintiff in error that he would repair the building and hold it to its contract. He did so repair it, in proper manner and with reasonable diligence, and at once tendered the building to the plaintiff in error, who refused to receive or occupy it; setting up as a pretext that the fire of February 12th had itself canceled the lease, according to its own terms. By agreement of parties, the leased premises were to be rented out by W. B. Leedy & Co., and the rents to be paid to F. H. Whitney, for the benefit of the party entitled, without prejudice, however, to the rights of either party. This has been done. After the maturity of the eighteenth of the series of 60 rent notes, in 1893, Whitney brought suit on all those due and unpaid, back to and including the seventh, in the city court of Birmingham. The cause was tried by the judge of the court, without a jury, both as

to issues of fact and law, and resulted in a judgment for Whitney. As indicated by the record, almost every conceivable issue was raised by the defendant there (plaintiff in error here). The general issue was pleaded, denying all the material allegations of Whitney's complaint. The execution by the defendant itself of both the notes and lease sued on, and the authority of James B. Hopkins to make them, were denied by sworn pleas, which were met and overcome. Unlawful eviction by the landlord pending the lease was set up as a defense; also, that the lease was annulled by the temporary untenable condition of the leased premises, occasioned by the fire of February 12, 1892. All these issues, and all others involved in them, were determined after a trial upon the merits, both in law and in fact, in favor of Whitney, first in the city court of Birmingham, and afterwards on appeal to the supreme court of Alabama, which itself passed upon all the issues in the case of every kind, both of fact and law, and in all things affirmed the findings and judgment of the court below. See *Manufacturing Co. v. Whitney*, 109 Ala. 645, 20 South. 333.

On the 29th of September, 1896, F. H. Whitney, residing at Atlantic, Cass county, Iowa, executed, with his wife, a voluntary trust deed of general assignment for the benefit of all his creditors equally, conveying to James B. Bruff, as trustee and assignee, all his property, both real and personal, except such as was exempt from execution in the state of Iowa, and expressly his "personal property, wheresoever situated." This trust deed was duly authenticated, filed, and recorded, under the laws of the state of Iowa, where both the assignor and the assignee resided, at Atlantic, in Cass county. The assignee, Bruff, in October, 1896, qualified, filed his inventories, and was placed in full possession and control of the trust estate, including the notes and lease now sued on in this action, and they were held by him in his possession and control when this suit was brought. The real property of the assignor, Whitney, in Alabama, for rents of which said lease and notes were executed, was also conveyed at the same time to his assignee, Bruff, for the same purpose, and the conveyance, duly executed, was filed and recorded in Jefferson county, Alabama. On the 11th of October, 1896, F. H. Whitney died, leaving a will, in which his son James G. Whitney is named sole executor, with very ample powers, and relieved from giving bond as such.

On the 2d of October, 1897, the said James B. Bruff, as assignee of F. H. Whitney, and the owner of the remaining 42 rent notes and the lease executed on August 19, 1891, brought this action thereon by summons and complaint, the latter counting on the said notes and the said lease, and in two common counts against the plaintiff in error, who removed the cause into the United States circuit court at Birmingham. In that court the plaintiff in error first filed on November 26, 1897, 17 demurrers to the complaint, of which the first 8 are omitted from the record. All these were overruled, except one (No. 13), for misjoinder of causes of action in the first count. This misjoinder was cured November 29, 1898, by amendment. On January 24, 1899, the plaintiff in error increased its demurrers, by additions or repetitions, to 32. On the next day, January 25, 1899, the plaintiff in error filed 15 pleas to the complaint, of which the last 9 are not in the record. To these pleas the defendant in error filed a number of replications on April 1, 1899. And, with the pleadings in this condition, the depositions of James B. Bruff and James G. Whitney were regularly taken and certified under a commission for the purpose issued from the court below. The cause coming on for trial on the 12th of December, 1899, the court below permitted the plaintiff in error to withdraw its pleas and refile its 32 former demurrers, and increase the number 12 more by additions or repetitions,—to 44 in all. These were all then overruled. The plaintiff in error then moved the court below to strike out counts 1 and 2 of defendant in error's complaint. This motion was denied. The plaintiff in error then moved the court below to require the defendant in error to elect upon which of the said counts he would proceed. This the court refused. The plaintiff in error then refiled its 15 pleas, of which only 7 appear in the record, and enlarged the number by amendment to 19. To all these the defendant in error refiled its replication. To these the plaintiff in error filed 10 demurrers,—about the same with the 44 filed to the complaint. These were all overruled. The plaintiff in error then filed 4 rejoinders to the replication. None of the 19 pleas or of the 4 rejoinders was verified by affidavit. And thus the case went to the

jury. The plaintiff in error introduced the 42 notes for \$150, sued on, and described in the first count of the complaint, and therein alleged to have been executed August 19, 1891, by the plaintiff in error, which was then a corporation doing business in Birmingham under the name of Hopkins Stove & Tinware Company, by signing them, "Hopkins Stove & Tinware Co., J. B. H., Man'g'r," and which were also averred expressly to be unpaid, and the property of the defendant in error, as the assignee of F. H. Whitney, in which character, as plaintiff, he was prosecuting the action. The court below allowed the introduction of these notes, against many objections, which were overruled. The defendant in error then introduced in evidence, against objections which were overruled, the complete record in the cause of Manufacturing Co. v. Whitney, from the supreme court of Alabama, containing all the pleadings, testimony, opinion, and judgment therein. The opinion shows the issues, conclusions of law, and findings of fact in that cause. The defendant in error then offered in evidence the lease described and sued on in the second count of his complaint, and therein alleged to have been executed August 19, 1891, by the plaintiff in error, then doing business in Birmingham, Ala., under the name and style of Hopkins Stove & Tinware Company, by signing the same, "Hopkins Stove & Tinware Company, J. B. H., Man'g'r," and later proved that the rents under said lease from April 1, 1893, to October 1, 1896, at \$150 per month, were due and unpaid, and the property of the defendant in error. The court below allowed the said lease to be introduced, against the objections of the plaintiff in error. The plaintiff in error then offered in evidence, without objection, the statutes of Iowa, the state of the domicile of F. H. Whitney and James B. Bruff, and also of James G. Whitney, the defendant in error, declaring the effect of trust deeds of assignment for creditors, and the rights, title, duties, and powers of trustees or assignees under voluntary deeds of general assignment. It was admitted that the district courts in the state of Iowa have original and general jurisdiction in all matters both of law and equity, including wills and estates, assignments, trusts, and trustees. The legal rate of interest in Iowa was agreed to be 6 per cent. Without objection, the agreement of April 25, 1892, executed by the plaintiff in error under the name of "Hopkins Stove & Tinware Co., per J. B. Hopkins," and by Franklin H. Whitney, by Garrett & Underwood, his attorneys, was admitted in evidence; and, further, it was admitted that plaintiff in error had received the benefits thereof up to April 1, 1893, and in the settlement of the judgment recovered by F. H. Whitney against the Phillips & Buttorff Manufacturing Company in the city court of Birmingham. The defendant in error introduced oral testimony that none of the notes sued on have ever been paid; that the only subscribing witness to the lease in Alabama (Dr. J. B. Vann) has been dead for years; that he appeared in the city court of Birmingham on the trial of the cause of F. H. Whitney against the Phillips & Buttorff Manufacturing Company, and testified to his attestation of the lease for five years, dated August 19, 1891, and that he was a witness to the signature of the lease, which was the signature of Mr. James B. Hopkins, manager of the Hopkins Stove & Tinware Company; and that all the 60 notes, including the 42 now sued on and offered in evidence, were signed in his presence. The signatures to these notes were also proved directly by W. B. Leedy to be in the handwriting of James B. Hopkins, the general manager and vice principal of defendant in error. This testimony was admitted by the court notwithstanding objections by the plaintiff in error, the depositions of James B. Bruff, the legal counsel and assignee of F. H. Whitney, and an attesting witness to his will, and James G. Whitney, of Atlantic, Iowa, the son and sole executor of F. H. Whitney, and his partner in the banking business, taken under a commission from the court below, together with the exhibits thereto, which appear in the record. The court below, on objection by the plaintiff in error, suppressed some small parts of these depositions, but these are not shown in the record. These depositions establish fully that Franklin H. Whitney (known as F. H. Whitney) was a resident of Atlantic, Cass county, Iowa, on the 29th of September, 1896; that he then made a trust deed of general assignment to James B. Bruff, which is shown in the record, for the equal benefit of all his creditors; that this deed was duly executed and recorded; that the assignee, Bruff, duly qualified, made bond, and entered upon his duties as such; that all the property, real and personal, of

F. H. Whitney, including the notes and lease sued on, were turned over to him as trustee under the assignment, and that neither F. H. Whitney in his lifetime, nor his executor since his death, has ever made or set up any claim to the lease and notes sued on since September 29, 1896; that James B. Bruff, as assignee of said F. H. Whitney, was in possession and control, by his attorneys, of the lease and 42 notes sued on when he brought suit thereon in this action on the 2d of October, 1897; that said notes given for rents due under said lease were then unpaid, and so remain; that about the 18th of March, 1898, said James B. Bruff, assignee, settled his trusts as assignee of F. H. Whitney, resigned, and was discharged as such, after turning over all the trust property remaining in his hands to his successor, James G. Whitney, the defendant in error, who had been duly appointed his successor as assignee, all of which was regularly done in the district court of Cass county, in the state of Iowa, which is shown to have had original, full, and general jurisdiction of the subject-matter and parties on the premises. It was agreed that the amount due upon the notes and lease sued on, if the defendant in error was entitled to recover, with interest computed at 8 per cent., less rents collected, and credited with interest at 8 per cent. under agreement of April 25, 1892, with the agreed attorney's fee of \$600, would be altogether \$6,635.72.

The plaintiff in error, as already stated, offered no testimony, but asked permission to verify its 19 pleas, which the court below refused. The plaintiff in error then asked the court to give the general charge on the evidence in its favor on each of the five counts of the complaint, each of which the court refused. The plaintiff in error asked four other charges, as to whether the lease and notes sued on were Iowa or Alabama contracts, and whether the rate of interest on them was 6 per cent. or 8 per cent., all of which the court refused. The defendant in error then asked the court, in writing, to charge the jury, if they believed the evidence, they must find for the plaintiff below (the defendant in error here). The court gave this charge, and the jury returned a verdict for the defendant in error for \$6,635.72. The plaintiff in error now assigns 90 errors in the action of the court below.

J. Quintus Cohen and Henry R. Dill, for plaintiff in error.

James J. Garrett and R. H. Thach, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. As this case is presented for our review, it seems clear that the Phillips & Buttorff Company, defendant below and plaintiff in error here, really and substantially owes to the estate of F. H. Whitney the full amount of the principal and interest of the notes sued on, and against them, when sued on by the proper plaintiff, said company has no defense, legal or equitable, and that the plaintiff below (defendant in error here) is the legal and beneficiary owner and holder of the notes in question, either as the assignee of Franklin H. Whitney, under an assignment for the benefit of creditors executed by Franklin H. Whitney in his lifetime, or as executor of the last will and testament of Franklin H. Whitney, duly executed and probated. The defense in the court below, so far as it had any merit, was on the line of defect in plaintiff's title as assignee of Franklin H. Whitney, and to that question were directed most of the demurrers, pleas, objections to evidence, and requested charges to the jury, with which the record abounds. On that question nearly all of the 90 assignments of error and the bulk of the very able and ingenious briefs of counsel in this court are based; and it seems clear that if that question is ruled, as we think it should be, in favor of the defendant in error, there can be no good reason for considering other rulings of the trial court, which, even if erroneous, were

not really injurious to the plaintiff in error, provided the plaintiff below was the legal owner and holder of the notes sued on.

The undisputed facts are that on or about the 29th day of September, 1896, the said Franklin H. Whitney and Ella Whitney, his wife, conveyed to said James B. Bruff, as trustee, by certain trust deeds, all their real estate then owned by said Franklin H. Whitney, without preference to any creditors, and further in trust for the payment of the debts of the Bank of Atlantic, said real estate being certain lands in Colorado and Missouri and in the state of Alabama, all the real estate owned by said Franklin H. Whitney in the county of Jefferson, state of Alabama, and all the rights and interest of every description whatsoever of the said Franklin H. Whitney in said real estate; that at or about the time of making said trust deeds the said Franklin H. Whitney made an assignment, purporting to be a general assignment of all his property located in the state of Iowa, to said James B. Bruff, in trust for the payment of his debts and the debts of the Bank of Atlantic; that Bruff accepted the trust and qualified as assignee; that as such he acquired possession of the lease and notes now sued on, as part of said personal property, and thereafter brought this suit; that later still he regularly settled his trust in the district court of Cass county, Iowa, resigned, and was discharged; that thereupon said court appointed James G. Whitney, the plaintiff, trustee in the assignment; that he accepted and qualified as such, and Bruff was ordered to convey and deliver all the trust estate to him, and in conformity he transferred the notes by indorsement, and the lease by such delivery as was practicable, to James G. Whitney, whereby there was vested in Whitney all the title that had been in the assignor, Whitney, and in his original assignee, Bruff. And when it is considered that under the laws of the state of Iowa, where Whitney, the assignor, and Bruff, his assignee, had their domiciles, which law controls in the premises as to personalty, the said general assignment made by F. H. Whitney on September 29, 1896, was authorized and valid; that it divested out of said Whitney, and invested in his assignee, Bruff, "the title to any property belonging to the assignor [Whitney] at the time of making the assignment" (McClain's Code Iowa, §§ 3292-3294 [2115-2117]); that said assignee, Bruff, thereby became vested, when duly qualified, with as "full power and authority to dispose of all the estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover in the name of such assignee everything belonging or appertaining to said estate, and generally do whatever the debtor might have done in the premises," with one exception, affecting only the sale of real property (Id. § 3306 [2127]); that the district court of Iowa for Cass county, in that state, is a superior court of record, of general jurisdiction both at law and in equity, with full jurisdiction of the trusts of said assignment from Whitney to Bruff; that having acquired jurisdiction, in fact, of such trust estate and trustee, said district court was fully empowered and authorized, in all cases shown to it to be proper, to remove such trustee, or, if he died, resigned, or failed to exercise the trust as by law required, to appoint a successor, who, when qualified under its orders, is declared by law to "possess all

the powers conferred upon such assignee, and shall be subject to all the duties hereby imposed as fully as though named in the assignment" (Id. § 3307 [2128]),—we feel bound to hold that the plaintiff below acquired a title good in every respect until impeached by fraud or mistake.

The plaintiff in error contends that no title whatever passed from Franklin H. Whitney to James B. Bruff, the assignee, under the deed of assignment executed on September 29, 1896, because, while the same purports to be a general assignment, wherein the said Franklin H. Whitney sells, transfers, and conveys to James B. Bruff "all of my property, both real and personal, except such as is exempt from execution, wherever situated, in the state of Iowa, and my personal property, wheresoever situated; Schedule A, hereto attached, being a list of my personal property assets, and Schedule B, hereto attached, being a list of my real estate hereby conveyed. And, in case any real or personal property subject to execution in the state of Iowa is not included in the above list, I hereby convey the same as fully as though the same were mentioned therein,"—it was in fact only a partial conveyance, and the personal property conveyed was only that enumerated in Schedule A, as follows: "Personal Property of Franklin H. Whitney. Forty-seven shares of the Atlantic Water Company; one large fire-proof safe, containing burglar-proof chest, now in Whitney Building, Kansas City, Missouri; one fire-proof safe, now used by Bank of Atlantic; one Diebold burglar-proof safe, now used by Bank of Atlantic,"—and, on this construction, claims that the case is in all respects identical with, and should be controlled by, *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314. *Bock v. Perkins* was a contest between a creditor and an assignee, in which it was claimed by the creditor that, while the deed of assignment purported to be a general assignment, the same was intended to be, and in fact was, only a special assignment, and, in addition, claimed it was void because it contained unlawful preferences. The supreme court held, as a matter of law, that, as to the property actually assigned, the schedule referred to in the assignment as more particularly describing the property conveyed controlled, and, as a matter of fact, that the assignment was not intended to be, and was not, a general assignment, and, from this fact, further held that the statute of the state of Iowa which provides that a general assignment for the security of creditors shall vest in the assignee the title to all of the property belonging to the debtor at the time of making the assignment, whether included in the inventory or not, was not applicable; quoting *Van Patten v. Burr*, 52 Iowa, 518, 3 N. W. 524, for the proposition, "The transaction contemplated in the Iowa statute, and termed a general assignment," is a disposition of all the property of the insolvent for the benefit of all his creditors. We distinguish the present case from *Bock v. Perkins*, *supra*, because the assignment made by Whitney to Bruff not only purported to be a general assignment, but was in fact intended to be a general assignment, which, with trust deeds of the same date to the same assignee, would convey all his property, except that exempt from execution under the laws of Iowa, for the equal benefit of all his creditors; and this purpose and intent was evi-

denced, not only by the document itself, but by the circumstances surrounding and attending the transaction. The same day the general assignment was executed said Franklin H. Whitney executed and delivered to the same assignee trust deeds conveying all of his real estate, charged with the same trust, situated outside of the state of Iowa, including the real estate in Alabama, the lease of which was the original cause of the present suit; and these trust deeds were evidently made outside of the purported general assignment, to insure the conveyance of the real estate according to the laws of the state where situated. The possession of the Alabama property and the notes given thereunder, evidently in accordance with the purport and intent of the assignor, passed into the hands and control of the assignee. Under these circumstances, we have no doubt, as a matter of fact, that the assignment in question was intended to be and was an assignment of all the property of the assignor, wheresoever situated, for the benefit of all his creditors; and, if it was such an assignment, the omission from the schedule of the lease of the real estate in Alabama and the notes given thereunder was not important, and, in accordance with the laws of Iowa, the assignor's domicile, the lease and notes passed to the assignee with as full title as if they had been expressly mentioned in the schedule. We are not permitted to doubt that the proceedings in the Iowa court in the matter of the assignment of Franklin H. Whitney were in all respects regular and conclusive as to the resignation of Bruff as assignee, and the appointment and qualification of James G. Whitney as assignee in Bruff's place, nor that the order of the court and the conveyance thereunder by Bruff to James G. Whitney operated a full and complete transfer of the legal title and ownership of the lease and notes herein sued on to the present plaintiff in the court a qua. The judgment of the circuit court is affirmed.

DURKEE v. NATIONAL BANK OF FLORIDA.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1900.)

No. 851.

1. BANKS—DEPOSITS—RIGHT TO APPLY TO NOTE OF DEPOSITOR.

The effect of a general deposit of money in a bank is to make the money the property of the bank, and the bank the debtor of the depositor. No trust exists in such cases. The bank does not hold the money as bailee, and it has the right to apply the deposit to the payment of matured notes of the depositor which it holds.

2. ASSUMPSIT—PLEADING—DEFENSES.

In an action against a bank to recover the amount of a general deposit the bank may show that it held notes of the depositor for an amount which equaled his deposit, and that the deposit had been applied to the payment of the notes under pleas to the effect that it was never indebted to the plaintiff as alleged, and that it did not have in its possession the sum sued for or any sum deposited with it by the depositor; and to make such defense it is not necessary for it to file a plea of set-off.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This action was brought by Joseph H. Durkee, as receiver of the Jacksonville, Tampa & Key West Railway, against the National Bank of the State of Florida, to recover \$28,059.37. The declaration contained three counts. It was alleged in each count that Robert B. Cable had been first appointed receiver; that the order appointing him had been vacated, and Mason Young appointed; that Young, as such receiver, had deposited with the defendant bank the moneys sued for; that Young had been discharged as receiver, and ordered to pay over all moneys held by him to his successor; and that the plaintiff was entitled to the money under this order. In the first count it was alleged that on the 7th day of April, 1893, the defendant had in its possession \$28,059.37 arising from the operation and earnings of the property, and deposited by Young as receiver, which sum Young, as receiver, directed the defendant to pay over to Cable as receiver, which the defendant refused to do. In the second count it was alleged that on the 8th day of April, 1893, the defendant had in its possession \$28,059.37 arising from the operation and earnings of the property, and deposited by Young as receiver; that on the same day Young made and delivered to Cable, as receiver, a certain check, draft, or order in writing, whereby he directed the defendant to pay to the order of Cable, as receiver, the sum of \$28,059.37, which check, draft, or order Cable, as receiver, caused to be presented for payment, and the defendant refused to pay it. In the third count it was alleged that during such period of Young's receivership he deposited, as receiver, funds and moneys arising from the operation and earnings of the property with the defendant, which funds were placed by the defendant to the credit of Young as receiver, and that when the receiver was discharged the defendant was indebted to the receiver in the sum of \$28,059.37, which sum was due from the defendant to the receiver on account of the funds and moneys deposited by the receiver with the defendant, which sum of money, by reason of the aforesaid orders of the court, became due to Cable, and the plaintiff, having been appointed receiver of the property, became entitled to receive from the defendant the sum of \$28,059.37.

The pleas on which the case was tried presented, among other defenses, the following: That the defendant was never indebted as alleged; that the defendant did not have in its possession on the 7th day of April, 1893, or at any subsequent day previous to the bringing of this suit, the sum of \$28,059.37, or any sum, deposited with it by Mason Young as receiver; that each and every deposit of money set up in the plaintiff's declaration was made by Young in the usual course of business with the defendant, and made as a general deposit, and not as a special deposit, and that said general deposit had been drawn against and exhausted; that on April 8, 1893, the defendant had paid checks of Young to the amount of \$73,816.81, and that sum was all the said Young had on that day on deposit with the defendant; and that Young since that day had deposited no money or fund with the defendant.

It was stipulated and agreed by the parties that a jury in the case be waived, and that the case be heard and determined upon all the facts by the court without a jury. The court (the Honorable James W. Locke presiding) made a special finding of the facts and the law as follows:

"This cause coming on to be heard by the court, a jury being waived by a stipulation of the parties in writing, and having been fully heard and considered, the court finds as matters of fact in this cause as follows: That the American Construction Company, a stockholder of the Jacksonville, Tampa & Key West Railway Company, filed its bill in this court on July 6, 1892, against the said railway company, praying discovery as to the financial affairs of the company, for an accounting, and for the appointment of a receiver. This bill alleged the execution and acceptance of first mortgages made by the railway company to the Mercantile Trust Company as trustee, amounting to \$2,216,000, and the execution on May 5, 1890, of a second mortgage by said railway company to the Pennsylvania Company for Insurance of Lives & Granting Annuities, as trustees, for \$4,000,000, known as the 'Consolidated Mortgage.' That the said railway company had issued another set of bonds, amounting to \$3,592,000, known as the 'Consolidated Trust Bonds,' for the purchase of the stock and bonds of the Florida Southern Railway Company and the St. Johns & Eustis Railway Company, but which were not made a lien on the property of the Jacksonville, Tampa & Key West Railway Company covered by

the above-mentioned mortgages, but were secured by a mortgage on the stock and bonds so purchased. The Mercantile Trust Company and the Pennsylvania Company, as trustees of the first and second mortgages covering the said railway property, were not made parties to said suit. That on July 23, 1892, the Pennsylvania Company, as trustee for the second mortgage, filed its bill in this court against the Jacksonville, Tampa & Key West Railway Company to foreclose its mortgage; alleging the execution of said mortgage, the issue of bonds thereunder, default therein, and conditions broken, and praying the appointment of a receiver, and the sequestration of the income and earnings of the mortgaged property,—the same being covered by said mortgage. That on said day Robert B. Cable was appointed said receiver of said railway property and its income and earnings. That on August 4, 1892, an order was made in this suit removing Cable as receiver, and the proceedings in said suit were stayed until further order of the court, and on the same day Mason Young was appointed receiver in the suit of the American Construction Company against said railway company. That on August 6, 1892, Mason Young, as receiver, filed his petition in the said suit of the American Construction Company, alleging that the Jacksonville, Tampa & Key West Railway Company had purchased the Florida Southern Railway Company and issued collateral trust bonds therefor, and that there was due thereon interest to the amount of \$73,500; that certain other interest charges were due, and that certain notes of the said railway company, the amounts of which were unknown to said receiver, were due and outstanding, which said receiver might be able to renew. That said receiver did not have funds sufficient to meet said obligations, and asked permission to borrow different amounts, giving receiver's notes therefor, not to exceed \$125,000. That the court made an order on the same day authorizing the receiver to pay such interest and obligations as might be due and payable by said railway company, to make renewals of said obligations, the same to be paid out of the incomes of the property or from any moneys in the hands of said receiver, and, if the same should not be sufficient, to issue receiver's notes in payment of said interest obligations, or, in the discretion of said receiver, to borrow money on receiver's notes to pay the same; the amount of said notes outstanding at any one time not to exceed \$125,000. That notice of said application was served only upon H. Bisbee, solicitor of the American Construction Company, and T. M. Day, Jr., counsel for the Jacksonville, Tampa & Key West Railway Company. That on August 10, 1892, said receiver borrowed money from the defendant bank amounting to \$38,000, giving therefor three (3) notes, for \$12,666.67 each, in favor of D. G. Ambler, president of said bank, signed, 'Jacksonville, Tampa & Key West Railway Company, Mason Young, Receiver,' due three, four, and five months after date, which amount, less the discount thereon, was credited on the defendant's books to the account of Mason Young, receiver. That on the same day the defendant bank issued its New York draft, payable to the American Loan & Trust Company, for \$36,000, and charged the same to the account of Mason Young, receiver, for which amount said receiver gave his check upon said bank, payable to T. P. Denham, defendant's cashier. That this \$36,000 was used to pay interest due on the collateral trust bonds mentioned in the receiver's petition for authority to make notes. That the defendant bank did not know for what purpose this draft was to be used. That on or about September 27, 1892, Mason Young, as receiver, began depositing funds with the defendant bank, which deposits were credited on the bank books to the 'Jacksonville, Tampa and Key West Railway Company, Mason Young, Receiver,' and continued to make such deposits until the date of his discharge. That these moneys so deposited were from the proceeds of the notes hereinbefore stated, and from the current income and earnings of the Jacksonville, Tampa & Key West Railway Company, of which fact the defendant is presumed to have had knowledge. That Mason Young, as receiver, drew checks against this account, which were paid by the bank. That on August 23, 1892, said railway company appealed from the order made in the American Construction Company's case, appointing Mason Young receiver and authorizing him to borrow money and make receiver's notes therefor, and the Pennsylvania Company appealed from the order in its suit removing Robert B. Cable as receiver and staying proceedings in said suit. That said appeals were perfected, and

that all of said orders were reversed by the appellate court, and that on February 1, 1893, the mandates of the appellate court were filed in this court, reversing all the orders appealed from, including the order authorizing said receiver's notes and directing the receivership of Robert B. Cable to be restored. That on April 7, 1893, said mandates were announced, and in accordance therewith the order appointing Mason Young receiver in the case of the American Construction Company was vacated by this court, and said receiver required to restore all property of said railway company; and at the same time, by an order of this court, the receivership of Robert B. Cable was restored in the foreclosure suit brought by the Pennsylvania Company, and all the railway property, funds, earnings, and income were ordered restored to him as receiver. That Joseph H. Durkee, the plaintiff, was substituted in Cable's place as receiver in the foreclosure suit, and not in the stockholders' suit. That, when Mason Young was discharged as receiver, he had deposited in said defendant bank, which had been credited to said account of the 'Jacksonville, Tampa and Key West Railway, Mason Young, Receiver,' \$28,059.37 in excess of the checks drawn by him as receiver, paid by said bank. That on April 7, 1893, Mason Young, as receiver, drew a check for this amount payable to R. B. Cable, receiver, which check was assigned to the plaintiff, and which the said bank refused to pay. That when the first note given by Mason Young as receiver, for \$12,666.67, payable to D. G. Ambler, and indorsed by him to the bank, became due, it was paid by Mason Young, receiver, on November 11, 1892, partly by another note given to the defendant bank for \$9,000, signed, 'Mason Young, Receiver,' payable to the bank. That, by giving said note of \$9,000 in part payment of the note then due, the amount of outstanding notes was not increased. That on November 11th, when this note was made, Mason Young, as receiver, had issued and had outstanding receiver's notes amounting to \$153,333.34. That at no time from this date until his discharge did Mason Young have less than \$150,000 in receiver's notes outstanding. That Mason Young made certain small payments on the other notes held by the bank, by checks which were drawn upon and charged to the account of the 'Jacksonville, Tampa and Key West Railway, Mason Young, Receiver.' That on April 6, 1893, the said notes, amounting to \$28,059.37, being past due, were, without any specific direction of Mason Young, receiver, charged to said account of the 'Jacksonville, Tampa and Key West Railway, Mason Young, Receiver,' by the bank. That on June 28, 1893, upon the petition of Joseph H. Durkee, receiver, a rule was issued against the defendant bank, in the suit in which the said receiver was appointed, requiring the defendant bank to show cause why it should not pay over to said receiver the said sum of money. That defendant made return to said rule, contesting the jurisdiction of said court. That said rule was discharged on November 10, 1893, and on the same day an order was made authorizing the plaintiff to bring suit against the defendant for said amount, if in the judgment of said receiver such suit would result in benefit to the fund in his hands. That on April 8th the bank paid to the order of Mason Young, receiver, \$73,816.81, which does not include the amount of \$28,059.37, which had been charged off on account of overdue notes, as stated. And the court further finds, as conclusions of fact, that the amounts represented to be advanced by the defendant were advanced in good faith in accordance with the terms of the order of the court, which, at the time said advances were made, had not been appealed from.

"And the court finds, as matters of law, that the plaintiff was authorized to bring this suit; that the discharge of the rule is no bar to this suit; that, this being a suit against a bank for an amount claimed to be due at a certain date, the defense of [not] any amount due said bank at that time could be interposed under the general issue without a special plea of set-off; that the receiver's notes given for amounts borrowed from the bank under orders of the court were not receiver's certificates giving a lien upon the property of the railway company as security, but might be paid from earnings of the road, whenever, in the discretion of the receiver, they could be; that said notes, having been discounted by defendant bank and placed to the credit of Mason Young as receiver of the Jacksonville, Tampa & Key West Railway Company, established a debit which the bank had a right to charge off against any deposits made by Mason Young in the same capacity; that the charging off of

said amount of \$28,059.37 upon overdue receiver's notes was allowable; that there was not said amount of \$28,059.37, or any other amount, due by said defendant to said plaintiff, as receiver, at the date of bringing the suit, and judgment should be entered for the defendant, and it is so ordered."

E. P. Axtell (J. C. Cooper, on the brief), for plaintiff in error.

W. H. Baker and H. B. Tompkins (A. W. Cockrell and Mr. Baker, on the briefs), for defendant in error.

Before McCORMICK and SHELBY, Circuit Judges, and PAR-LANGE, District Judge.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendant bank held the three notes of Mason Young, receiver of the Jacksonville, Tampa & Key West Railway Company, for \$12,-666.67 each, dated August 10, 1892, and due, respectively, at three, four, and five months after date. These notes were given for money advanced by the bank. This money was placed with other money to Young's credit as receiver. When the notes became due the bank charged them to Young's account. In other words, it used the funds on deposit to pay these notes. It required all the funds that were to Young's credit to pay his notes. The controlling question in this case is, did the bank have the right to do this? If the bank had the right to apply these funds to the payment of these notes, then the plaintiff in error, as the successor of Young in the receivership, has no just claim against the bank. The money was in the bank as a general deposit. The effect of such deposit is to make the money the property of the bank, and the bank the debtor of the depositor. No trust exists in such cases. The bank does not hold the money as bailee. When, therefore, these notes fell due, the bank had the right to apply the deposits to their payment. Having done this, it was not indebted to Young or to his successor in the receivership. 2 Morse, Banks (3d Ed.) § 559; 1 Morse, Banks (3d Ed.) § 324; Bank v. Hughes, 17 Wend. 94; Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; Lehman v. Manufacturing Co., 64 Ala. 567, 595; Schuler v. Bank, 27 Fed. 424; 3 Am. & Eng. Enc. Law (2d Ed.) 835, and cases there cited.

It is not necessary to file a plea of set-off, to make this defense. The pleas filed were sufficient for that purpose. One of the pleas was to the effect that the defendant bank was never indebted to the plaintiff as alleged. Other pleas were to the effect that the defendant bank did not have in its possession the sum of \$28,059.37, or any sum, deposited with it by Mason Young as receiver. These pleas were sustained by the findings of the court. When it was shown that the bank held Young's notes as receiver for an amount which equaled the deposits, and that the deposits had been applied to the payment of these notes, a good defense was proved under these pleas. The judgment of the circuit court is affirmed.

WHITNEY v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, First Circuit. June 13, 1900.)

No. 329.

1. APPEAL—REVIEW—VERDICT.

A defendant in whose favor a verdict has been rendered by direction of the court is entitled to support such verdict upon any ground which the evidence in the record permits, and of which he has not by his conduct waived the right to avail himself. If, upon all the evidence, the verdict was one which must necessarily have been rendered, it must stand, regardless of the sufficiency of the particular ground on which it was directed.

2. CARRIERS—INJURY OF PASSENGER—BURDEN OF PROOF AS TO NEGLIGENCE.

The rule which requires an employé suing his employer for an injury to allege and prove the negligence upon which the right of recovery is based does not apply to a suit by a passenger against a common carrier, in which case the fact of the injury while the passenger was himself in the exercise of due care raises a presumption of negligence on the part of the carrier, which casts upon it the burden of proving the exercise of proper care, and that it used all appliances, readily attainable, known to science for the prevention of accidents.¹

3. SAME—WHO IS PASSENGER—EMPLOYE USING PASS.

Plaintiff, being in the employment of defendant, a railroad company, changed to a different employment, still with defendant, and, in connection with the change, stipulated for free transportation to Boston from the city where he was to be employed, not in connection with his work, but for his own convenience. On one of these trips, made for his own purposes, and while not at work or going to or from his work, he was injured by the derailling of the car in which he was riding. He was traveling on a pass, similar to others which had been previously issued to him, stamped as an employé's pass, and containing on the back a waiver of all claims against the defendant arising from the negligence of its agents or otherwise. *Held*, that plaintiff was a passenger, and that an action to recover for the injury was governed by the rules applicable as between carrier and passenger, and not by those applicable as between master and servant, and the stipulations relieving the defendant from liability for negligence will not be enforced against the plaintiff, although he voluntarily assented to them.²

In Error to the Circuit Court of the United States for the District of Massachusetts.

Edward H. Pierce, for plaintiff in error.

Charles F. Choate, Jr., for defendant in error.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This suit was brought by the plaintiff in error for an injury occurring to him while riding in a passenger train of the defendant in error. The circuit court directed a verdict for the defendant, and the plaintiff below thereupon sued out this writ of error. The record raises two questions: First, whether there was any case to go to the jury on the allegation of negligence; and,

¹ Burden of proof of negligence where passengers have been injured, see note to *Railway Co. v. Myers*, 32 C. C. A. 23.

² Limitation of liability by carriers for injuries to passengers, see note to *Clark v. Geer*, 32 C. C. A. 301.

second, whether or not the plaintiff was a passenger. The only evidence offered in the court below was that in behalf of the plaintiff. At the close of that evidence a motion was made to direct a verdict for the defendant on the ground that no sufficient proof of defendant's negligence had been shown, which motion the court overruled. Thereupon the defendant moved that the court direct a verdict for the defendant on the ground that the plaintiff was an employé of the defendant when injured, and that he could not recover by reason of the fact of his riding on an employé's pass, by the conditions on the back of which the holder expressly assumed all risks arising from the negligence of the agents of the defendant, or otherwise, while using it. On that motion the court made a ruling favorable to the defendant, which appears in the record, and also it directed a verdict for the defendant. The exceptions were both to the ruling and to the order to return a verdict.

The bill of exceptions states, "All the evidence at the trial material to the exceptions in this case was as follows." Therefore it is presumable that the entire evidence is in the bill of exceptions, except what related to the question of damages, and possibly to some other questions about which there is now no dispute. Under the rulings, it is presumably the right of the defendant to support the verdict on any ground which the evidence in the bill of exceptions permits. This is a well-settled rule, expressly restated in *Sullivan v. Mining Co.*, 143 U. S. 431, 434, 12 Sup. Ct. 555, 36 L. Ed. 214, where it is held that if, on all the facts in the case, the judgment was one which must necessarily have been rendered, it must stand. The same ruling was applied, under very peculiar circumstances, in *Dry-Goods Co. v. Malcolm*, 164 U. S. 483, 491, 492, 17 Sup. Ct. 158, 41 L. Ed. 524, where the basis for sustaining the judgment was altogether different from that which was expressly presented by the bill of exceptions. Of course, if it were apparent from the record before us that the defendant had rested its case in the court below entirely on the proposition that the plaintiff was an employé, or otherwise expressly or impliedly waived other defenses, or by its course had in any way blinded the plaintiff, so that it might be thought it had stopped him from putting in all the evidence of negligence that he might have put in, it could not have brought this question before this court for its consideration.

The injury happened through the overturning of a car in which the plaintiff was riding, at a switch near the approaches to the defendant's station at Boston. The effective cause of the overturning is not shown by the proofs. The plaintiff suggests three different explanations of the accident: One, that the switch was defective; second, that it was not provided with modern appliances for safety; and, third, that the switchman was personally negligent. The defendant offered no evidence in its own behalf, and did not even call the switchman, nor show reason for not calling him. It is well settled that, in a case brought by an employé against an employer, the employé is subject to the ordinary rule of the common law, that it rests on him to allege and prove that the injury arose from the negligence of his employer. This was so held by us in *Stevens*

v. Chamberlin, 40 C. C. A. 421, 100 Fed. 378, 380, and it is recognized as a well-known rule of law in *Railway Co. v. Barrett*, 166 U. S. 617, 619, 17 Sup. Ct. 707, 41 L. Ed. 1136. But, with reference to passengers, a necessity arises out of the fact that they are not presumed to have knowledge of the methods of particular carriers, and that to them the causes of injuries are inscrutable. The rule is best stated in *Gleeson v. Railway Co.*, 140 U. S. 435, 443, 11 Sup. Ct. 862, 35 L. Ed. 463. There the decisions of the supreme court are referred to, wherein it is said to have been settled that the happening of an injurious accident is, in passenger cases, prima facie evidence of negligence on the part of the carrier, "and that, the passenger being himself in the exercise of due care, the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight."

The nature of the duty resting on the defendant in this case with reference to the alleged absence of modern appliances was stated in *Mather v. Rillston*, 156 U. S. 391, 399, 15 Sup. Ct. 467, 39 L. Ed. 470. While, of course, no carrier can be held at fault, so long as he uses approved safeguards, merely because he does not always use those which theoretically or experimentally may attain better results, yet in that case the general rule laid down by the court was as follows:

"We think it may be laid down as a legal principle that, in all occupations which are attended with great and unusual danger, there must be used all appliances, readily attainable, known to science for the prevention of accident, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence."

In view of this, we think the case would justly have been left to the jury on the question whether the safeguard appliances referred to were available on the part of the defendant, if that question had been reached. Also, in view of the lack of proof offered by the defendant with reference to its switchman, we think the court would not have been justified in taking from the jury the question, if reached, whether the defendant had fully met the burden resting on it according to the rule in *Gleeson v. Railway Co.* So far as this part of the case is concerned, the ruling of the court below cannot be questioned.

Coming to the main issue, we are controlled with reference to it by the decisions of the supreme court. The only evidence, as we have said, was that of the plaintiff. The essential facts are not disputed, for the purposes of this writ of error; neither is there any substantial difference between the parties as to any question, except of law. The facts are, for this appeal, so similar to those in *Doyle v. Railroad Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, that it is not maintained that, if that case controlled this court, the ruling of the circuit court could be supported. It is said, however, that we are not bound by the decisions of the supreme judicial court of Massachusetts on a question of this character, and such is the settled rule. Especially, matters arising out of the transportation of goods and passengers are so largely of an interstate character, as is this at bar, that uniformity of decision in the federal courts

becomes necessary; and this could not be accomplished if conclusive effect were given locally to local decisions, which, on questions of this nature, are often conflicting. Nevertheless, *Doyle v. Railroad Co.* seems to be governed by the same rules as those laid down by the supreme court.

The plaintiff claimed to go to the jury on the following alleged facts: Being in the employment of the defendant, he changed to a new employment, still with the defendant. In connection with the change of employment, he stipulated, not only for an increase of wages, but also for free transportation to Boston from the city where he was to be employed, for his own convenience, and not in connection with going to or from his work. He was injured while on one of these trips to Boston, and while not going to or from his work, and while he was not employed; that is to say, during the hours when he was free for recreation or to visit his family, or to use his time for any purpose of his own. He had received successive passes as each expired, all of them, so far as the case shows, having plainly stamped on the face that they were employes' passes, and on the back a waiver of all claims against the defendant arising from the negligence of its agents "or otherwise," sufficient to cover the case at bar, unless the same is controlled by the rules of public policy, and the decisions of the supreme court with reference thereto. The record does not expressly show that the plaintiff knew what appeared on the back of his passes, but, inasmuch as he had been for a long time an employé, the court would not have been justified in permitting the jury to find, on the evidence, that he did not know it.

The essential question is stated by the defendant as follows: It being established that the contract under which the plaintiff was being transported at the time of his injury was made at his own request, voluntarily, and with full knowledge of its terms and conditions, and it being a contract which the plaintiff was not entitled to receive except by mutual agreement, and which the defendant was not bound to grant except on conditions, does any public policy require it to be declared void? Subject to the caution not to draw from the words "at his own request, voluntarily," any inference contrary to what we have already said, this sufficiently explains the issue which the case raises. The question thus stated is on all fours with that answered in *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535. It there appeared that Stevens was the owner of a patented car coupler, for the option and use of which the corporation, which was the plaintiff in error, was negotiating; that he went, at its request and expense, to a point on its railroad, to see one of its officers in reference to this matter, and a free pass was granted him; that the pass contained an indorsement, which for present purposes was substantially to the same effect as that on the pass in the case at bar; and that Stevens testified that he put the pass into his pocket without looking at the indorsement. There was a special finding that he did not know what was indorsed on the pass, but the conclusions of the court were made independently of this. It found, at page 658, 95 U. S., and page 536, 24 L. Ed., that the transportation of the plaintiff, although not paid for in money, was not

a matter of charity or gratuity, but was by virtue of an agreement in which the mutual interests of both parties were consulted; that the matter of mutual interest was a part of the consideration which the plaintiff consented to; that giving him a free pass did not alter the nature of the transaction; that the pass was a mere ticket to be shown to the conductor as evidence of his right to be transported; that it was not evidence of any contract that the plaintiff was to assume all the risks; and, what is the pith of the decision as applied to the case at bar, as appears at page 659, 95 U. S., and page 536, 24 L. Ed., that it would not have been valid if it had been. On page 660, 95 U. S., and page 536, 24 L. Ed., the court laid aside all question whether or not Stevens knew of the condition on the back of the pass, and said:

"But we have already shown that the carrying of the plaintiff from Portland to Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent to the defendant, as a common carrier, to stipulate for the immunities expressed on the back of the pass." "The defendant, being, by the very nature of the transaction, a common carrier for hire, cannot set up as against the plaintiff, who was a passenger for hire, any such estoppel or agreement as that which is insisted upon."

It is not necessary to examine at length the other decisions of the supreme court which are usually cited on this class of questions. It is sufficient to say that that court has firmly adhered to the rule of *Railway Co. v. Stevens*, both with reference to passengers and goods. It has not, however, passed directly on the question whether or not a carrier can lawfully stipulate for a release from the negligence of itself or its servants, with a person traveling on an absolutely free passage. In *Railroad Co. v. Derby*, 14 How. 468, 486, 14 L. Ed. 502, and in *The New World v. King*, 16 How. 469, 474, 14 L. Ed. 1019, the court held that the assumption of the custody of the person of one traveling gratuitously was sufficient to impose upon the carrier liability for the greatest diligence as to his safety. In those cases there was no stipulation against liability. In *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and in *Railroad Co. v. Reeder*, 170 U. S. 530, 18 Sup. Ct. 705, 42 L. Ed. 1134, it applied the rule of public policy to persons accompanying cattle on freight trains, although in the latter case it recognized the fact which we explained in *Railroad Co. v. Nichols*, 29 C. C. A. 500, 85 Fed. 945, 948, that a person traveling under those circumstances impliedly subjects himself to certain risks necessarily incident to freight trains and not incident to passenger trains, and that it might not be unreasonable to require him to specially stipulate accordingly. In *Railway Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, Adv. S. U. S. 385, 44 L. Ed. —, the court held that stipulations between an express company and a railway company by which a messenger should release the railway company from liability for negligence might be valid; but the case is entirely exceptional, because the court had already decided, in *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, that railway companies are not required by usage or by the common law to transport the traffic of an express company in the manner in which

such traffic is usually carried. Therefore it followed that an express company, in negotiating with a railway company for itself, its merchandise and employes, does not stand on the common public right, but only on such special contracts as the two parties may voluntarily enter into. Moreover, it appeared to the court that a messenger of an express company is not qua passenger, more than a vendor of petty articles on railway trains. Without analyzing the case further, it is clearly exceptional, and it in no manner impugns in the slightest degree *Railway Co. v. Stevens*, as is made especially plain by the reference to the latter case, at page 505, 176 U. S., page 387, 20 Sup. Ct., and page —, 44 L. Ed.

The defendant urges on us the fact that the plaintiff had been previously in the employment of the defendant; but we are unable to see the pertinency of this, except so far as it would justify the court in assuming that the plaintiff knew the conditions indorsed on his pass. Whatever may have been his prior contract with the defendant, it is clear that, on the case as presented in this record, he was entitled to go to the jury on the proposition that the contract which controlled the parties at the time of his injury was new and independent.

Our attention has also been called to various cases relating to the liability of carriers to employes when passing between their homes and their places of labor. The supreme court has never passed on this particular phase; but it clearly raises an essentially different question from that at bar, because there is no injustice or legal inconsistency in holding that under some circumstances the going to or returning from work is, in the eyes of the law, an incident to the employment, if not a part thereof. As we have already said, the proofs on which the plaintiff was entitled to go to the jury entirely relieve the case of any proposition of this character. As in *Railway Co. v. Stevens*, he was at the time of his injury traveling in a passenger train, under a special arrangement which raised a valid consideration, and at a time and in relation to a matter which in no manner concerned his employment by the defendant. The only apparent difference in any particular is that the plaintiff was not traveling on an errand in which both parties were mutually interested, as *Stevens* was, but exclusively for his own purposes, precisely like any ordinary passenger. This difference tends to make his case clearer.

It is urged that the plaintiff was not paying his fare in money, and that he did not stand as one of the public ordinarily stands, in dealing with carriers, because his carriage was a part of an entire contract covering several elements, so that, therefore, both he and the defendant were at liberty to stipulate for such conditions as they might mutually agree upon. In this particular, however, the case of *Railway Co. v. Stevens* is essentially in point against the defendant. The defendant also urges that the line of reasoning in *Railroad Co. v. Lockwood*, which led to the conclusions of the court, embraces several propositions, among which are that of the general public interest in the safe carriage of persons, and that the imposition of conditions by a carrier amounts to an abdication of the essential duties of his employment; and it also presents other references to *Railroad*

Co. v. Lockwood, for the purpose of showing that, under the relations which the parties in the case at bar bear to each other, they were not within the precise reasons which led to the conclusions of the supreme court. We need not, however, follow through this line of argument, because the question is, what is the rule of law? and not, what are the various reasons out of which the rule was developed? These reasons change and fluctuate from time to time with the progress of events, or with the different views of different judges. The rule which governs this case, as we have already said, is expressly stated in *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; and it is so firmly fixed, and has been applied in *Railway Co. v. Stevens* under circumstances so essentially like those at bar that we seem to be controlled by it, and by its application, as the rule and its application have each been determined by the supreme court. Under this rule, and under its application, the plaintiff below was qua passenger at the time of his injury, having given for his passage a valuable consideration, so that public policy will not permit us to enforce the stipulations indorsed on his pass, although he freely assented to them. So far as concerns any moral obligation growing out of those stipulations which it is claimed he now seeks to violate, the defendant must appeal elsewhere than to courts of law.

The judgment of the circuit court is reversed, and the case is remanded to that court, with directions to set aside the verdict and proceed thereupon in accordance with law; and the costs of this court are awarded to the plaintiff in error.

PROVIDENT SAVINGS LIFE ASSUR. SOC. OF NEW YORK v. HADLEY.

(Circuit Court of Appeals, First Circuit. April 24, 1900.)

No. 235.

1. INSURANCE—CONSTRUCTION OF POLICY—CONFLICT OF LAWS.

In an application for life insurance, made by a citizen of Massachusetts in the state of New York, the question, "State here the exact kind of policy or policies desired," was answered, "Twenty-year endowment bond." Thereafter the insurance company forwarded to the applicant, at his home, in Massachusetts, five bond policies, of \$5,000 each, and requested him to send his check for the premium "if, after inspection, they were found in all respects satisfactory," which he did. The application provided that the insurance applied for should not become binding upon the company until the first premium thereon had been actually received. *Held*, that as the acts of approval, acceptance, and payment were performed in Massachusetts, the policies were Massachusetts contracts.

2. SAME.

Where the rights of parties to a contract are in dispute, and are presented for adjudication in the state where the contract was closed, the controversy is to be determined according to the law of that state.

3. SAME—APPLICATION AS PART OF POLICY—STATE STATUTE.

Under Acts Mass. 1894, c. 522, § 73, declaring that every policy which contains a reference to the application for insurance must have attached thereto a correct copy of the application, and that unless so attached it shall not be treated as a part of the policy, the application will not be allowed to go to the jury, in an action on a policy to which the applica-

tion is not attached, where the policy was approved and accepted, and the premium paid, by the insured in Massachusetts, though the application therefor was made in the state of New York.

4. SAME—FALSE REPRESENTATIONS IN APPLICATION—MATERIALITY—QUESTION FOR JURY.

Where, under the law, an application for life insurance cannot be treated as a part of the policy, and for that reason is not submitted to the jury, but the application is permitted to be used in evidence for the purpose of showing the representations made by the insured, and as bearing upon the question whether the company was influenced to enter into the contract by false and material representations, the materiality of the alleged misrepresentations and false statements is a question for the jury.

5. INSTRUCTIONS TO JURY—JUDGE'S EXPRESSION OF OPINION ON EVIDENCE.

In charging the jury, in an action on a policy of life insurance, upon the question whether the insurance company was influenced to enter into the contract by false and material representations, the court said: "It is difficult for me to see that it is material. Perhaps it will be difficult for you to see that it is. But this is not for me to pass upon, but for you." *Held* that, the judge's right to interfere with the finding of the jury upon such question being expressly renounced in the charge, the expression of the judge's opinion was without prejudice.

6. INSURANCE—APPLICATION—FALSE REPRESENTATIONS—MATERIALITY—QUESTION FOR JURY.

Where an application for life insurance cannot be considered a part of the contract for insurance, because it is not attached to the policy, and there is therefore no warranty in respect to the questions and answers contained therein, but it is sought to avoid the policy because of false representations, which it is alleged formed an inducement to the contract, the question whether the material and substantial facts shown by the evidence are sufficient to show the representations to be materially untrue, and whether the facts are so far inconsistent with the representations relied upon as to establish a material misrepresentation, are questions for the jury.

7. SAME—INSTRUCTIONS TO JURY.

Upon the question whether the representations in an application for insurance that the applicant had never used spirituous liquors to excess were in substance untrue, the court instructed the jury that it is not sufficient to avoid the policy to prove a single case of excess, merely, nor a case of overindulgence thoughtlessly in one, two, or three instances. *Held* that, the instruction being simply explanatory of the measure of proof in respect to the question of a substantial variance between the conditions shown by the evidence and those shown by the answers, there was no error.

8. SAME—TIME LIMIT UPON EVIDENCE—DISCRETION OF COURT—REVIEW.

Where it is sought to avoid a policy of life insurance upon the ground of the falsity of the representation of the assured, in his application, that he had never used intoxicating liquors to excess, a reasonable time limit may be made by the court, within which the inquiry into the falsity of the representation is to be confined, and the determination of such limit involves a discretion which is not ordinarily subject to review.

9. SAME—STATEMENTS MADE CARELESSLY—INSTRUCTIONS TO JURY.

An application for life insurance represented that the applicant had never been engaged in the liquor business. In an action upon the policy it appeared that, at a period eight or ten years before the making of the application, the insured had owned and operated a drug establishment, and that, as an incident to the business, liquors were sold in the way liquors are usually sold in such establishments. In respect to such misrepresentation the court instructed the jury "that the mere fact that a statement which was not true is made is far from making out a defense upon this point. The answer might have been made carelessly." *Held*, that since the charge of the court elsewhere clearly pointed out the differ-

ence between material and immaterial representations, and the rules of law applicable to each, and informed the jury that any apparent departure from such rules in the expressions of the court should be disregarded, the instruction, if erroneous, was without prejudice.

In Error to the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 90 Fed. 390.

Robert M. Morse (William T. Gilbert and Thomas F. Desmond, on the brief), for plaintiff in error.

Alfred Henenway (Arthur J. Selfridge, on the brief), for defendant in error.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

ALDRICH, District Judge. Hadley, to whom the five \$5,000 20-year life insurance bonds in suit were issued, was a citizen of Massachusetts, and on the 2d day of January, 1897, being in New York, applied to the Provident Savings Life Assurance Society of New York for insurance upon his life, and the insurance described in his application as that desired was \$25,000. Among the printed questions in the application addressed to the applicant was the following: "State here the exact kind of policy or policies desired." To this Hadley answered: "Twenty-year endowment bond." Parts 1, 2, and 3, the usual forms of application used by that company, were filled out and executed; and in the usual course of the business the applicant was examined, and informed that he had passed the medical department. The first premium was not paid, but it was understood that the 20-year endowment bond was to be filled out and forwarded to Hadley at his home, in New Bedford, Mass. Thus the matter stood until January 9, 1897, when the secretary of the company inclosed the five policies, of \$5,000 each, which are in suit, saying:

"Enclosed we hand you bond policies numbers 80,932-3-4-5-6, on your life, aggregating in amount \$25,000, in accordance with your application made a few days ago at this office. We have been obliged to issue this insurance in separate policies, for the reason that our bonds are engraved only in amounts of one thousand dollars or five thousand dollars. * * * If, after inspection, they are found in all respects satisfactory, please send check for \$847.50, the total of the five semiannual installments of \$169.50 each."

The question as to the place of contract,—whether New York or Massachusetts,—and the question whether the New York or the Massachusetts law should govern the contract, were very elaborately and ably discussed by counsel at the arguments; but it seems to us, after all, that the problem presented may be solved upon simple grounds, and that we need not determine whether the variance between the application executed in New York, which called for a single \$25,000 "twenty-year endowment bond" as "the exact kind of policy * * * desired," and the five \$5,000 endowment bonds finally delivered in Massachusetts, was of sufficient substance to operate, in and of itself, to open what had been done in New York, and to carry the act of final completion to Massachusetts, for the simple reason that the company, in its communication through its secretary, who, it must be presumed,

acted upon authority, treated the contract as incomplete, and left its approval and acceptance and completion at the option of the party in whose favor the five \$5,000 policies were written, thus leaving the final act of acceptance and payment to be performed in Massachusetts. While the general plan of insurance offered by the company in New York was accepted, the particular and literal form finally offered for approval and acceptance in Massachusetts, and the particular form which became the contract, was neither offered nor accepted in New York, nor until the particular form was received in Massachusetts on January 9, 1897, which was subsequently accepted and paid for in that state. So we have no hesitation in saying there was no error at the trial in treating the contract as a Massachusetts contract. It is true that Hadley made no point of the variance, and that he subsequently forwarded a check for the amount in question. Nevertheless the new condition involved in the different kind of policies was submitted to him for his rejection or approval and acceptance, and, that having been done, it is quite immaterial whether the option was acted upon one way or the other. It is not a question as to how he acted, but whether something was left open to be acted upon. Moreover, quite aside from the question whether, by reason of the fact that the application was not attached to the policy, it is or is not to be treated as a part of the final contract, the statements which it contains may be considered upon the question whether the contract was a complete and binding contract in New York on the 2d of January, 1897, or whether it was incomplete and not binding until the final act of approval and acceptance and payment in Massachusetts on some day subsequent to January 9, 1897; and it is expressly provided in part 1 of the application that the insurance applied for shall not become binding upon the society until the first premium thereon has been actually received by said society, and as the act of payment, as well as the act of approval and acceptance, was performed in Massachusetts, the policy must be deemed to be a Massachusetts contract. *Society v. Clements*, 140 U. S. 226, 232, 11 Sup. Ct. 822, 35 L. Ed. 497; *Insurance Co. v. Robinson* (C. C.) 54 Fed. 580, 583.

The question whether the rights of the parties should be administered under New York law or under Massachusetts law is deemed material by the parties, for the reason that the New York law is supposed to be less favorable to the policy holder than that of Massachusetts; but we understand it to be well settled that where rights are in dispute, and are being adjudicated in the state where the contract is closed, such dispute is to be determined according to the law of that state. The conditions upon which a given state may permit insurance companies to do business therein may properly enough become a part of the public policy of such state. And the supreme court of Massachusetts has frequently and recently upheld and sustained the legislative policy of Massachusetts as declared in respect to regulating the conditions under which insurance companies shall do business in that state. *Nugent v. Association*, 172 Mass. 278, 280, 283, 52 N. E. 440; *Considine v. Insurance Co.*, 165 Mass. 462, 43 N. E. 201. The statutes of Massachusetts (Acts 1894, c. 522, § 73) declare that every policy which contains a reference to the application for insurance must

have attached thereto a correct copy of the application, and that unless the application is attached it shall not be treated as a part of the policy. This statute is sustained by the authorities cited, as well as others. Similar statutes in other states have been sustained, but with that we have nothing to do here. It is quite sufficient to ascertain the law of Massachusetts on the subject, and whether this court, sitting in Massachusetts and enforcing a Massachusetts contract, should be governed by the law of that state; and as to this proposition the law seems to be well settled that the Massachusetts statute, as interpreted by the highest court of that state in respect to a question of this kind, should govern. *Fairfield v. Gallatin Co.*, 100 U. S. 47, 25 L. Ed. 544; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008; *McElvaine v. Brush*, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; *Merchants' & Manufacturers' Nat. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; *Wilson v. North Carolina*, 169 U. S. 586, 592, 18 Sup. Ct. 435, 42 L. Ed. 865. Therefore there was no error below in directing the trial upon the lines of a Massachusetts contract and of the Massachusetts law. The case of *Nugent v. Association*, 172 Mass. 278, 280, 281, 52 N. E. 440, and other Massachusetts cases, certainly go to the extent of treating the application as no part of the contract where it is not attached to the policy as required by the statutes. The Massachusetts statute neither discriminates in favor of Massachusetts insurance companies, nor against foreign insurance companies, but is sweeping in its provision that every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and, unless so attached, the same shall not be considered a part of the policy. In view of this statute and the Massachusetts decisions, we have no hesitation in holding that it applies to any insurance contract which, under the circumstances of the case in question, is an insurance contract which was entered into in Massachusetts, and that, in accordance with the judicially interpreted statutes of Massachusetts, the court below properly refused to submit the application to the jury as a part of the contract, and as containing warranties. Yet, notwithstanding the fact that the application was not treated as a part of the contract, the circuit court, under the common-law rule, permitted the application to be used in evidence by the company, not as a part of the policy or as an application, but as showing representations made by Hadley, and as bearing upon the issue whether the insurance company was influenced to enter into the contract by false and material misrepresentations, of a character intended to deceive. The plaintiff below maintains in argument here that under the statutes of Massachusetts, and *Considine v. Insurance Co.*, 165 Mass. 462, 43 N. E. 201, *Boyd v. Association*, 167 Mass. 242, 45 N. E. 735, and *Nugent v. Association*, 172 Mass. 278, 281, 52 N. E. 440, the application, not having been attached to the policy, was inadmissible as evidence for any purpose whatever, and therefore that the defendant below had no right to introduce it for the purpose of showing what was said by the insured. We do not pass upon the question whether the statutes or the decisions of the state court should control us upon a question of evidence and a common-law defense like the one in question, for the reason that the

verdict was for the plaintiff below, and no exception presents this question for review. Therefore, without deciding the question, but assuming, as we must for the purposes of this case, that the defense in this respect was properly entertained, and the evidence thereon properly admitted, we will consider the questions which are presented. The questions come from the defendant below, and the exceptions are based—First, upon the ground that the application should have been admitted as a part of the contract; and, second, when used to show misrepresentations, that the question of the materiality of the statements in the application was for the court, rather than the jury. We have passed upon the first, and, as to the second, it was contended in argument for the insurance company, in accordance with the exception, that the question whether the alleged misrepresentations contained in the application were material was a question for the court, rather than the jury; but the cases cited in support of this position were based upon the idea that the court submitted to the jury the materiality of questions which the parties themselves, by the express terms of a contract, of which the application was a part, had determined to be material. Such cases are quite aside from the issue presented by the situation here, which results from the fact that the statute excludes from the contract the application which contains the alleged misrepresentations. So, in this view, the case presents the policy alone as the contract, and the issue is whether it should be avoided on the common-law ground of misrepresentation; and, under such an issue, we think the court properly left the question of the materiality of the alleged misrepresentations and false statements to the jury. *Campbell v. Insurance Co.*, 98 Mass. 381, 396.

We now come to the question whether there was error in the instructions to the jury upon this issue. Counsel urge with great seriousness and with energy that the defendant was prejudiced by reason of the instructions to the jury thereon; and the particular point is that the court, in submitting the question to the jury, remarked: "It is difficult for me to see that it is material. Perhaps it will be difficult for you to see that it is." But it must be said that in connection with this remark the learned judge said, "But this is not for me to pass upon, but for you." It is urged on the other side that it is established by repeated decisions that a court of the United States, in submitting a case to the jury, may, at its discretion, express its opinion upon the facts. We do not understand that the courts of the United States possess any peculiar right to express opinions upon facts submitted to the jury which, in the absence of restricting statutes, is not possessed by other courts. It is true, however, that there are cases which hold that an expression of an opinion by the judge upon the facts is not error which will disturb the verdict; but it will be found that such cases are generally put upon the ground that the judge ultimately left the question to the jury, and distinctly reminded the jurors that the question was, after all, a question to be decided by them upon their own responsibility. The decisions are not grounded upon the right or propriety of the expression, but, rather, upon the ground that the judge immediately renounced his right to interfere with the findings upon the *questions of fact* submitted to the jury, and that therefore the jury was

not influenced, or the parties prejudiced. So it would seem that the learned judge in this instance, if any error was committed, immediately rectified it, thus bringing himself within the line of the decisions applying to such a situation.

The questions attended with the most difficulty are those which relate to the instructions given with reference to the statement of the applicant that he had never been engaged in the sale of spirituous or intoxicating liquors, wherein the jury was told that the answers might have been carelessly made, and upon the other point, with reference to the question whether the applicant had ever used spirits, wine, or malt liquor to excess, where the jury was told, in effect, that the alleged excessive use of intoxicating liquors disclosed by the evidence might have been the result of thoughtless overindulgence. This point stands quite differently from the point just considered, which was directed against the expressions which it is claimed were expressions of an opinion by the judge upon the facts. One stands upon the ground that the court, having qualified the remark, charged upon the jury the entire responsibility of finding the facts, and that the defendant therefore was not prejudiced, while in the other instances, and those now under consideration, the court, in submitting the questions to the jury, gave them a rule of law under which they were to exercise and discharge the responsibility of finding the facts; and the inquiry is whether the jury were given too much latitude with respect to the questions which they were to decide. In the consideration of the questions with which we are now dealing, we must keep in mind that the contractual rights of the parties reside solely in the insurance bonds, and that all considerations of warranties in respect to the questions and answers contained in the application are out of the case, and that, while the paper which was called an "application" was used before the jury, it was used, not because it was an application, but because it was a paper which contained certain statements which it is claimed were material statements which induced the company to enter into the contract, and that such material representations were misstatements of fact. So it will be seen that the question was one, generally speaking, of avoiding a contract, upon common-law lines, on the ground of misstatement, and quite aside from a case with the usual warranties, and the consequences that follow the usual conditions which exist in life insurance contracts when the application is accepted and treated as a part thereof. But it was not a contract where the parties had equal information as to the subject-matter thereof. It was a contract where, from the particular conditions, one must rely on the other for his knowledge of the facts, and where the other is bound to diligence, care, thoughtfulness, and good faith in respect to his information. Therefore it comes within that exceptional class of contracts termed "*uberrimæ fidei*," where the rules in respect to avoidance on the ground of misstatement are different and more rigorous than those governing where the parties stand upon the same ground with respect to information. It has been said by a modern text writer, in respect to contracts of this kind, that a misrepresentation made recklessly or carelessly, and without caring whether it be true

or false, is fraudulent. Of course, this must be subject to the qualification that the misrepresentation must have been material, and must have been acted upon by the other party. It has also been said that, to the general rule that misrepresentations not amounting to fraud, and not forming a term of the contract, do not affect its validity, there are exceptions in cases of certain special contracts, sometimes said to be *uberrimæ fidei*, where the most perfect good faith is required. Lord Herschel, in *Derry v. Peek*, 14 App. Cas. 337, points out a distinction between actions of deceit, where fraudulent misrepresentation must be shown in order to recover, and actions for rescission of a contract on the ground of misrepresentation of a material fact. In the first instance the representations must be known to be false, while in the other contracts induced by statements made recklessly cannot stand. It is said that a distinction exists in England between life insurance contracts and fire insurance contracts, in respect to a question of this kind, but it would seem that there is no such distinction recognized in this country. The early case of *McLanahan v. Insurance Co.*, 1 Pet. 170, 186, discusses the attitude of the insured; and the situation is treated as calling for "due and reasonable diligence in cases of this nature," and it is said what constitutes this "is principally matter of fact for the consideration of a jury." In *Vose v. Insurance Co.*, 6 Cush. 42, 48, it is said that, where there is no warranty, an untrue allegation of a material fact, or the concealment of a material fact, will avoid the policy, though such allegation or concealment be the result of negligence, and not of design. In *Campbell v. Insurance Co.*, 98 Mass. 381, 389-391, it is demonstrated that the warranty in insurance enters into and becomes a part of the contract, although the representation is in its nature no part of the contract, and may be proved, though existing only in parol, and preceding the written instrument. It is also there said that this principle is in some respects peculiar to insurance, and that the representations of the insured on or before the time of making the contract are a presentation of the elements on which to estimate the risk proposed to be assumed, and that they are the basis of the contract,—its foundation,—on the faith of which it is entered into; and it is said in that case (at page 396) that an instruction that an untrue statement innocently made would not avoid the policy, as a general statement of the law applicable to representations in insurance contracts, was too liberal and erroneous, but (at page 395) that it was a question for the jury to determine, under instructions, whether the facts which appeared in evidence were so far inconsistent with the representations made as to establish a material misrepresentation. So it would seem that the question becomes a question for the jury whether the material and substantial facts shown by the evidence are sufficient to show the representations to be materially untrue, and that it may, in a given case, become a question whether the facts are so far inconsistent with the representations relied upon as to establish a material misrepresentation, and this would likewise be a question for the jury. In the case last mentioned it was said, in substance, that to instruct that statements innocently made would not avoid the contract on the

ground of misrepresentations was, in effect, giving the jury too great latitude in that respect, for the question is not whether the answers were made innocently, but it is for the jury to determine, upon the evidence, and in view of all the circumstances, whether the representations in the answers to the inquiries varied from the truth in any respect material to the risk, and that it was for the jury to judge, "not only of the fact of variance, but of its extent and materiality." When that case was before the court upon a subsequent hearing, Mr. Justice Gray, in speaking for the court (at page 401), treats the representations as apart from the warranties, to be determined, not upon the ground whether they were innocently or ignorantly made, but whether, in view of the evidence, they were substantially and materially untrue, and, if so, they avoided the policy, though they were made ignorantly and in good faith. In the case at bar the circuit court submitted to the jury, under instructions, the question whether the misrepresentations were material to the risk, but did not submit the question whether the evidence disclosed conditions so substantially different from the representations as to enhance the risk; but to this there was no exception.

One of the exceptions to be determined upon the lines of the foregoing general observations was taken to the expression:

"I must instruct you that it is not sufficient to prove a single case of excess, merely,—not sufficient to prove a case of overindulgence thoughtlessly in one, two, or three instances."

This was said to the jury, and related to the question whether the representations that the insured had never used spirituous liquors to excess were, in substance, untrue, in the sense of the contract; and in this we can find no substantial error. It was simply explanatory of the measure of proof in respect to the question whether there was any substantial variance between the conditions shown by the evidence and the conditions disclosed by the answers; and, taking this together with the other instructions on the subject, the jury was, in effect, instructed that it was not sufficient to show a single case of excess, merely,—not sufficient to prove a case of overindulgence thoughtlessly in one, two, or three instances. In substance, it was saying that the expression "excess" was used in the sense of a condition increasing the insurance risk, and should be interpreted in a broader sense than a single indulgence, and as directed against a habit, or, at least, a condition, which, as a matter of fact, was of sufficient substance to increase and enhance the risk, within the contemplation of the parties. This was simply giving the jury an opportunity to determine the substance of the issue,—in other words, to determine whether the conditions shown by the evidence were, in the sense of the contract, substantially and materially at variance with the representations upon which the contract was made. Moreover, the instructions on this branch of the case were sufficiently favorable to the insurance company; for the jury was told to consider, first, whether or not the statements to which the counsel called attention were material to the risk, in the way explained, and whether they were untrue, and then to consider whether the defendant relied upon such statements as were found to be material to the

risk, and whether, if relied on, they were inducements to the issuing of the policies,—not the sole inducement, not the entire inducement, but if, among other things, they were a substantial inducement, contributing to the result which brought about their issue,—and that, if these things all concurred, then the verdict must be for the defendant, whether there was an intention on the part of Hadley to deceive or not, and independently of any such intention.

The point is also taken that the time limit upon the evidence, except that of a general character, tending to show that the insured was guilty of excessive use of intoxicating liquor to the period subsequent to 1886, was not warranted. This point is based upon the same alleged representations in the application, and which were as follows: "Have you ever used spirits, wine, or malt liquor? Ans. Yes. Have you ever used them to excess? Ans. No." It is probable that the court below, acting upon the idea that the application was not a part of the contract, determined the question of time limit upon the ordinary rules as to remoteness. Ordinarily the question of remoteness in respect to a situation of this kind would be a question for the court to determine at the trial, and not a question subject to review; but the particular question presented is whether the expression, "never used liquor to excess," places a limitation upon the rule which would otherwise obtain as to the exercise of discretion by a trial judge in respect to the question of remoteness. It must be assumed that this question of remoteness was determined at the trial with reference to the idea that the actual conditions to be shown, as varying from the representations upon which the company relied, must present matter which would have substantially and materially enhanced the risk at the time of the contract. So it was for the court to say, within reasonable limits, what conditions would fairly tend to show this, and what were too remote in point of time. Although the general expression, whether he had ever indulged excessively, literally carries it, in point of time, to his childhood, it is not reasonable that such scope should be given in a trial where the issue is whether the conditions actually existing at the time of the contract were so far at variance with the statements actually made as to have substantially and materially enhanced the risk. To take an extreme for purposes of illustration, it is manifest that no one would contend that the scope of the evidence should go back to and include the day of the insured's birth, although literally the question and the answer carry it there. So it follows that a reasonable time limit, which should comprehend the substantial and material conditions embodied in the contract, may and should be made; and the determination of a question of remoteness of this kind involves discretion ordinarily exercised at the trial, and a discretion ordinarily not subject to review.

The other instruction or remark to the jury to which exception was taken is this:

"You must bear in mind that the mere fact that a statement which was not true is made is far from making out a defense upon this point. The answer might have been made carelessly."

As to this point, we are unanimous in the conclusion that the remark, under the circumstances of this particular case, should not disturb the verdict; but, while we all agree as to the result in this respect, we do not base our conclusions upon the same ground. I cannot avoid the conclusion that this was, in substance, saying to the jury, on this point, that the insured would be relieved from the consequences of misrepresentation if it was done negligently, thoughtlessly, or carelessly, while the rule would at least require that the party should act with reasonable care and diligence and thoughtfulness in respect to information upon which the other contracting party is expected to act. It is claimed on one hand that this remark was qualified by what followed, where it is said, "If made incidentally, if made without reckless intent, if made through mere oversight, where it is not material to the risk, it would not answer to establish the defense," while on the other hand it is insisted that, instead of qualifying, this emphasized what had been said before, in that it minimized the issue of materiality which was being submitted to the jury, by characterizing the statement as one which would not amount to a defense, even if untrue, if made incidentally, without reckless intent, or through oversight, where it is not material to the risk. On the whole, taking all the instructions together, I cannot view them otherwise than as leaving the impression upon the jury that if the answers were made carelessly or through oversight, but without reckless intent, the policy should not be avoided. I think the instructions on this point may have given the jury to understand that, at least, as to matters which the insured deemed immaterial, relief might be granted on the ground that he acted carelessly or indifferently. This, I think, gave the jury too great latitude in this direction. It is true, it does not follow that, because a representation is not literally true, the policy is avoided, but, at least, care and diligence and thoughtfulness should be exercised in making the answers; and then it becomes a question of fact for the jury whether the representations induced the contract, whether they were material, and whether the conditions shown are substantially and materially at variance therewith, and whether answering them in accordance with the conditions shown by the evidence would have increased the risk in the estimation of the insurance company, and whether, as a matter of fact, such conditions did increase the risk. I do not say that a party who has innocently and honestly, but ignorantly, stated that he has no disease, when in fact he has consumption, would not be relieved, under some circumstances, if killed by the cars, and not by consumption; or, if one is in honest doubt whether a certain condition is a disease, and, on the whole, thinks it is not, and if such condition turns out to be disease, but a disease which does not contribute to the loss of life, that it may not become a question for the jury, under certain circumstances, and under proper instruction, whether it was a material misstatement, within the meaning of the contract. I do not say whether the party may or may not be relieved, on the ground of mistake or reasonable care, from material misstatements about conditions which do not contribute to the loss; but I do say, as to statements of even

doubtful materiality, the party, under such circumstances, should exercise reasonable care and thoughtfulness in respect to his statements, and should not be relieved on the ground that he answered carelessly. In this case the question of materiality involved in such situation was treated as of such a character and of such importance as to entitle the parties to go to the jury upon the question whether or not the statements were material misstatements; and, under the instructions, the jury, if finding the statements material misstatements, might have acted upon the idea that the plaintiff could be relieved from the consequences thereof on the ground that the insured deemed the questions immaterial, and answered them carelessly or incidentally. When the case is not one of warranties, but of alleged misrepresentations, the question, after all, is whether the actual conditions were materially and substantially different from the statements made, and whether the statements influenced the contract; and this means, of course, that the conditions shown by the evidence to exist must be such as materially and substantially to enhance the actual risk beyond that represented by the statements upon which the company acted, and these are questions for the jury under instructions. But, when such conditions are found by the jury to exist, a beneficiary plaintiff cannot be relieved upon the ground that the insured deemed the statements immaterial, and made them carelessly. So it follows that the expression that the answer may have been made carelessly was, in the abstract, erroneous. On the whole, as said, I must accept the remark as, in the abstract, erroneous. Still I hold to the view that the error was harmless, and should be treated as harmless error, not prejudicing the insurance company, and for that reason not to be accepted as a sufficient ground for disturbing the verdict. This is so for the reason that it is more than difficult, it is even impossible, for me to see, in view of the full instructions, which were quite sufficiently favorable to the defendant, on the other branch of the case,—upon the more serious question as to the excessive use of intoxicating liquor, which involved a reasonable and substantial question for the jury, and upon which the jury found for the plaintiff,—that the company could have been prejudiced on this branch, or the jury influenced by the remark to reach a result which it would not have otherwise reached. It is impossible for me to see that the company could have been prejudiced by this inadvertent remark in relation to a statement in the application in respect to an inconsequential condition, which it is difficult to see could in a substantial and material manner have enhanced or affected the risk. This remark related to the statement by the insured that he had never been engaged in the liquor business. The insured, who at the time of the policy was a manufacturer of cotton yarns, at a period eight or ten years before had owned and operated a drug establishment; and, as an incident to the business, liquors were sold in the way liquors are usually sold at such establishments. It is impossible, as said, to see that such business conditions, which ceased so long before the contract, could in a substantial and material way have enhanced the risk; and it is difficult to see that in a case of alleged misrepresentation, not warranties, a verdict against

an insured, based upon such evidence or conditions as showing substantial and material misrepresentations, should not be set aside on the ground that it was against the evidence. Suppose this question had been answered: "Yes; as a druggist, according to the usual course of such establishments. But my connection with that concern ceased more than ten years ago;" is it reasonable to suppose that the insurance company would have refused the risk for that reason? While the representation was literally untrue, it is difficult to see that it varied from the truth in any respect material to the risk. The insured may have honestly interpreted the question in accordance with a somewhat common acceptance of the meaning of such an expression as personal liquor business over a bar, yet, after all, it is not a question of literal truth or of honest misinterpretation, but one of substance. As said in *Campbell v. Insurance Co.*, 98 Mass. 381, 401, the representations need not be literally true, but substantially true in all respects material to the risk to be assumed. So I say that in this respect the variance between the conditions proven and the answers made was not of sufficient substance to become the subject of reversible error by the inadvertent remark to which exception was taken.

COLT, Circuit Judge. In my view, the ruling that the contract was a Massachusetts contract, and was to be controlled by the law of that state, was without error, and the rulings on evidence were correct. When the judge, in his charge to the jury, came to the contract, his instructions on the distinction, in contracts of insurance, between warranties and representations, were without error, and clearly pointed out the difference between material and immaterial representations, and the rules of law applicable to each kind. It was sufficiently impressed on the jurors that, regardless of any expression of opinion by him on matters of fact, all such matters were exclusively for them to consider and decide. If it be admitted that, later in the charge, in the endeavor to illustrate the rules given, he fell into apparent errors of expression, it is still true that at the close of his instructions the true and correct rules were repeated, and it was distinctly told to the jurors that any apparent departures from these final statements so repeated, if there were any, should be disregarded, as unintentional and inadvertent expressions. The first and the last impressions of the charge were right, and nowhere was anything said to withdraw or negative them. So I concur in the result reached by Judge ALDRICH, though not in all respects adopting his reasoning.

WEBB, District Judge. I concur with Judge COLT.

The judgment of the circuit court is affirmed, with interest, and the defendant in error recovers her costs in this court.

In re MYERS.

(District Court, E. D. Pennsylvania. June 8, 1900.)

No. 227.

1. BANKRUPTCY—LANDLORD'S LIEN FOR RENT—PROCEEDS OF LIQUOR LICENSE.

Under the laws of Pennsylvania (Act June 16, 1836; P. L. 777), which give a landlord a lien on goods and chattels being in or upon any messuage and liable to distress of the landlord, a landlord is not entitled to priority of payment of rent due from a bankrupt out of the proceeds of a license to the bankrupt to sell liquors upon the demised premises, such license not being property subject to execution or to distress under the laws of the state.

2. SAME—EXEMPTIONS OF BANKRUPT—PENNSYLVANIA STATUTE.

A license to sell liquors not being property subject to seizure and sale on execution under the laws of Pennsylvania, a bankrupt resident in that state is not entitled to claim the amount of his statutory exemption from the proceeds of the sale of such a license held by him, under Bankr. Act 1898, § 6, allowing the exemptions prescribed by the state laws, the exemption given by the state statute (Act April 9, 1849; P. L. 533) being only with respect to property subject to levy and sale on execution.

In Bankruptcy. On certificate by referee concerning allowance of landlord's claim for rent, and of the bankrupt's claim for exemption. The opinion of the referee is as follows (MASON, Referee):

The bankrupt filed his petition in bankruptcy July 27, 1899, setting forth in Schedule B6 that he had "a retail liquor license for 40 South Sixth street, Philadelphia, which he is advised is a license personal, and not an asset of his business"; and under Schedule A1(4), other debts having priority, "McDowell estate, care of Guarantee Trust & Safe-Deposit Company," "rent of 40 S. 6th street, \$800"; and under Schedule B5, property claimed to be exempted by state laws, "\$300 worth, under the act of 1849 of Penna."

On September 7, 1899, an appraisal of the bankrupt's estate, consisting of liquors and fixtures at 40 South Sixth street, aggregating \$127 (no valuation being placed upon the license), was made.

On December 15, 1899, the said fixtures and liquors were set apart by the trustee to the bankrupt at the said valuation of \$127, the bankrupt remaining on the premises and continuing the business of retail liquor selling.

Subsequently, the rights of a trustee as to a liquor license having been determined by the court in *Re Becker*, 2 Nat. Bankr. N. 245, 98 Fed. 407, an appraisal of the license was made in the sum of \$1,500, and on February 9, 1900, all the right, title, and interest of the bankrupt in and to a license to sell liquors at retail at 40 South Sixth street, in the city of Philadelphia, was sold by the trustee at public auction for the sum of \$2,700.

On March 19, 1900, the Guarantee Trust & Safe-Deposit Company, trustee under the will of M. E. McDowell, deceased, filed a deposition for proof of its claim for rent in the sum of \$1,150, and subsequently an amendment setting forth the amount due at the time of the filing of the petition in bankruptcy as \$850.

In the first deposition priority of payment from the fund in the hands of the trustee was claimed. This claim has also been urged by counsel at the meeting of creditors held to consider the trustee's account; and the bankrupt has also claimed that out of the moneys, the proceeds of the license, he be allowed the sum of \$173, to make up the amount of his exemption to \$300, as claimed in the schedules.

1. The claim of a landlord to priority of payment was considered in *Re Gerson*, 1 Nat. Bankr. N. 315, and was based upon the provision of the act of assembly of Pennsylvania of June 16, 1836 (P. L. 777), providing that "the goods and chattels being in or upon any messuage," "taken by virtue of an execution and liable to distress of the landlord, shall be liable for the payment

of any sums of money due for rent at the time of taking such goods in execution."

That the license in question constituted such goods and chattels, "liable to distress of the landlord," is a proposition for which no authority has been cited, and which the referee is of the opinion cannot be sustained; and he therefore disallows the claim of priority.

2. As to the bankrupt's claim for a portion of the proceeds of the sale of the license as part of his exemption, it is to be observed that no specific exemption of property (as was provided by the bankruptcy act of 1867) is given by the bankruptcy act of July 1, 1898. The only provision relative to the subject is in section 6, which is as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or a greater portion thereof, immediately preceding the filing of the petition."

By the act of assembly of Pennsylvania of April 9, 1849 (P. L. 533), it is provided that "in lieu of the property now exempt by law from levy and sale on execution issued upon any judgment obtained upon contract and distress for rent, property to the value of \$300, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school books in use in the family (which shall remain exempt as heretofore), and no more, owned by or in possession of any debtor, shall be exempt from levy and sale on execution or by distress for rent."

Provision is made for the appraisement of such property, the setting aside of real estate of this value, or if no division can be made, where the real estate is of greater value than \$300, for the payment out of the proceeds of the sale of the whole.

By the act of April 8, 1859 (P. L. 425), the debtor may elect to retain as exemption "out of any bank notes, money, stocks, judgments or other indebtedness, to such persons." By subsequent acts provisions are made for exemption of sewing machines, pianos, melodeons and organs.

It is obvious therefore that, the exemption given by the first-mentioned act being only with respect to property liable to levy and sale on execution, unless the license in question is such property there can be no exemption thereof under the bankruptcy act. No case determining this precise question has been cited. The nearest analogy would seem to be a patent right, with respect to which it was held by the court of common pleas No. 4 of Philadelphia, in the case of *Harrington v. Cambridge*, 14 Wkly. Notes Cas. 456, that it cannot be taken in execution under fl. fa., Thayer, P. J., saying: "I have never heard of selling a man's right, title, and interest in a patent under a fl. fa. It required an act of assembly to effect the sale of stocks in that manner. The decision of the supreme court of the United States is against the plaintiff. In such a case as this, the decision of that tribunal is of the highest authority."

In *Ager v. Murray* (1881) 105 U. S. 126, 26 L. Ed. 942, where it was held that a patent right might be subjected by a bill in equity to the payment of a judgment debt of the patentee, it was said that, while it might pass by an assignment in bankruptcy, it could not be seized and sold under a fieri facias, Mr. Justice Gray saying (page 129, 105 U. S., and page 943, 26 L. Ed.): "It has been said by an English text-writer that 'a patent right may be seized and sold in execution by the sheriff under a fieri facias, being in the nature of a personal chattel.' Webst. Pat. 23. We are not aware of any instance in which such a course has been judicially approved." "But it is within the general jurisdiction of a court in chancery to assist a judgment creditor to reach and apply to the payment of his debt any property of the judgment debtor which by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment debtor has the entire beneficial interest, of shares in a corporation, or of choses in action."

Another provision of the law of Pennsylvania which seems to come most appropriately under the category of "exemptions which may be prescribed by the state laws" is to be found in the act of assembly of May 4, 1864 (P. L.

762): "Any assignor under whose assignment in trust, for the benefit of creditors, either by general words or particular description, there have been transferred any articles of household furniture, or things of domestic use, may, after the appraisement thereof, apply to the court of common pleas of the proper county, to have set aside, for the use of the said assignor and family, any of the said articles and things, not exceeding in value, at the appraisement thereof, three hundred dollars; and the court may, if no cause be shown to the contrary, after due notice to creditors, order that the same be released from the assigned estate, and handed to the assignor."

As an assignment for the benefit of creditors is the nearest analogy to proceedings in bankruptcy, the exemptions therefrom being thus limited to articles of household furniture or things of domestic use, such exemptions evidently do not embrace the proceeds of the sale of a liquor license.

It is to be remarked that there is not annexed to the word "exemptions" in the act of 1898 the definitive clauses found in the act of March 2, 1867, where, in addition to household and kitchen furniture to the value of \$500, the property excluded was that "exempted from levy and sale upon execution or other process, or order of any court, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864."

While, therefore, the provisions of the act of May 4, 1864, would seem to be peculiarly relative, they are not exclusively definitive of the term "exemptions," which has in the petitions in this judicial district, as the referee believes, been invariably referred to the act of April 9, 1849.

Under the act of 1867, in *Re Bennett* (Sept., 1868) 2 N. B. R. 181 (Quarto, 66), Fed. Cas. No. 1,315; *Re Erben, Id.*,—it was held that under the provisions of the fourteenth section of the bankruptcy law of March 2, 1867, referred to, a vested expectant interest of the bankrupt in a sum of money payable at his own death or at the death of another person may, in Pennsylvania, be set apart for the use of the bankrupt. The interest referred to in *Bennett's Case* was that in the proceeds of the sale of land, one-third of which had been invested to secure a widow's life interest; and in *Erben's Case*, annual premiums on a life insurance, payable to the bankrupt's wife, which the bankrupt had paid after insolvency. Upon the hearing of these cases in court, Cadwalader, J., said that: "In case of a similar expectant interest in corporeal property, which interest could be levied upon and sold on execution, he would have had no doubt of the applicability of the exemption laws of the state. But the expectant interests here in question could not be sold under an execution. They could not be reached by a creditor in a court of the state, otherwise than by way of attachment execution,—a proceeding under which there could be no sale, in the strict sense of the word. In such a case the question of exemption depended, under the act of congress, altogether upon the effect of the legislation of the state, or depended upon the meaning of words, which was to be determined according to the effect attributable to them by the state courts under such legislation. He therefore asked the assistance of two of the judges of the state (Judge Strong, of the supreme court, and Judge Hare, president of the district court of the city and county of Philadelphia), who expressed their concurrent opinion that the interests in question were included in the meaning of the words, "property exempted from levy and sale on execution or other processes or order of the court by the laws of the state," and would be exempted under these laws to an amount not exceeding \$300 in each case.

It appears, however, to have been conceded that these interests might have been reached by an attachment execution, and this has been held to be an execution within the act of 1849. *Strouse's Ex'r v. Becker* (1863) 44 Pa. St. 206.

As, therefore, the property in a liquor license cannot be taken in execution in Pennsylvania, within the purview of the act of 1849, the referee is of the opinion that the bankrupt's claim for this additional exemption must be disallowed.

Clinton O. Mayer, for bankrupt.
David Mandel, Jr., for creditors.

McPHERSON, District Judge. I agree with the learned referee in his disposition of the bankrupt's claim for exemption, and of the landlord's claim to priority. Nothing need be added to the referee's opinion, except the citation of *In re Ulrich*, 6 Pa. Dist. R. 408, in which it was decided by one of the common pleas courts of the state that a license to sell liquor cannot be levied upon and sold by the sheriff; and *Moss' Appeal*, 35 Pa. St. 162, and *Wickey v. Eyster*, 58 Pa. St. 501, in which the supreme court held that the landlord's claim to be paid out of the proceeds of sale depends upon his power to distrain the goods. A license can no more be distrained than taken in execution.

The disallowance of these claims is accordingly approved.

In re MARSHALL PAPER CO.
MARSHALL PAPER CO. v. TRAIN.

(Circuit Court of Appeals, First Circuit. June 7, 1900.)

Nos. 299, 301.

1. BANKRUPTCY—RIGHT TO DISCHARGE—CORPORATIONS.

Under Bankr. Act 1898, a corporation which has been adjudged bankrupt is entitled to a discharge in all respects as an individual bankrupt would be.

2. SAME—GROUNDS FOR REFUSING DISCHARGE.

Under Bankr. Act 1898, § 14b, providing that on an application for a discharge the judge "shall * * * investigate the merits of the application, and discharge the applicant, unless he has" committed some one of certain acts therein enumerated, the refusal to grant a discharge does not rest in the discretion of the judge, but the applicant is entitled to a discharge as a matter of right, unless he is found guilty of some one of the prescribed offenses.

3. SAME—ISSUES ON APPLICATION FOR DISCHARGE.

The right to a discharge and its effect are wholly distinct questions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied on by the debtor as a defense to the enforcement of a particular claim, and that issue cannot properly arise or be considered in determining the right to a discharge.

4. SAME—EFFECT OF DISCHARGE—CORPORATIONS.

The effect of a discharge is to release only the bankrupt's personal liability, and under Bankr. Act 1898, § 16, which provides that "the liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt," the discharge of a corporation bankrupt does not prevent creditors from subsequently taking judgment against it in a state court in such limited form as may enable them to enforce the secondary liability of the directors under the state statute.

Petition for Revision of Proceedings in and Appeal from the District Court of the United States for the District of Massachusetts.

M. F. Dickinson, Jr., and Hollis R. Bailey, for appellant.

George R. Nutter and Edward F. McClennen, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

COLT, Circuit Judge. This appeal and petition relate to two orders or decrees entered by the district court in the matter of the Marshall Paper Company, bankrupt. 95 Fed. 419. The question

raised by the appeal is whether the order of the district court refusing to grant the petitioner a discharge was proper.

The district court based its decision on two grounds: First, it doubted, at least in some cases, whether a corporation was entitled under the act to a discharge; second, it held that the court could refuse a discharge for causes other than those mentioned in section 14 of the act, and it declined to grant a discharge in the present case by reason of the injurious effect it might have upon the creditors' right to enforce the secondary liability of the directors of the corporation under the Massachusetts statute.

We think a corporation is entitled to a discharge under the bankrupt act of 1898. The provisions of the act, supplemented by its legislative history, forbid, in our opinion, any other conclusion. By section 1, par. 19, it is declared that "persons" shall include corporations, except where otherwise specified; by section 14a, that any person may file an application for a discharge; and by section 4b, that any corporation may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. As any person may file an application for a discharge, and as a corporation is a "person," within the meaning of the act, and entitled to the benefits of the act, it follows that a corporation is entitled to a discharge under the act.

The bankrupt act of 1867 expressly excepted corporations from the right to a discharge. Rev. St. § 5122. This exception was retained in the earlier drafts of the present act, but it was stricken out before the act became a law. To quote from Judge Lowell's opinion in the district court:

"Some earlier drafts of section 14 of the present act—drafts which in other respects resemble almost literally the section as passed—began with the words, 'Any person not a corporation.' See S. 1694, 52d Cong., 1st Sess., § 50; H. R. 9348, 52d Cong., 1st Sess., § 13; S. 1035, 55th Cong., 2d Sess., § 13, of the substitute. See, also, the similar change made in drafting section 17 of the act." 95 Fed. 421.

Where a former act contains an express exception, and the first drafts of a later act relating to the same subject contain the same exception, and this exception is omitted from the act as finally enacted, and other provisions in the act are made to conform with this change, we cannot but conclude that congress intended to make the change, and the courts should not seek to render it nugatory by a forced construction.

The bankrupt, under section 14, is entitled to a discharge as a matter of right, provided he has not committed any of the offenses therein enumerated. Section 14b reads as follows:

"The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

By this provision, the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. In *re Black* (D. C.) 97 Fed. 493. A refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, "investigate the merits of the application," must be taken in connection with the context. To construe these words as if they stood alone and disconnected from what follows would be to leave the whole question of discharge in the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.

When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise, the judge "shall" discharge the applicant.

The right to a discharge, and the effect of a discharge, are wholly distinct propositions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge. In *re Rhutassel* (D. C.) 96 Fed. 597; In *re Thomas* (D. C.) 92 Fed. 912; In *re Mussey* (D. C.) 99 Fed. 71.

A discharge releases only the bankrupt's personal liability. In accordance with this underlying principle, section 16 of the act provides:

"The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

The theory of a discharge as well as this express provision of the act forbid that the secondary liability of the directors of a corporation, under the Massachusetts statute, should be affected by the corporation's discharge in bankruptcy. Such a discharge does not prevent creditors from taking judgment in the state court against the corporation in such limited form as may enable them to reap the benefit of the directors' liability. The rendering of such a judgment depends upon the authority of the state court under the local law. There is nothing in the bankrupt act to prevent it. The judgment will not be against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the directors in accordance with the state statute. *Hill v. Harding*, 130 U. S. 699, 702, 703, 9 Sup. Ct. 725, 32 L. Ed. 1083.

A suit in the state court against a corporation has a double aspect. So far as it is brought against a corporation for a debt provable

in bankruptcy, its discharge in bankruptcy may be pleaded as a bar. So far as it is brought to obtain a judgment against the corporation for the purpose of subsequently enforcing the secondary liability of the directors under the state statute, the discharge is no bar, and the court may render a special judgment for that purpose. *Hill v. Harding*, supra. Section 37 of the act of 1867 (Rev. St. § 5122) expressly excluded corporations from a discharge. Under that act it was decided in *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656, 23 L. Ed. 336, that a creditor of a manufacturing corporation, which was duly adjudged a bankrupt, who has proved his claim and received a dividend thereon, does not thereby waive his right of action for so much of the claim as remains unpaid. Near the close of the opinion in that case (page 666, 91 U. S., and page 340, 23 L. Ed.) Mr. Justice Clifford, in discussing the general question of discharge in bankruptcy and the reasons therefor, observed:

"Certificates of discharge are granted to the individual bankrupt 'to free his faculties from the clog of his indebtedness,' and to encourage him to start again in the business pursuits of life * * * unfettered with past misfortunes."

As a reason why the act excluded corporations from a discharge, the opinion goes on to say:

"Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a necessary preliminary step to the stockholder's individual liability."

This general expression by the supreme court, which was unnecessary to the determination of the particular question before the court, because the act of 1867 expressly denied the benefit of a discharge to corporations, is not binding upon this court in another case arising under an act which entitles a corporation to a discharge.

The principle of a qualified judgment against a bankrupt after his discharge, for the sole purpose of establishing a secondary liability, which is recognized in the later case of *Hill v. Harding*, supra, was not discussed by Mr. Justice Clifford, because it was neither necessary nor pertinent to the determination of the questions which were raised and decided in the case then under consideration. The petitioning corporation having duly filed its application for a discharge under section 14, and not having been adjudged guilty of any of the offenses therein mentioned, we are of the opinion that it was entitled to a discharge.

In the original petition, which was heard with this appeal, we are asked to revise the order of the district court refusing to enjoin certain actions at law in the state court, under section 11a, until the question of discharge is determined. As we have already determined that the bankrupt is entitled to a discharge, it becomes unnecessary to decide the point raised by the petition.

In No. 301, the decree of the district court refusing a discharge is reversed, and that court is directed to enter a decree discharging the Marshall Paper Company, and the costs of this court are awarded to the appellant.

In No. 299, it is ordered, adjudged, and decreed that the petition be dismissed, without prejudice, and without costs.

In re LOGAN.

(District Court, D. Kentucky. June, 1900.)

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—EVIDENCE.

Where a bankrupt's application for discharge, with specifications in opposition thereto by creditors, alleging that he had sworn falsely, in his original examination at the first meeting of creditors, with reference to his assets, is referred to the referee to ascertain and report the facts, the record of such examination of the bankrupt is not admissible in evidence on behalf of the objecting creditors, and should not be received by the referee nor included in his report to the court.

2. SAME—PLEADINGS.

Where a bankrupt presents his application for discharge in due form, and specifications in opposition thereto are filed by creditors, no further pleading on the part of the bankrupt is necessary, and the allegations of the specifications cannot be taken as confessed for want of an answer by the bankrupt; on the contrary, the burden is on the objecting creditors to establish their averments by proof.

In Bankruptcy. On review of report of referee in bankruptcy on bankrupt's application for discharge and opposition thereto by creditors.

Thomas R. Brown, for objecting creditors.

EVANS, District Judge. The adjudication in this case was made in June, 1899. On the 21st day of the following October the bankrupt filed his petition for a discharge. Subsequently, and in due season, a creditor entered his appearance for that purpose, and filed specifications of objections to the discharge. The bankrupt filed no further pleading. The matter was referred to the referee, as permitted under the last clause of general orders in bankruptcy No. 12, to "ascertain and report the facts (89 Fed. vii., 32 C. C. A. xvi.)," and that officer, having taken the testimony, reported in favor of granting the relief asked. The grounds of objection to the discharge, as specified, were, in substance: First, that the bankrupt had knowingly and fraudulently concealed and omitted from his schedule certain assets, namely, the indebtedness to him of small sums from certain creditors; and, second, that he had in his original examination in writing before the referee at the first meeting of creditors sworn falsely in respect to the same matters. In the proceedings before the referee the creditors offered in evidence the original examination of the bankrupt, but the referee sustained the objection of the bankrupt to that testimony upon the ground that the latter was "entitled to be examined with reference to the pending issues if his testimony was to be used either for or against him upon this question." This ruling, we think, was correct, as it is certainly true that the bankrupt had a right to exemption from any harmful consequence from his examination at the first or other meetings of his creditors under the protection tendered by the last clause but one of section 7 of the act. The creditor had specified as one of the grounds of objections to the discharge that the bankrupt had sworn falsely in that examination; but, after a very careful consideration of the question, we have lately ruled in the case of *In re*

Marx, 102 Fed. 676, that, under the section of the act referred to, this could not be successfully made a ground for opposing a discharge. It is insisted by the creditor, inasmuch as the bankrupt made no response to the specifications of objections to the discharge, that the charges made by the creditor therein should be taken as confessed; and we are cited to Loveland, Bankr. § 281, in support of this view. We cannot agree with that learned author in the proposition that further pleading was necessary. There is no rule in bankruptcy which requires in such cases any further pleading by a bankrupt. By the mode of procedure, uniform in this district, at least, the bankrupt files a petition for a discharge, in which he avers that he has complied with all the provisions of the bankrupt act. This is his pleading, and upon it the proper notice is served upon all creditors. The prayer of this petition will be granted as of course, unless some creditor objects, and specifies his grounds of objection. If the grounds are specified, the case goes to the referee as the next step to ascertain and report the facts. Unless the specified grounds are established by the proof, the discharge is granted. Nothing is taken for granted, and the onus is on the creditor. Failure to establish the objections by evidence cannot be a ground for refusing the discharge, and it follows logically and inevitably from this fact that no further pleading is necessary upon the part of the bankrupt. The proof must be taken in any event, and without proof the creditor fails. The bankrupt may rely upon the presumption of innocence. This no doubt explains why no general rule has been made by the supreme court requiring further pleadings in such cases. The issues are made by the bankrupt's petition for a discharge and the creditors' specifications of objections thereto, and the only step the rules require after this in order to a settlement of the question is the reference to ascertain and report the facts, unless the court itself does that, in which event the same rules would apply. And it may add stress to this view that, excepting one not alleged in this case, all the specifications of objections, to be sufficient in law, must charge what is a criminal act upon the part of the bankrupt, and the law in such cases itself enters a plea of not guilty unless in cases where there is a voluntary and express plea of guilty. We should probably not disagree with the referee upon the merits of the case if the proof is made to show, as he states the fact to be in his report, that the bankrupt seasonably surrendered his account books to the trustee, unless there should be something in the original examination to demand another judgment. The bankrupt was a physician, and in the course of long years of practice might have made small, and probably bad, accounts, which could well be honestly forgotten. But, for the failure to show the prompt surrender of the account books, the report of the referee is not approved, and the matter is again referred to him for further proceedings in conformity with this opinion, and for a further report thereafter.

In re COUNT DE TOULOUSE LAUTREC.

(Circuit Court of Appeals, Seventh Circuit. June 14, 1900.)

No. 699.

1. EXTRADITION—DECISION OF COMMISSIONER—REVIEW ON HABEAS CORPUS.

In proceedings for the extradition of one charged in the complaint with being a fugitive from the justice of a foreign country, and with the commission of an extraditable offense under the treaty between such country and the United States, where the commissioner before whom the hearing is had jurisdiction of the person of the accused, his finding of probable cause is open on habeas corpus only to the inquiry whether there was legal evidence before him on which to exercise his judgment, and not as to the sufficiency of such evidence.

2. SAME.

A petition for a writ of habeas corpus in such a case, where it is admitted that the commitment was founded upon evidence, to be entitled to consideration must show either (1) all the evidence which was accepted by the commissioner as material, or (2) allegations of fact respecting such evidence which clearly overcome the presumption that legal evidence was heard in support of the commitment; and, in case of allegations of the latter class, mere general conclusions on the part of the pleader of the legal effect of the evidence are insufficient.

3. FORGERY—UTTERING FORGED INSTRUMENTS—INSTRUMENTS INNOCENTLY MADE.

Copies of bonds and coupons engraved for the use of corporations, which copies were innocently made by the engravers as samples, and never delivered to the corporations, are not genuine instruments; and, although they are not forged instruments so long as they are innocently retained by the engravers or others to whom they are delivered, they become forgeries when fraudulently uttered as genuine obligations, although without alteration, and the person so uttering them is guilty of the offense of uttering forged instruments.

Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois.

Newton Wyeth, for appellant.

William Brace, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge. Under the designation of Count Toulouse de Lautrec, alias Castano, the petitioner is imprisoned for the purpose of extradition, pursuant to section 5270 of the Revised Statutes of the United States, under a mittimus issued by a United States commissioner for the Northern district of Illinois; and this appeal is from an order of the district court for such district whereby his petition thereupon for writs of habeas corpus and certiorari was dismissed for insufficiency, and the petitioner was remanded to the custody of the marshal. The petition is voluminous in the recital of proceedings and matters which are wholly irrelevant to the jurisdictional issue involved, but singularly deficient in allegations of fact respecting that issue. It shows the fact of the hearing of testimony before the commissioner, presumably material for his decision, but does not purport to state even its substance; and in respect of the portion of the evidence which appears in the petition, and is made the basis of the argument for setting aside the action of the commissioner, the reference purports to be a mere summary or interpretation by

counsel of the testimony upon a single branch of the inquiry, as stated by way of a motion in the course of the proceedings before the commissioner, and thus brought into the petition by general averments only of its truth. The rule is well settled that the decision of the committing magistrate in extradition proceedings cannot be reviewed on habeas corpus if he has jurisdiction of the accused and of the subject-matter,—the offense charged being within the terms of the treaty of extradition,—“and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment.” *Ornelas v. Ruiz*, 161 U. S. 502, 508, 16 Sup. Ct. 689, 40 L. Ed. 787; *Bryant v. U. S.*, 167 U. S. 104, 165, 17 Sup. Ct. 744, 42 L. Ed. 94. The petition in the case at bar shows that the accused was before the commissioner on a complaint made by the British consul which charged that the accused feloniously uttered in the dominion of Canada certain forged coupon obligations, well knowing the same to be forged, and “that he was a fugitive from the justice of the dominion of Canada,” thus charging an extraditable offense under the treaty with Great Britain. Having jurisdiction, therefore, both of the accused and of the subject-matter, the finding by the commissioner of probable cause to believe the accused guilty of such offense is open only, on habeas corpus, to the inquiry whether there was legal evidence of facts before the commissioner on which to exercise his judgment, “and not whether the legal evidence of facts was sufficient or insufficient to warrant his conclusions.” *Ornelas v. Ruiz*, supra; *Bryant v. U. S.*, supra; *Benson v. McMahon*, 127 U. S. 457, 462, 8 Sup. Ct. 1240, 32 L. Ed. 234; *In re Luis Oteiza y Cortes*, 136 U. S. 330, 334, 10 Sup. Ct. 1031, 34 L. Ed. 464. With the fact conceded that the commitment was founded upon evidence, the petition for a writ is not entitled to consideration unless it shows either (1) all the evidence which was accepted as material, or (2) allegations of fact respecting such evidence which clearly overcome the presumption that legal evidence was heard in support of the commitment; and, in the case of allegations of the latter class, mere general conclusions on the part of the pleader of their legal effect, standing alone, are not sufficient. It is questionable, to say the least, whether this petition so states the evidence which was before the commissioner that an issue is presented, within the authorities referred to. Assuming, however, for the purposes of the case, that the evidence upon the question of forgery, as thus stated in the petition, is well averred and in accord with the fact, it is clearly legal evidence to establish the fact that the instruments of which felonious utterance is charged were not the genuine obligations of the purported promisors, but were, instead, false instruments. The assumed facts are substantially as follows: The instruments in question purported to be interest coupons issued in connection with corporate bonds, respectively, by (1) the city of Gloucester, Massachusetts; (2) the Fitchburg Gas & Electric Light Company, a corporation of Massachusetts; and (3) the Hyde Park Electric Light Company, a corporation of the same state. The original bonds and coupons in each instance were lithographed and printed by Francis Doane & Co., printers, of Boston, upon orders of the corporations, respectively; and the printers innocently retained

printed copies of each set, "as samples or proof sheets or otherwise," after delivering to the several corporations the printed sheets which were ordered. The printers from time to time gave out the copies thus retained by them to various parties as samples, and the petitioner so obtained from them the copies of which he is charged with the offense of uttering. It is further stated that the coupons were "in no manner altered or changed." Copies of these coupons, as produced before the commissioner, are not annexed to the petition; but certain of them were exhibited by counsel for the petitioner in the course of his argument at the bar of this court, showing that the signature of the appropriate officer is printed, and not written, and is apparently made as a lithographic facsimile of an original signature. The coupons thus exhibited further show a serial number rudely stamped in a space apparently left blank for that purpose by the printer, but the view which we are constrained to adopt of the character of these printed copies in the hands of the petitioner renders it unnecessary to determine whether the appearance of the coupons so produced in the manner indicated is entitled to consideration as evidence tending to show an alteration or change of the printed copy; and, for like reason, the conceded fact that testimony was received before the commissioner, but not presented in the record, which tended to show that no such stamping was on the coupons when they left the hands of the printers, is not considered in ascertaining whether legal evidence appears to warrant the finding that the coupons were forgeries.

The contention on behalf of the appellant, briefly stated, is this: That the facts recited in the petition show that the coupons in question were genuine in their origin, because printed under the direction and authority of the corporations respectively purporting to issue them, and in the exact form in which they were uttered by the accused; that the innocence of the printers in retaining the printed copies for samples or like legitimate purpose, and in giving them to the accused for such purpose, saves them from characterization as forgeries, and their subsequent utterance by the accused without alteration is not the utterance of a forged instrument, however fraudulent the transaction may otherwise appear; that fraudulent use in uttering is not legal evidence of the primary fact of forgery. These propositions rest in the first place on the erroneous assumption that the printed copies of the coupons so retained in the hands of the printers were authorized by the corporation, and therefore genuine in fact. The authority for the printing extended only to the impressions of which delivery was to be made, and was in fact made, to the corporation ordering them. Until their acceptance, adoption, and issue by the corporate authorities, it is obvious that even the copies so delivered were not corporate obligations, and were not genuine in fact. It is true that the making by the printers of the lithographic form of the instruments, including the lithographic facsimile of the signature on the coupon form, was authorized; and it is alike true that the impressions or copies made by the printers in excess of those delivered upon the orders, retained for innocent purposes, were not within the legal definition of forgery, while so retained either in their

hands or in the hands of others. The rule is well established that the mere making, innocently and without authority, of any form of instrument which would constitute forgery if made with fraudulent intent, is not forgery, in the eyes of the law, until such intent appears, but conduct which shows or implies fraudulent purpose or use is legal evidence of forgery in fact. In general terms, forgery is well defined in 2 Bish. New Cr. Law, § 523, as "the fraudulent making of a false writing which if genuine would be apparently of some legal efficiency." See, also, the general definitions in 3 Greenl. Ev. § 103; 9 Enc. Pl. & Prac. p. 550, etc.; 13 Am. & Eng. Enc. Law (2d Ed.) p. 1082, etc. But the making, in this view, does not consist alone of the manual operation of putting the instrument into form as the apparent obligation or act of another; and the authorities establish numerous instances wherein forgery is found, apart from the manual making or signing, as in the fraudulent procurement and use of a signature or writing as an obligation, when it is not so intended or understood by the maker. In *Com. v. Baldwin*, 11 Gray, 197, 198, the court says, "It would be difficult by a single definition of the crime of forgery to include all possible cases," and then refers to well-recognized instances not strictly within the general definition, including that of "the appending of a genuine signature of another to an instrument for which it was not intended," and that of the accused signing his own name where "it purports to be and is designed to be received as the instrument of a third person having the same name." The decision in *Benson v. McMahon*, 127 U. S. 457, 467, 8 Sup. Ct. 1240, 32 L. Ed. 234, is peculiarly applicable to the case at bar, in the circumstances which were held to be sufficient for the extradition of the accused to Mexico upon a charge of forgery. The alleged forged instruments were opera tickets which were printed in accordance with orders of the accused, without written signatures, and apparently without intentional fraud on the part of the engravers or printers. The contention was that the innocence of the actual makers of the tickets, and the absence of any written signature or symbol, or of any alteration or change by the accused, placed the instruments outside the definitions of forgery at common law, making the transaction a common-law cheat only. This view was overruled, and both the opinion of the court and the authorities cited are pertinent here. In that case the accused procured the printing of the tickets, and here the coupons were procured after the printing. In each the accused adopted the otherwise innocent work of the printer for the purpose of defrauding purchasers by selling as genuine an instrument which purported to have legal efficiency, but was neither intended nor issued as such by the purported maker. The instruments were equally false in both cases, and became equally forged instruments when the purpose arose to use them fraudulently. In the case cited the offense charged was forgery of the tickets, making it necessary to find its commission in the acts of the accused; but here the charge is that the accused uttered forged coupons, and proof that they are not genuine—are false tokens in fact, and so understood by the accused before his fraudulent use—is legal evidence that they were forgeries when uttered, without proof to identify the person who conceived the fraudulent purpose, or the particular time

or manner of its conception. The following authorities are deemed sufficient further citations in support of this view: *Reg. v. Dunlop*, 15 U. O. Q. B. 118; *U. S. v. Turner*, 7 Pet. 132, 8 L. Ed. 633; *White v. Van Horn*, 159 U. S. 3, 18, 15 Sup. Ct. 1027, 40 L. Ed. 55; *Com. v. Ray*, 3 Gray, 441, 446; *Com. v. Foster*, 114 Mass. 311; *State v. Kroeger*, 47 Mo. 552; *Gregory v. State*, 26 Ohio St. 510.

We are of opinion that the facts stated in the petition are competent evidence to establish the fact that the coupons were forged obligations, both at common law and within the statute of Illinois,—namely, the law of the forum as fixed by the treaty,—and that the petition fails to state grounds for the issue of the writs. The order of the district court is therefore affirmed.

HELLER & MERZ CO. v. SHAVER et al.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. June 23, 1900.)

1. UNFAIR COMPETITION—GROUNDS FOR RELIEF.

It may be stated as a general principle, underlying the law of unfair competition, that nobody has the right to sell his goods as the goods of somebody else.

2. SAME—SELLING DIFFERENT GOODS UNDER SAME NAME.

Complainant was a manufacturer of laundry bluing sold under the brands "American Wash Blue" and "American Ball Blue." For some 10 years a firm handled these products, and introduced them to the trade in its territory under such names. At the end of that time the firm went out of business, and defendants purchased its assets, advertised themselves as its successors, and as "manufacturers of American Wash Blue and American Ball Blue"; claiming the right to use such brands, and selling thereunder, in the same territory, the product of a different manufacturer. *Held*, that such action was a fraud upon the public, and constituted unfair competition as to the complainant, which entitled it to the protection by injunction, regardless of the question whether it had a right to the exclusive use of the names as trade-names.¹

3. EQUITY—RIGHT TO RELIEF—DOCTRINE OF CLEAN HANDS.

A complainant's right to relief in equity against unfair competition cannot be defeated on the ground that it has been guilty of fraud in misrepresenting to the public the origin of an article manufactured by it, which is not involved in the suit.

In Equity. Suit to enjoin unfair competition in trade. On final hearing.

Edmund Wetmore and Rothrock & Grimm (Rowland Cox and Herman Gustow, on the brief), for complainant.

Offield, Towle & Linthicum and U. C. Blake, for defendants.

SHIRAS, District Judge. The purpose sought by complainant in this case is to restrain the defendants from making use of the brands "American Ball Blue" and "American Wash Blue" in the sale of ultramarine blue manufactured by parties other than the complainant corporation. The evidence shows that about the year 1870 the firm of Heller & Merz engaged in the business of manufacturing and selling ultramarine blue or bluing at Newark, N. J.; that in January, 1889, the partners formed a corporation under the laws of the state of New

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

Jersey, which succeeded to the business and rights of the pre-existing firm, and has since conducted the business of manufacturing and selling ultramarine blue under the corporate name of the Heller & Merz Company. It is further shown in the evidence that, about the year 1875, the firm of Heller & Merz prepared and put upon the market a laundry blue under the designation or brand of "American Wash Blue," and in the year 1876 they put upon the market what is known as "American Ball Blue." It also appears that in these years the firm of Pomeroy & Olmsted were engaged in business at Cedar Rapids, Iowa, as manufacturers of laundry soaps and jobbers of sal soda and rosin, and in 1878, if not earlier, they became interested in the sale of the ultramarine blues manufactured by Heller & Merz. The relation which existed between the parties is made clear by the following letters written by Pomeroy & Olmsted:

Office of Pomeroy & Olmsted, Manufacturers of Laundry Soaps and Jobbers
of Sal Soda and Rosin.

Cedar Rapids, Iowa, Feby. 12, 1878.

Messrs. Heller & Merz, New York City—Gentlemen: Inclosed find drft. to your order for one hundred forty-three & $\frac{79}{100}$ dolls.; also, duebill for (1) case W. blue, for which we allowed \$3.50. Can we chrg. tour a/c with that amt? Please send one bbl. blue (10 cakes in each pkg., same as we have had) & we would like some cards to paste on our boxes, and any other ad. matter you think would tell. We can distribute it to good advantage. What would you charge us for 50 bxs. put up with our name on & in good shape? If you would make us figures, we would endeavor to reach the jobbing trade that are not now handling your goods. Think the blue, as we get it, suits the trade of this section better than would the ball. Awaiting your acknowledgment of receipt, we remain,

Yours, truly,

Pomeroy & Olmsted.

Office of Pomeroy & Olmsted, Manufacturers of Laundry Soaps and Jobbers
of Sal Soda and Rosin.

Cedar Rapids, Iowa, July 5th, 1878.

Messrs. Heller & Merz, New York City—Gentlemen: Your proposition to furnish us the wash blue in lots of 100 boxes, put up with our name, &c., at \$2.50, is accepted and we shall endeavor to dispose of what we have first recd. as speedily as possible. We have kept steadily at work, introducing the blue, wherever we could get merchants to try it, and, though some have returned it, we were confident it was no fault of the article itself, but rather that of the ones using. Now, however, we begin to have calls for it from parties who have been selling other blues, and the prospect is very encouraging. You may have inquiries for prices & perhaps orders for it from dealers in this section of the country. If so, we trust you will refer them to us, and believe it to be to your, as well as our, interest to do so. We have made the prices very reasonable (\$3.50 to retailers and \$3.00 to jobbers), and assure you will make every effort to push the goods. You may look for an order from us in a short time.

Yours, very truly,

Pomeroy & Olmsted.

P. S. Any advertising matter you may send us will be carefully distributed. Would it not be a good idea to put some nice show cards in our soap boxes? It would scatter them very generally. Anything our traveling men could carry with them, and scatter along in the stores and towns they visit, if you will send, we will see it so disposed of. Please give the matter your attention and oblige,

P. & O.

Some time about the end of the year 1879, E. F. Pomeroy retired from the firm of Pomeroy & Olmsted, and the business was carried on in the name of G. M. Olmsted & Co., and the following letters were sent by them to Heller & Merz:

T. M. Sinclair, President. H. B. Soutter, Secretary. G. M. Olmsted, Treasurer.
G. M. Olmsted & Co. (Incorporated), Soap Makers, and Agents for American Wash Blue.

Cedar Rapids, Iowa, May 29th, 1880.

Messrs. Heller & Merz, New York City—Gents: Please send us 100 boxes "Am. Wash Blue." If you can substitute our name for that of P. & O. on the label without too much trouble, we would be pleased to have you do so. Will send drft. to balance a/c in short time. What discount do you give for cash on receipt of invoice?

Yours, truly,

G. M. Olmsted & Co.

T. M. Sinclair, President. H. B. Soutter, Secretary. G. M. Olmsted, Treasurer.
G. M. Olmsted & Co. (Incorporated), Soap Makers, and Agents for American Wash Blue.

Cedar Rapids, Iowa, June 25th, 1880.

Messrs. Heller & Merz, New York City—Gents: Inclosed we hand you S. D. for two hundred eighty-six and $\frac{00}{100}$ dolls. to bal. on a/c. Please send receipt. We have heard nothing from our order of May 29th. Can we expect the goods soon? Have been entirely out for two weeks, and have orders now for 25 bxs. We have established depots for sale of our soaps in Dakota, Minnesota & Sioux City and Des Moines, to ship to these points in car-load lots, and have put in the blue also. In this way we have (6) different jobbing houses introducing the goods, and we believe we will very largely increase our trade in your blue, though in meantime it obliges us to carry a large stock at these different points. People here West are slow to take hold of new articles unless they are guarantied to give satisfaction, and we have found it very hard work to battle against the bottle blue, which is very universally used in this part of the country. We are gradually, however, overcoming the prejudice, and, when once used right, find no trouble in selling again. If you would put a cheap wrapper around each package, with instructions for using plainly & simply printed thereon, it would be a great benefit to us all. A great many instances have come to our knowledge of consumers dropping the cake directly into the water, and of course were not satisfied, and ready at once to declare the blue a humbug. Our traveling men say, "We could sell far more if it was put up in smaller boxes, and so as to retail for 5c." Could you not put up the blue, say 5 lozenges in a package, and 30 packages in a box, same style in every respect otherwise? Please give us figures at once, and, if so we can see a fair margin, will take 100 bxs. Our Mr. Pomeroy, having gone into the soap business at Minneapolis, Minn., will very likely wish to handle the blue there. As we have worked up a trade in Southern Minnesota & Dakota, he would very likely trespass on that territory and injure us. If you will refer him to us, we will sell him at a very small advance, or, if you will put it up in a different style entirely for him, we will not object. Hoping to hear from you at once, and trusting we shall soon be in receipt of the blue ordered, we remain.

Very truly yours,

G. M. Olmsted & Co.

P. S. Please name discount you are willing to give for cash.

In 1897, and after the death of G. M. Olmsted, the defendants, having associated themselves in business under the firm name of Shaver, Blake & Co., bought the assets of G. M. Olmsted & Co., and announced themselves as successors to G. M. Olmsted & Co., and as manufacturers of American Ball Blue and American Wash Blue, addressing to the trade letters, of which the following is a sample:

Shaver, Blake & Co., Successors to G. M. Olmsted & Co.,
Manufacturers of American Ball Blue, American Wash Blue.

Cedar Rapids, Iowa, Aug. 18, '98.

Kothe, Wells & Bauer, Indianapolis, Ind.—Gentlemen: We desire to again call your attention to our quotations of one and two ounce American Ball

Blue, and the fact that we guaranty the quality. Any letters that you may receive from competitors, advising you that we have no right to the name "American Ball Blue," we would ask you to forward to us, and we will promptly give them the attention they deserve. We assure you that we have an undisputable right to the brand, and shall continue offering it. We have had the brand American Wash Blue on the market for twelve years, and shall continue to offer it, together with American Ball Blue, at greatly reduced prices. We would appreciate your correspondence and inquiries, and would solicit the opportunity of submitting samples.

Very truly yours,

Shaver, Blake & Co.

It will be noticed that, so long as the business at Cedar Rapids was conducted by the firms of Pomeroy & Olmsted and G. M. Olmsted & Co., they were acting in unison with the complainant, and were engaged in advertising and selling the product manufactured by Heller & Merz, using, in so doing, the names of "American Wash Blue" and "American Ball Blue." When the defendants, claiming to be the successors of G. M. Olmsted & Co., entered into business at Cedar Rapids, they became at once competitors with complainant in the sale of laundry blue, and they represented that they were the manufacturers of American Ball Blue and American Wash Blue, having an indisputable right to the brand "American Wash Blue." This competition at once affected the business of complainant, and, as the letters from their customers printed in the record clearly disclose, the action of defendants caused the question to arise as to the party entitled to use the brands "American Wash Blue" and "American Ball Blue"; and thereupon, to settle this question, and to protect its alleged rights, the complainant instituted the present suit, and thus the court is called upon to ascertain and determine whether complainant has any such interest in or right to the named brands as entitles it to restrain the defendants from making use of these brands in connection with the business carried on by them. That these brands have acquired a commercial value cannot be questioned. Unless this were so, the defendants would certainly not be willing to incur the expense of litigation over the right to the use of the brands, and therefore it may be assumed, without further discussion, that the right to the use of the brands is a matter of recognized value. This value pertains to the brands, because, through past use and experience, the public have learned that the commodity sold under these names and descriptions is one of a certain degree of merit. This value acquired by the brands in question was wholly derived from the use of the bluing manufactured by Heller & Merz, for it is clearly shown in the evidence that the firms of Pomeroy & Olmsted and G. M. Olmsted & Co. were not manufacturers of bluing, but dealt only in the product furnished them by Heller & Merz, either directly or through the Consolidated Ultramarine Company. When the firm of G. M. Olmsted & Co. ceased to do business, owing to the death of G. M. Olmsted, the situation was as follows: The present complainant was the manufacturer of the commodities sold under the names or brands of "American Wash Blue" and "American Ball Blue." From the year 1880 to the year 1898 the firm of G. M. Olmsted & Co., advertising themselves as agents for American Wash Blue, had been engaged in selling complainant's product in Iowa and adjacent territory, acting, not in competition to, but in conjunction with, complain-

ant. If, in 1898, the firm of G. M. Olmsted & Co., ceasing to act as agents for the sale of complainant's products, had advertised to the public that they were the manufacturers of American Wash Blue and American Ball Blue, having had the former brand on the market for a period of 12 years, but, instead of furnishing to their customers the commodities previously sold under these brands, they had substituted others in place thereof, would not the firm have been fairly chargeable with the perpetration of a fraud both upon the complainant and also upon the public? The evidence justifies the assumption that from long use these brands had come to represent to the public specific articles, which were in fact the product of complainant's manufactory, and in fact the commodities sold under these names by the firm of Olmsted & Co. were manufactured by Heller & Merz. Though the name of the manufacturer was not connected with the brands, and the customers might not know by whom the article was made, yet the brands described to the customer a specific article or commodity, and after the firm of Olmsted & Co. had been instrumental in introducing to their customers a specific article known by the name of "American Wash Blue" or "American Ball Blue," manufactured by complainant, the public certainly would be misled and deceived if the firm should substitute the product of another manufacturer for that of complainant, but should assure the public that it was the same article that they had sold for years under the name of American Wash or Ball Blue. Such conduct would be within the condemnation of the recognized rule that no one is justified in inducing the public to buy wares in fact manufactured by A. by representing that they are made by B. Thus, in *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, it is said:

"Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

That such conduct would also be a fraud upon the rights of complainant is equally clear. The evidence demonstrates the fact that Heller & Merz were the manufacturers of the commodities that were sold under the names of "American Wash Blue" and "American Ball Blue," and it was the quality of these commodities that gave a commercial value to the names or brands under which they became known in the community. The evidence also shows that Heller & Merz furnished the signs, labels, and other advertising material that were used in bringing the commodities designated by these brands before the public; and certainly, under such circumstances, it would have been a fraud upon part of Olmsted & Co. if they had undertaken to compete with complainant by asserting that in fact they were the manufacturers of the commodities in question, and the owners of the brands by which they were known and designated by the trade. Thus, in *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, it is said:

"Equity gives relief in such cases upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celeb-

city in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer. Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp, because, by so doing, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would or might be depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy."

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997, after stating the general rule in the following words: "Undoubtedly, an unfair and fraudulent competition against the business of the plaintiff, conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's, would, in a proper case, constitute ground for relief,"—the court quoted with approval the language of Mr. Justice Bradley in *Nail Co. v. Bennett* (C. C.) 43 Fed. 800, wherein it was said:

"There is here a substantial fact stated,—that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendants' nail for the complainant's. Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainant, which the defendants have imitated for the purpose of deceiving, and have deceived, the public thereby, and induced them to buy their goods as the goods of the complainant. This is a fraud."

Under the principle recognized in these cases, and under the circumstances of the relation existing between the complainant and *Olmsted & Co.*, it needs no further citation of authorities to show that if that firm had undertaken to avail themselves of the reputation acquired by the products of the complainant, by advertising themselves to be the manufacturers of the commodities sold under the brands "*American Wash Blue*" and "*American Ball Blue*," and to be the owners of these brands, a court of equity would have restrained them from thus unfairly competing with complainant on the ground that their claim to the use of these brands was unfounded, and was in fact a fraud upon the public and the complainant alike. The present defendants certainly stand in no better position in this particular than *Olmsted & Co.*, whose successors they claim to be. Having bought the assets of that firm, the defendants advertised themselves as successors to *G. M. Olmsted & Co.*, as manufacturers of *American Wash Blue* and *American Ball Blue*, as having an indisputable right to the brand "*American Ball Blue*" and as having had the brand "*American Wash Blue*" on the market for 12 years. The evidence shows that the defendants are not manufacturers of bluing in any form, but at present they obtain the goods sold by them from the *International Ultramarine Works* of New York. It cannot be denied, therefore, that the defendants are seeking to carry on the business of selling bluing in Iowa and adjacent states by availing themselves of the credit and reputation acquired by the commodities manufactured by the complainant, and which are known to the public as "*American Wash Blue*" and "*American Ball Blue*"; and by the assertions that they are the successors to

G. M. Olmsted & Co., by whom the complainant's goods were handled, and that they are the manufacturers of these brands of goods, having an indisputable right to the use of the brands, they are imposing upon the public to the injury of complainant,—a condition of affairs that clearly entitles the complainant to a restrictive injunction, unless some one or more of the defenses pleaded by the defendants are sufficient to defeat the equity relied upon by complainant.

The first contention of defendants is that complainant cannot maintain a right to a trade-mark in the designation "American," that being a geographical name, and intended merely to affirm that the articles sold under that description are of domestic, and not of foreign, origin. If the complainant's right to relief was based solely upon the claim of a trade-mark, or, in other words, if complainant could not sustain the suit except by claiming a strict right to a trade-mark in the brands "American Wash Blue" and "American Ball Blue," the position of the defendants that the word "American," being a geographical name, cannot be appropriated by any one person as a trade-mark, would be sustained by the authorities. The ground, however, upon which complainant bases its claim to relief, is not that these words constitute a trade-mark, but that they have acquired a special meaning, in the nature of brands, designating the articles manufactured by complainant; and the effort of defendants to utilize these brands in the furtherance of their trade constitutes unfair competition in business, which may be restrained when otherwise a fraud will be perpetrated on the public. This principle is perhaps as clearly stated in *Saxlehner v. Apollinaris Co.*, 13 Law Times Rep. 258, cited in *Flour-Mills Co. v. Eagle*, 30 C. C. A. 386, 86 Fed. 608, 41 L. R. A. 162, as in any of the authorities to be found upon the point. It appeared in that case that the complainant was the owner of a mineral spring in Hungary named "Hunyadi Janos," and the defendant for a long time acted as exclusive agent for the sale of the waters in England. Upon the termination of the contract of agency, the defendant began selling water from another Hungarian spring, calling it "Uj Hunyadi," and, upon suit brought, an injunction was granted, it being stated in the opinion of the court that:

"The plaintiff's case, as thus opened, was brought distinctly within the authority of *Reddaway v. Banham* [1896] App. Cas. 199, which, be it observed, was decided by the house of lords some time before the writ issued. * * * I have studied the case with this view, and it seems to me the entire doctrine is summed up in one sentence in the first paragraph of the lord chancellor's speech moving the judgment of the house. 'Nobody has the right to represent his goods as the goods of somebody else.' Observe that the proposition is perfectly general. There is no limit as regards name, origin, honesty of manufacture or sale, or otherwise. * * * It matters not, therefore, how a plaintiff's goods have come to acquire a particular value, or how the defendant's goods have come to adopt that value. If, in fact, the defendant is selling his goods as those of the plaintiff, he is doing what the law will not allow, and the plaintiff is entitled to relief against him."

It will be noticed that in this case the goods of the plaintiff were known in England as "Hunyadi Janos"; it was this name or brand that had acquired a significance, without reference to the name of the party dealing in them; and the defendant was restrained from advertising other water under a name so similar that it would mislead the

public into believing that they were the same. The facts, therefore, which in that case were held to entitle complainant to relief, are strictly analogous to those relied on by the complainant in the present case. In *Flour-Mills Co. v. Eagle*, 30 C. C. A. 386, 86 Fed. 608, 41 L. R. A. 162, the circuit court of appeals for the Seventh circuit stated the rule to be that:

"Where one person has so dressed out his goods as to deceive the public into the belief that they are really the goods of another person, and so put them upon the market, to the manifest injury of that person and of the public, an action at law will lie for the deceit, and, to save a multiplicity of suits and prevent irreparable injury, equity will restrain such unfair and fraudulent competition. This rule is so well established, is so general and elastic in its application, and so consonant to the general principles of equity jurisprudence, that it would be difficult to frame a case coming fairly within its spirit and meaning in which a court of chancery will not find a way to afford the proper relief."

Under the doctrine of these authorities, the question is not whether, technically, the word "American" can be appropriated as a trade-mark, but it is whether it appears that the complainant has built up a business in Iowa and the adjacent states, in the sale of its commodities known to the trade and the public under the brands "American Wash Blue" and "American Ball Blue," and that it is shown that the defendants are endeavoring to introduce into the same market goods of another manufacturer, by representing that they are the articles which have become known under the brands used by complainant. But it is argued with much earnestness by defendants that the style of the package and the labels thereon used by defendants do not so closely represent those used by complainant that any one could be deceived thereby. The deceit lies, not in the form and color of the packages, but in the fact that the packages all bear thereon the name or brand "American Ball Blue" and the defendants, in their letter and circulars, assert that they are the manufacturers of American Wash Blue and American Ball Blue, and are the owners of these brands. This is an assertion to the trade and to the public that they are furnishing the commodities known by these names, which is not true in fact, and the evidence clearly shows that this action on part of defendants has injuriously affected the business of complainant.

It is further contended that the complainant is not entitled to the favorable consideration of the court, because it is alleged that the complainant is engaged in selling bluing of its own manufacture under the titles of Germania and Bavarian Blues; that this is a fraud upon the public, in that these blues thus sold are not a foreign product, and therefore the complainant does not come into court with clean hands. It is not shown that the complainant advertised the articles sold under the names of Germania and Bavarian Blues as being in fact of foreign make, any further than that such might be the inference from the use of the words "Germania" and "Bavarian." The defendants have introduced in evidence boxes of the bluing put up by complainant under the names "Germania" and "Bavarian." On the face of the one box are the words "Germania Ultramarine Blue," and on the sides are the words "American Ultramarine Blue," and "None genuine without our signature. The Heller & Merz Co." On the face of the other box are the words "Bavarian Ultramarine Blue," and across these

words, in red ink, is printed the words "None genuine without name. The Heller & Merz Co., New York." Upon the ends of the box is a label containing the words "American Ultramarine Works." Under these circumstances, the evidence would not justify the court in holding that it was proven that the complainant was representing to the public that the bluing put upon the market by it under the names "Germania" and "Bavarian" were of foreign manufacture; but, if that were true, the complainant is not seeking protection for its business in selling Germania or Bavarian Blues. It asks the aid of the court to protect it against unfair competition in the business of selling the commodities known under the names of "American Wash Blue" and "American Ball Blue," and it is not claimed that it has committed any fraud upon the public in connection with this business, and therefore it is not a case for the application of the rule invoked by defendants.

Without further extending this opinion, the court finds and holds that the complainant has a valuable right in the business of selling its own products known to the trade and public by the names of "American Wash Blue" and "American Ball Blue"; that the defendants are not the owners of these names or brands, and are not the manufacturers of the articles described by these brands, and that their efforts to introduce and sell upon the market products of another manufacturer, under the representation that they are American Ball Blue or American Wash Blue, come within the definition of unfair competition, which, if permitted, would deceive the public, and injuriously affect the legitimate business of complainant; and therefore the complainant is entitled to an injunction, as prayed for, restraining the defendants from infringing upon the rights of the complainant.

NEW YORK ASBESTOS MFG. CO. v. AMBLER ASBESTOS AIR-CELL
COVERING CO. et al.

(Circuit Court of Appeals, Third Circuit. June 19, 1900.)

No. 23.

1. APPEAL AND ERROR—REFUSAL OF PRELIMINARY INJUNCTION.

A judgment of the circuit court refusing a preliminary injunction will not be reversed by the court of appeals except for very strong reasons.

2. TRADE-MARKS—DESCRIPTIVE WORDS—PRELIMINARY INJUNCTION.

The use of the words "air cell" and "fireboard," in designating certain fireproof material manufactured and sold by defendant, does not amount to such a fraud upon a previous manufacturer of similar products as will warrant the issue of a preliminary injunction upon the pleadings.

3. SAME—EX PARTE AFFIDAVITS.

A preliminary injunction will not be awarded on ex parte affidavits, to restrain alleged unfair competition in trade, except in a clear case.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Henry Schreiter, for appellant.

Henry N. Paul, Jr., and Joseph C. Fraley, for appellees.

Before ACHESON and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This is an appeal from an order of the circuit court of the United States for the Eastern district of Pennsylvania, entered on the 3d day of February, 1900, denying appellant's motion for preliminary injunction, as prayed for in the bill of complaint. The suit is brought by appellant, a corporation organized and existing by virtue of the laws of the state of New York, against the appellees, the Ambler Asbestos Air Cell Covering Company, chartered by the state of Pennsylvania, and the other named defendants, as officers thereof. The bill charges respondents with acts of unfair and fraudulent competition in trade, and also with infringement of trade-marks; but, in the argument, counsel for appellant disclaimed reliance on this charge, and confined themselves to the contention as to unfair and fraudulent competition in trade. The motion for preliminary injunction was made upon the pleadings, bill of complaint, answer, and replication, and upon the affidavits and exhibits submitted with the moving papers; and it is the appeal from the refusal of the court below to grant a preliminary injunction that is now before this court.

The granting of a preliminary injunction is an exercise of a very far reaching power, never to be indulged in except in a case clearly demanding it; and the decision of a court of first instance, refusing such an injunction, will not, except for very strong reasons, be reversed by this court. The unfair and fraudulent competition alleged, and sought to be supported by affidavits and exhibits submitted with the moving papers, is the use by defendants of the words "air cell" and "fireboard" in designating certain fireproof material manufactured and sold by them. The value of air, as a nonconductor of heat, has long been known, and its utilization in nonconducting coverings for boilers, and other appliances for the interception of and protection from heat, antedates its use by either complainant or defendants. A careful examination of the pleadings and affidavits printed in the record fails to convince us of the propriety of issuing a preliminary injunction on the ground that the use made by defendants of the words "air cell" and "fireboard," in designating their product, amounted to a fraud on complainant or the public, or to unfair competition in trade; and this, without prejudice to any determination to be hereafter made by the court below of the issues involved, upon the final hearing of the case. We think the court below wisely exercised its discretion in refusing a preliminary injunction asked for, and we here quote and adopt the opinion of the learned judge of that court (99 Fed. 85), as expressing satisfactorily our views in this case:

"Dallas, J. That either 'air cell' or 'fireboard,' as used by the plaintiff, constitutes a valid trade-mark, is, at least, open to very serious doubt. The impression now made upon my mind is that those terms are descriptive of certain products; that they identify the manufactured articles with which they are associated,—not the manufacturer thereof; and no more need be said upon the subject of trade-mark, separately considered, upon this motion. *New York Asbestos Mfg. Co. v. New York Fireproof Covering Co.* (Sup.) 62 N. Y. Supp. 339; *Vitascope Co. v. U. S. Phonograph Co.* (C. C.) 83 Fed. 32.

"Neither has it been made satisfactorily to appear that the defendant's competition with the plaintiff has been unfair to the latter, or misleading to the trade or the public. In *Lare v. Harper & Bros.*, 30 C. C. A. 373, 86 Fed. 482, it was said: 'It is a wholesome doctrine that equity will restrain unfair competition in trade; but it should be applied with caution, lest, through possible

misapplication, healthful and honorable competition be defeated;' and, further, that 'it is a rule, subject to few exceptions, that a preliminary injunction should not be awarded on ex parte affidavits, unless in a clear case. This rule has full application in a case like the present [a suit for unfair competition], where, though the bill should ultimately be dismissed, great damage would result from such an injunction,' etc. These observations are quite as pertinent to this case as to the one in which they were made. In *Van Camp Packing Co. v. Cruikshanks Bros. Co.*, 33 C. C. A. 280, 90 Fed. 814, the court of appeals for this circuit (which also decided *Lare v. Harper & Bros.*, supra) affirmed an order refusing a preliminary injunction, which had been sought to restrain the alleged imitation by the defendant of the plaintiff's boxes and the stamps and letters upon them, because, in a 'state of uncertainty,' the writ ought not to be awarded. In each of these cases the evidence in support of the motion was, in my opinion, more nearly convincing than it is in the present one. Preliminary injunction refused."

The order and decree of the circuit court is hereby affirmed.

DIELMAN v. WHITE et al.

(Circuit Court, D. Massachusetts. May 31, 1900.)

No. 1,133.

1. COPYRIGHT—WORK OF ART EXECUTED ON COMMISSION—RIGHTS OF ARTIST.

When an artist is commissioned to execute a work of art not in existence at the time the commission is given, there is a very strong implication that such work of art, when executed, sold, and delivered under the commission, is to belong unreservedly and without limitation to the patron, and that he may make or permit, to any extent, reproductions thereof; and the burden rests upon the artist to prove that he retains a copyright therein.

2. SAME—MOSAIC FURNISHED FOR PUBLIC BUILDING.

Complainant accepted and executed a commission to furnish, deliver, and put in place, complete, two mosaic panels in the reading room of the Congressional Library Building, in Washington, from designs to be made by him. After he had painted the cartoons from which the panels were made, he copyrighted the same, and placed a notice of the copyright thereon, after which the painting was submitted to and approved by the architect in charge of the building; and the same notice was also placed upon the panels themselves, without objection by any officer representing the government. Defendant took photographs of the mosaics after they were in place, with the consent of the officers in charge of the library. *Held*, that the failure of the officers to object to the placing of the copyright notice upon the panels did not bind the government to a construction of the contract contrary to its legal effect, or entitle complainant to claim a copyright in such panels, in the absence of any reservation of such right.

In Equity. Suit to enjoin infringement of copyright.

Alex P. Browne, for complainant.

Fish, Richardson & Storrow, for defendants.

LOWELL, District Judge. This is a suit by the designer of a certain mosaic in the Congressional Library at Washington to enjoin the publication of photographs of the mosaic. On December 22, 1894, Mr. Green, superintendent and engineer of the library, offered Mr. Dielman the commission "to paint, furnish, and put in place, complete," the marble mosaic panel in question; leaving the subject of the design largely to Mr. Dielman's choice. On December 27, 1894,

Mr. Dielman accepted the commission. On February 14, 1895, he submitted to Mr. Green a statement in writing of the composition proposed. On March 30, 1895, in a letter to Mr. Green, he said:

"Under these circumstances, I feel that the best final result can be obtained by my undertaking to furnish you the completed mosaic, and I am therefore prepared to make the contract to that effect."

On April 1, 1895, Mr. Green wrote as follows:

"Washington, D. C., April 1, 1895.

"Mr. Frederick Dielman, 1512 Broadway, New York, N. Y.—Dear Sir: I have just received with pleasure your letter of the 30th ultimo, accepting the offered commission to furnish the two mosaic panels, in translucent tesserae, for the Congressional Reading Room mantels in this building, and now herewith inclose the formal order therefor.

"Very respectfully,

Bernard R. Green,

"Superintendent and Engineer."

The formal order was as follows:

"Washington, D. C., April 1, 1895.

"Mr. Frederick Dielman, 1512 Broadway, New York, N. Y.: Please furnish for this building, deliver, and put in place, complete, two mosaic panels of translucent glass tesserae in the two marble mantels of the W. S. C. Congressional Reading room, in accordance with the letter of December 22, 1894, from this office, and your letter of March 30, 1895, for the gross sum of four thousand dollars (\$4,000).

Bernard R. Green,

"Superintendent and Engineer."

On May 9, 1895, Mr. Dielman submitted some sketches. Thereafter he painted a cartoon, and caused the same to be copyrighted in the usual way. This cartoon was sent to Venice, and in that place the mosaic in question was manufactured in the usual manner by workers in mosaic. Both the cartoon and the mosaic bore in the lower left-hand corner these words: "Copyright, 1896, by Frederick Dielman." In 1897 the mosaic, having been sent from Italy, and entered at New York duty free by order of the government, was set in place. The defendant took the photographs which are alleged to infringe, with the knowledge of the officers in charge of the library.

The only question presented in this case is the right of the complainant, by reason of the copyright he took out, to exclude others from photographing the mosaic. No mention whatever of copyright was made in the correspondence, and the only evidence that anything was said to any United States officer concerning the copyright is found in the following answers of the complainant:

"Int. 23. Please state whether or not the painting or cartoon was ever submitted for acceptance to any person representing the United States government in the matter of the erection or decoration of the new library of congress, and, if yes, to whom and when first. Ans. The painting or cartoon, before it was sent to Venice for reproduction in mosaic, was submitted to Edward P. Casey, architect in charge of the Library Building, and was by him accepted. Int. 24. Please state when the putting on of the copyright notice by you was done, with reference to the time of such submission. Ans. The copyright notice was put on the painting before the same was submitted." "Cross Int. 43. Did you make any express contract with the government whereby you reserved the right to copyright your cartoon? Ans. I did not make any express contract, as I understand such to be. Cross Int. 44. Do I understand you to mean that you made any contract at all to that effect? Ans. Only in so far as I was persuaded that the government had no objection to my reserving

the copyright on the design, 'Law,' inasmuch as the placing of the inscription or copyright notice was subject of discussion with a representative of the government, and no objection to my placing the same upon the panel was made." "Redirect Int. 76. Was anything said by Mr. Casey or yourself with reference to the copyright notice which you have testified was put upon your painting or cartoon before it was submitted to Mr. Edward P. Casey? Ans. If I remember rightly, the size of the letters forming that inscription was a subject of discussion."

Taken by itself, the contract seems to me plainly inconsistent with any reservation of copyright on the part of the artist. In general, when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily upon the artist himself. If a patron gives a commission to an artist, there appears to me a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron. It is not necessary to decide if the artist retains the right to make for another a replica. Reproduction by the artist may be a question of artistic ethics rather than of law; but that the patron has a right to make and permit, to any extent, reproductions of the work of art sold to him, appears to me plain, unless the contrary is plainly set out in the contract. Stating the question in another way, I am convinced that the government could treat the delivery of a copyrighted picture or mosaic as a failure on the complainant's part to carry out the contract he had made. The unrestricted right to produce a work of art thus commissioned is implied in a sale to a nation or a municipality as well as to an individual. It was argued that a reservation of copyright on the part of the artist would tend to defeat offensive reproductions for advertising purposes and the like, but I perceive no force in this argument. If the copyright is retained by the artist, or sold by him to some one else, the owner of the copyright is no more restrained from offensive reproductions than is an outsider, in the absence of copyright. If a restraint upon improper reproduction is desired, the copyright should be vested in the public patron, but considerations of this sort have little bearing upon the construction of the contract now before the court. The case appears to me to be without considerable authority, either direct or by analogy, and the question to be one of reasonable usage commonly understood. In *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425, it was held that a judge cannot take out a copyright in an opinion, statement of the case, and headnote prepared by him in the discharge of his official duty; but the analogy between a judge and this complainant appears to me remote. In *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, it was held that an official reporter paid by a state can take out copyright in the matter prepared by him as reporter. The decision was rested largely upon long-established custom, and the court said:

"There is in such case a tacit assent by the government to his exercising such privilege. The universal practical construction has been that such right exists, unless it is affirmatively forbidden or taken away; and the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary under the governments both of states and of the United States."

Again, the analogy between a reporter and Mr. Dielman appears to me remote, as does that between Mr. Dielman and the employé in *Solomons v. U. S.*, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667, and in *Gill v. U. S.*, 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480. If the commission to produce a work of art ordinarily imports permission to take out a copyright therein, so that the patron may be excluded from reproducing it, then this contract made between the United States and the complainant permitted him to take out a copyright in this mosaic. If, on the other hand, as I believe, the commission to produce a work of art imports unrestricted right of reproduction in the patron, then this contract made between the complainant and the government, in and of itself, imported a denial of the complainant's copyright. See *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784. It is unnecessary to decide what would be the result of a purchase and sale of a picture, already copyrighted when the contract was first entered into. While, however, an accepted commission to paint a picture ordinarily imports an unrestricted right of reproduction in the patron, it is doubtless possible, by apt expressions in the contract, for the artist to retain the copyright for himself. Here it is urged with much force by the complainant that the patron, the United States, has acquiesced in this, the complainant's construction of the contract. First. Because, when the matter was called to the attention of Mr. Edward P. Casey, he did not object to the copyright. Upon this point the evidence is so slight, and there is such want of proof of authority to bind the government on Mr. Casey's part, that I think the complainant's conversation with him, standing by itself, is entitled to very little weight. Second. Because the United States, by its officers, permitted the placing (indeed, placed for itself) the mosaic in question, bearing the copyright notice. It was further testified by Mr. Wright, a witness for the defendant, that the larger number of the mural works of art in the Congressional Library are marked "Copyright." It seems, therefore, that the United States has permitted the complainant to placard the mosaic in question with a statement that his construction of the contract between him and the government is the correct one, and that the library is pretty thoroughly placarded with like statements of like claims on the part of other artists. These facts are entitled to much weight, and have caused me to doubt gravely if the United States has not acquiesced in the complainant's claim of copyright. The officers in charge of the library, in permitting these inscriptions to remain, have failed in the performance of their duty, unless the complainant's contention is correct; but as they have encouraged the taking of photographs, while permitting the inscriptions to remain, their conduct is, in any case, indefensible. Upon the whole, considering the nature of governments and the habits of governmental officers, which are matters of common knowledge, I do not deem the evidence of acquiescence strong enough to overthrow what appears to me the plain and necessary meaning of the original contract. For these reasons, though with grave doubt, the bill is dismissed, with costs. Bill dismissed.

ANIMARIUM CO. v. FILLOON et al.

(Circuit Court, S. D. Iowa, C. D. June 21, 1900.)

PATENTS—VALIDITY—THE OXYDONOR.

The Sanche patent, No. 587,237, for a device known as the "Oxydonor," an appliance for use in treatment for disease, considered, and, on evidence showing that in actual use the device had proved operative and useful, held valid, as against defendants, who were shown to be manufacturing and selling an infringing device of similar nature.

In Equity. Suit for infringement of a patent and trade-marks. On rehearing. For former opinion, see 98 Fed. 103.

SHIRAS, District Judge. This case was originally before the court at the November term, 1899, at which time G. Walter Filloon was the sole defendant, and, upon the hearing then had, it was held that the instrument known as the "Oxygenor" was in fact an imitation of the "Oxydonor," a device manufactured by the complainant company under letters patent No. 587,237, dated July 27, 1897, and that, in his efforts to supplant the Oxydonor by introducing the Oxygenor to his customers, the defendant Filloon pirated the trade-marks of the complainant, used in connection with the Oxydonor; but the injunction sought by the complainant was refused because it was not shown to the satisfaction of the court that the device known as the "Oxydonor" was in fact valuable or useful, in such sense as to sustain the validity of letters patent No. 587,237; it being further held that, as there were then pending in other jurisdictions suits involving the validity of the patent, the injunction would be refused, with leave to complainant to apply for a rehearing in case the validity of the patent and the usefulness of the Oxydonor should be established by decree in the other pending cases. See opinion in 98 Fed. 103. Subsequently, it was agreed by the parties interested in the Oxydonor and Oxygenor Companies that the questions at issue should be fully presented in the present case, and to that end a rehearing was consented to, and James Mahler, Myrtle G. Mahler, and Chattie E. Field, composing the partnership doing business under the name of the Oxygenor Company, were made co-defendants in the suit, and answered the bill of complaint, and the record was reopened for taking further evidence, upon the completion of which the case was submitted to the court after a full and elaborate argument of counsel. The additional evidence adduced in the case does not shift the pivotal point upon which the decision must be rested, for it is clear that if letters patent No. 587,237 are valid, and the device covered thereby is useful, then the complainant is entitled to the injunction prayed for, to restrain the defendants from manufacturing and selling the instrument known as the "Oxygenor," or from using the trade-marks associated with the sale of the Oxydonor. Upon the issue of the usefulness of the device, the defendants claim that the Oxydonor is wholly inert; that it does not set in operation any natural force; that the so-called principle of diaduction, claimed to have been discovered by Dr. Sanche, the patentee, and to be utilized through the Oxydonor, does not exist; and that the beneficial results derived from the use of the Oxydonor must be attributed

to its influence upon the imagination of the patients. I must confess that the additional evidence taken in the case has not given to the court any better understanding of the so-called principle of diaduction than was had at the former hearing. I am entirely certain that I do not understand the working of this so-called force, if any such exists, and I greatly doubt whether Dr. Sanche has any clear conception of the force or principle which he seeks to describe under the name of "diaduction." But, though this be true, it does not follow that the patent covering the device in question is invalid because the inventor may not understand the principle upon which it operates. A patent cannot be granted to one who may have discovered a hitherto unknown mode of operation of the forces of nature, or have discovered the law governing the operation of a natural force, for in such cases nothing new is invented, but only a discovery is made of a pre-existing matter. If, however, a person invents an instrument or device whereby a natural force may be utilized with beneficial results, the instrument so devised may be patented, and the fact that the inventor may misconceive the nature and mode of operation of the force called into action through his patented device will not invalidate the patent. The usefulness of the patented article is to be determined by the practical results derived from its use, and not from a consideration of the theories existing in the mind of the inventor as to the nature of the force brought into action by the use of the patented device. Upon the issue of the beneficial results following the use of the Oxydonor, the complainant has introduced the testimony of some 70 witnesses, residing in many different parts of the country, who have used the device, and their testimony is to the effect that they derived beneficial results from its use. As was stated in the original opinion filed herein, the evidence of the defendant Filloon showed that many thousands of these instruments had been sold in Iowa and adjacent states, and thus full opportunity was given to the defendants to prove the actual results flowing from the use of the device, and, if possible, to show that, when put to actual use, it was inert and inoperative. This field of investigation was not entered into by the defendants, who have largely depended for evidence, in support of their claim that the Oxydonor is worthless as a curative agency, upon the views and theories of persons who have not given the device any thorough, practical test. Upon this question of the actual beneficial results produced by the use of the Oxydonor, the weight of the evidence must be held to be with complainant, and the situation of the case is this: The evidence shows that the complainant, as assignee of Dr. Sanche, is the owner of letters patent No. 587,237, which were not issued until after a prolonged contest before the patent office, and which must be held, therefore, to represent the well-considered judgment of that office, and to create a strong *prima facie* case in favor of the validity of the patent, which can only be overcome by evidence of a clear and convincing nature. Rob. Pat. § 1016. The evidence further shows that a very large number of the instruments described in the letters patent have been sold throughout the country, and have been used by all classes of people; and the complainant has introduced in evidence the testimony of some 70 of the persons so using the invention, and their testimony shows

that the device has operated beneficially when used by them, and this class of evidence has not been met by the defendants; so that it must be held that the evidence proves that, in actual use, the Oxydonor has shown itself to be operative and useful. The evidence further shows that the defendants are earnestly striving to defeat the patent held by complainant in order that they may be free to sell to the public an instrument or device of like nature to that manufactured by complainant,—a course of conduct on their part which is wholly incompatible with the theory of the uselessness of the Oxydonor, unless they admit that they are willing to incur a great expense in defeating complainant's patent, to the end that they may also engage in a fraud upon the public by selling an instrument of like nature and appearance. If we absolve the defendants from the imputation of willingness to participate in a fraud upon the public, we must then conclude that they recognize a merit in devices of the nature of the Oxydonor and Oxygenor. Under these circumstances, the court cannot find that the evidence clearly shows that the patented device is wholly without utility, and is not, therefore, justified in refusing the injunction prayed for against the defendants on the ground that the letters patent are void, because they cover a worthless device.

Thus, in *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939, it is said:

"The patent is *prima facie* evidence of both novelty and utility, and neither of these presumptions has been rebutted by the evidence. On the contrary, they are strengthened. * * * The fact that it has been infringed by defendants is sufficient to establish its utility, at least as against them."

In *Kearney v. Railroad Co.* (C. C.) 32 Fed. 320, it was aptly said by Mr. Justice Bradley:

"The first question which presents itself when such a defense is made is, then why did you use it? This mode of attacking a patent can never succeed without showing by the clearest evidence that the invention is utterly frivolous and worthless; and the fact that the defendants have used it, and infringed the patent, is always a strong argumentum ad hominem against them."

It is upon the principle laid down in these and similar cases that the court relies for the conclusion it has reached upon the issues submitted. The question whether the continued use of the devices patented by Dr. Sanche will demonstrate their value is, in the mind of the court, a matter of grave doubt; but, because the attitude of the court upon this question is that of a "doubting Thomas," it is not justified in holding the patent to be void. The complainant is therefore entitled to a decree and an injunction as prayed for against the defendants composing the Oxygenor Company, and also against the defendant Filloon, restraining him from selling the infringing devices, and from using the trade-marks representing the complainant's instruments.

BRESNAHAN et al. v. TRIPP GIANT LEVELLER CO. (two cases).

FULLER et al. v. SAME.

(Circuit Court of Appeals, First Circuit. June 5, 1900.)

Nos. 327, 328, 331.

1. PATENTS—CONSTRUCTION OF CLAIMS.

The claims of a patent should be construed, where they reasonably may be, to cover the entire invention of the patentee; and where a patent contains several claims, some of which are limited to details, the others are, *prima facie*, not to be restricted by insisting that they contain, as necessary elements, the particulars which are specifically covered elsewhere.

2. SAME—INFRINGEMENT—MACHINE FOR BEATING OUT SHOE SOLES.

In the Cutcheon patent, No. 384,893, for improvements in machines for beating out the soles of boots and shoes, claim 1 is confined to that portion of the mechanism which lies between the actuating jacks and the crank shaft; and infringement of such claim is not avoided by the substitution of mechanism different from that described in claim 4, between the crank shaft and the source of power.

3. SAME—SUIT FOR INFRINGEMENT.

The fact that a defendant is merely a user of infringing machines, and not a manufacturer, does not affect the right of complainant to a preliminary injunction, unless under exceptional circumstances, as where it appears that his general market is not jeopardized, and that he can be made entirely good by the payment of damages equivalent to a license fee. *Westinghouse Air-Brake Co. v. Burton Stock-Car Co.*, 77 Fed. 301, 23 C. C. A. 174, distinguished.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Frederick P. Fish and William Quinby, for appellants.

Causten Browne and Alexander P. Browne, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PUTNAM, Circuit Judge. These are appeals from decretal orders granting ad interim injunctions in suits on a patent for an invention. The only question relates to infringement, and this depends on the extent of the patentee's invention, and the construction to be given to the claim in issue. Consequently the general rules which govern us are those stated by this court in *Hatch Storage-Battery Co. v. Electric Storage-Battery Co.* (C. C. A.; in an opinion passed down on March 16, 1900) 100 Fed. 975.

There is so much literature in the courts in this circuit with reference to the patent in suit, that we need not state the facts at length. The only claim in issue is the first one, as follows:

"(1) A machine for beating out the soles of boots and shoes, provided with two jacks, two molds, and means, substantially as described, having provision

for automatically moving one jack in one direction while the other is being moved in the opposite direction, whereby the sole of the shoe upon one jack will be under pressure, while the other jack will be in a convenient position for the removal of the shoe therefrom."

For the proper construction of this claim, it will be necessary to refer to claim 4, as follows:

"(4) In a machine for beating out the soles of boots and shoes, the combination of a mold or die; a vertically-movable jack; a crank; a toggle mechanism connecting said crank and jack, and having provision for the movement of the latter; a crank-shaft; a cam secured to said crank-shaft, and provided with an abrupt shoulder; a driving-shaft; gearing for connecting said crank-shaft and said driving-shaft; a rocker-shaft; a stop-arm secured to said rocker-shaft, and engaging with the shoulder upon said cam to stop the machine; a treadle secured to said rocker-shaft; a spring connecting said treadle with a stationary part of the machine; a brake-shoe operated by said treadle, and acting upon said brake-wheel; and a suitable clutch mechanism for applying power to the driving-shaft when the shoe has been released from contact with the brake-wheel, and the stop-arm has been disengaged from the shoulder of said cam."

Claim 1 has relation, by its express terms, to that part of the machine which has a duplicated mechanism. Claim 4 has relation to a part of the machine which does not necessarily involve a duplicated mechanism. Each claim may well cover a distinct invention. To hold that claim 1 necessarily involves the details which are set out in claim 4, which details may be used in a machine with only one jack and one mold, would be to so limit claim 1 that in effect it would be no broader than claim 4. This is practically the substance of the contention of the appellants. If the patentee's invention is broader than that set out in claim 4, the limit which the appellants thus seek to place on claim 1 would be contrary to the rule so steadily applied in this circuit, that claims ought to be construed, where they reasonably may be, to cover the entire invention of the patentee. The contention is also opposed to the general rule of construction, applicable where there are several claims, to the effect that, if some of the claims are limited to details, those which remain are *prima facie* not to be fettered by insisting that they contain, as necessary elements, the particulars which are specifically covered elsewhere.

An examination of the history of the decisions of this court with reference to this patent will show that these rules have been applied by us to the construction of claim 1, and that we have not understood that claim 1 has relation to the mechanism which lies between the crank-shaft spoken of in claim 4 and the source of power. Without detailing the features as to which the appellants claim that their machine differs from the machine covered by the patent in suit, it is sufficient to say that they all relate to the portion last named, and not to those elements which lie between the crank-shaft and the jacks, and which secure the simultaneous motion of one jack in one direction while the other is being moved in the opposite direction, as pointed out in claim 1.

The first decision to which we need refer is that of the circuit court, passed down on September 9, 1892, in *Cutcheon v. Herrick* (C. C.) 52 Fed. 147, 148. In that case there was a decree for the complainant. The case came before this court on appeal in *Herrick v. Leveller Co.*, 8 C. C. A. 475, 60 Fed. 80, where the opinion was passed down on October 12, 1893. There the decree of the court below was affirmed in a per curiam, which adopted its opinion. Those opinions were expressed in such general terms that a question arose with reference to the construction of claim 1, which came before this court again in *Bresnahan v. Leveller Co.*, 19 C. C. A. 237, 72 Fed. 920, where an opinion was passed down on February 14, 1896. We said, at pages 923, 924, 72 Fed., and page 241, 19 C. C. A., as follows:

"Claim 1 of the patent in suit is a very broad one, and, as we held it valid, it would seem that no method of making the connection between the actuating jacks and the crank-shaft, by means well known in the arts at the date of the patent, would evade it. We are also unable to perceive that the discussion in relation to the treadles and their connections is pertinent, as there is nothing in the letter of claim 1, or in the opinions of either this court or the circuit court in the former case, which makes any automatic stop movement, or any other stop movement, an element." "There was nothing in that case in either court which called for any elements except those stated in the claim; and these, as explained by the circuit court in the extract we have made from its opinion, cover the first device in which both of the operations of compressing and clearing were performed automatically, and specify no elements, except two jacks, two molds, and means for automatically moving one jack in one direction while the other is being moved in another direction."

Then we proceeded to show that the words in claim 1, "substantially as described," did not effectually limit it. The patent was again before us in *Bresnahan v. Leveller Co.* (C. C. A.) 99 Fed. 280, where, in an opinion passed down on January 10, 1900, we firmly adhered to what we had before determined, and stated that the new proofs then before us "should not narrow the claim as interpreted in" our prior decisions.

There is nothing indefinite in the extracts we have given from our opinions, except the fact that the relations of the word "automatically" in claim 1 were not, in terms, explained, although we think they can be gathered from what we said, so far as the word relates to that claim. The appellants insist that this word, as used in this claim, relates to the entire mechanism intervening between the treadle with which the machine is started, and the lasts; but there is nothing which necessitates this construction. It is plain, on examining our opinion in *Bresnahan v. Leveller Co.*, that we regarded the pith of claim 1 as relating to the "method of making the connection between the actuating jacks and the crank-shaft." We stated that we were unable to perceive that the discussion in relation to the treadles and their connections was pertinent, and this was not limited by the fact that we afterwards referred to the stop movement, which had been particularly brought to our attention. Very few machines are perfectly automatic. Occasionally we have had before us a machine in which the mere presentation of the blank to be worked on caused the mechanism to commence its operation

and complete it, and then to cease operating, all without any other human intervention; but neither of the machines now before us is automatic, in the entire sense of the word, notwithstanding the contention of the appellants to the contrary. In the patented machine, when constructed with all the details described in the specification and covered by all the claims, not only must the work be presented to the machine, but human intervention is necessary at the treadle to set the machine in operation every time a blank is introduced for compression. It follows that in this machine the word "automatically" is not used in such a strict sense that it may not yield to a just construction of the claims; and therefore it may as well be applied to any part of the patented machine as to the whole of it, when necessary to give full effect to the invention. In the appellants' machine, the portions to which claim 4 relates are so constructed as to require the constant intervention of human agency at the treadle during the entire round of operation. This, however, has no relation to the mechanism between the crank-shaft and the jacks, because, so far as that part of the appellants' machine is concerned, it has "provision for automatically moving one jack in one direction while the other is being moved in the opposite direction," all substantially as described in the patentee's specification, and as covered by claim 1. This "provision" consists of the crank-shaft, with a pair of toggles, or their equivalent, and the incidental details of each, all of which constitute the "means substantially as described" in the claim.

As, therefore, in our previous opinions we have sustained the validity of claim 1, and held it to be broad, and given it substantially the same effect as we now give it, there was not only sufficient in the prior litigation, according to the rules applicable under these circumstances, to justify the court below in granting the injunctions now appealed against, but there was enough, in view of the necessity of giving patents protection during their short terms of existence, to require that the court should have entered the decretal orders which it did enter.

One or more of the pending suits out of which these appeals arose were brought against infringers who were simply users, having purchased machines from the infringing manufacturers. Under these circumstances, these parties rely on the principles announced in *Westinghouse Air-Brake Co. v. Burton Stock-Car Co.*, 23 C. C. A. 174, 77 Fed. 301, decided by this court on October 9, 1896. An examination of the opinion in that case will show that the circumstances which the court relied on were peculiar. The same was the fact with reference to the other citations made to us by the appellants, the most important of which were referred to in the opinion filed in the circuit court in the same case (*Westinghouse Air-Brake Co. v. Burton Stock-Car Co.* [C. C.] 70 Fed. 619), where it was shown, moreover, that there was no danger that that complainant could not be made entirely good by the payment of damages equivalent to a license fee. There was nothing to indicate that that complainant's market was jeopardized in any general sense. To apply decisions in such special cases to ordinary users would be to destroy the patentee's

market, and to ignore the recognized rules which the equity courts so frequently apply in order to protect the substantial values of patents by using in their behalf *ad interim* injunctions.

In each case the judgment is as follows:

The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellee.

BLISS v. REED.

(Circuit Court, W. D. Pennsylvania. June 1, 1900.)

1. PATENTS—INVENTION—TRACTION ENGINES.

The Elward patent, No. 272,670, for a traction engine having two supporting and driving wheels which can rotate independently of each other, a compensating gearing through which power may be applied to both driving wheels equally when they are rotating at different speeds, a driving engine and a friction-clutch mechanism interposed between the driving engine and the compensating gearing mechanism, whereby the engine may be put into full motion, and its momentum then transferred equally to both driving wheels, covers a mechanical arrangement absolutely new, and a true combination in the sense of the patent law; the constituent elements co-operating to produce a result both new and useful.

2. SAME.

The Giddings patent, No. 330,576, claim 1, which relates to friction-clutch mechanism for use on traction engines, discloses a patentable combination which was not anticipated.

3. SAME—ASSIGNMENT—CONSTRUCTION.

An assignment of a patent by the patentee to a person named "(et al.," passes all the right, title, and interest of the patentee, and vests the same in the person named as assignee, at least so far as to entitle him to maintain a suit thereon against a naked infringer.

4. SAME—INVENTION—TRACTION ENGINES.

The Titus patent, No. 302,449, claim 2, covering a particular construction of friction-clutch mechanism for use on traction engines, shows an invention of novelty and merit, and is valid.

In Equity. Suit for infringement of patents. On final hearing.

H. H. Bliss and John R. Bennett, for complainant.

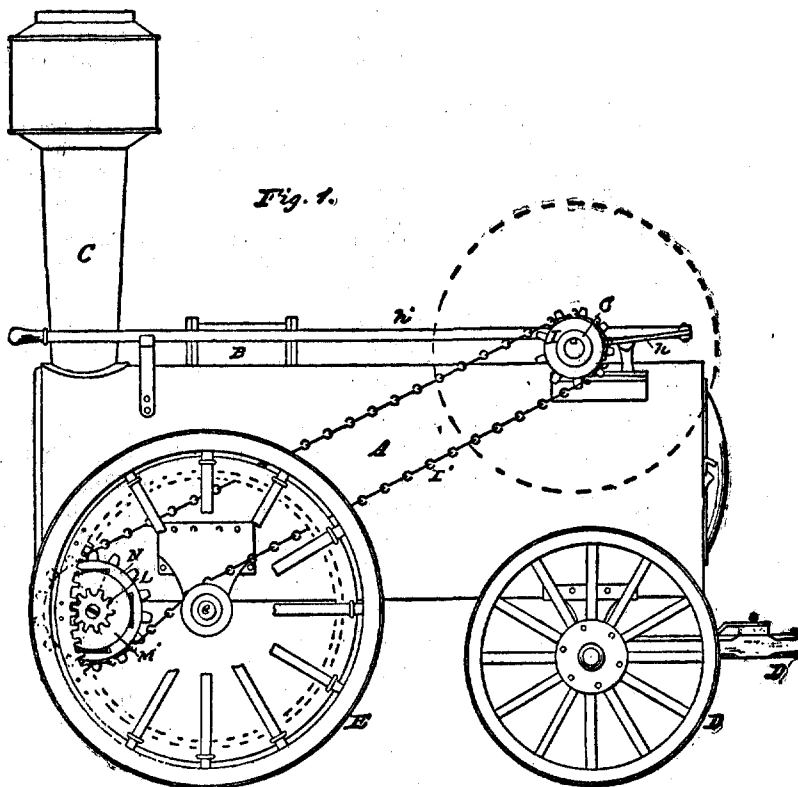
J. H. Whitaker and Lysander Hill, for respondent.

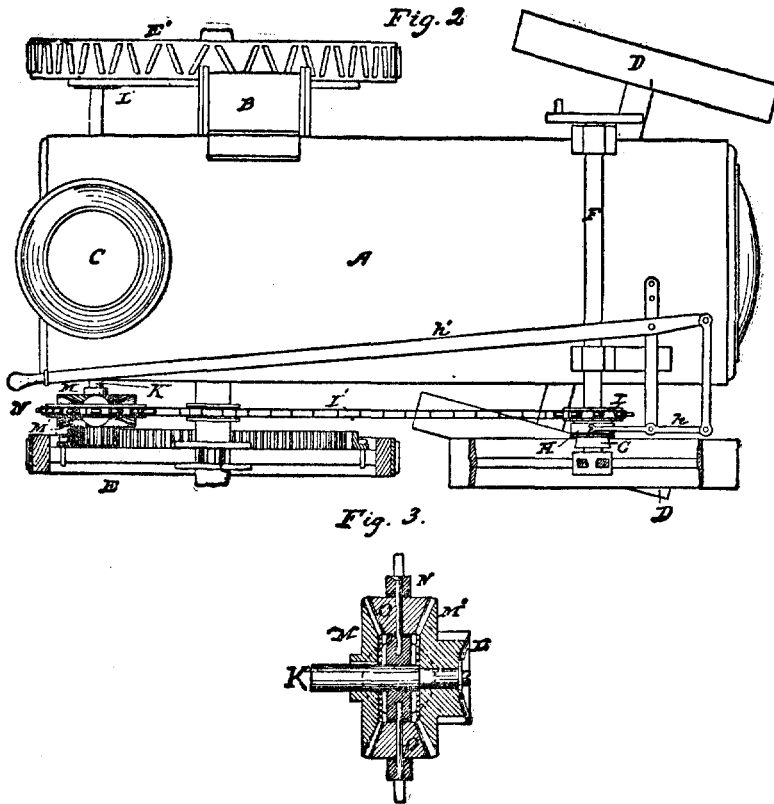
ACHESON, Circuit Judge. The bill charges infringement of three letters patent relating to traction engines, namely, No. 272,670, granted to John H. Elward on February 20, 1883, No. 330,576, granted to Charles M. Giddings on November 17, 1885, and No. 302,449, granted to John C. Titus on July 22, 1884. The traction engine which these patents concern is the modern agricultural machine which propels itself, without the guidance and aid of tracks, over common country roads or across fields under uncertain, changing, and difficult conditions. To the Elward patent—the earliest of the three patents in suit—attention will be directed first. This patent describes, and by its illustrative drawings shows, a steam boiler and a driving engine; two supporting and driving wheels so mounted that they can rotate independently of each other; a compensating or power dividing gear through which power may be imparted to

both driving wheels equally, even when they are rotating at different speeds; a friction-clutch mechanism located between the driving engine and the compensating gear; the engine cylinder and crank shaft carrying a fly wheel at its outer end, placed above the boiler, and so arranged that the crank shaft and its fly wheel, while disconnected from the gear train, can be freely rotated to generate momentum; the construction of the machine and the relation of the parts being such that the engineer standing on his platform can raise the speed of the crank shaft and fly wheel to any desired practical limit, and then, by the manipulation of the friction clutch, transmit this increased energy, as well as the normal power of the driving engine, through the compensating gear train to the driving wheels.

The specification of this patent states:

"The object of this invention is to so construct a traction engine that it can be readily started after it has come to rest in the position occupied by it while in the operation of turning. To this end it consists in the combination with a compensating gear, which permits the power to be applied by both driving wheels equally, of a friction clutch, which permits the speed and power of the engine to be raised to the utmost before connecting the engine with the driving wheel."





The specification further sets forth:

"The parts K, L, L¹, M, M¹, N, and O constitute a compensating gear of substantially the character now well known. When the power is transmitted by these devices, it is imparted to both driving wheels equally at all times, as is well known, and hence, in order to turn an engine on a curved path, a compensating mechanism of substantially this character is indispensable. By combining with this mechanism a friction clutch, I am enabled to impart the utmost power to the engine at any instant in equal degrees to the driving wheels. Without the compensating gear the power enhanced by the clutch would be all exerted upon one wheel, and even this greatest power thus exerted upon but one wheel is insufficient to start an engine of ordinary weight. Without the clutch the engine cannot get up enough momentum to overcome the inertia of the machine, although a compensating gear be employed."

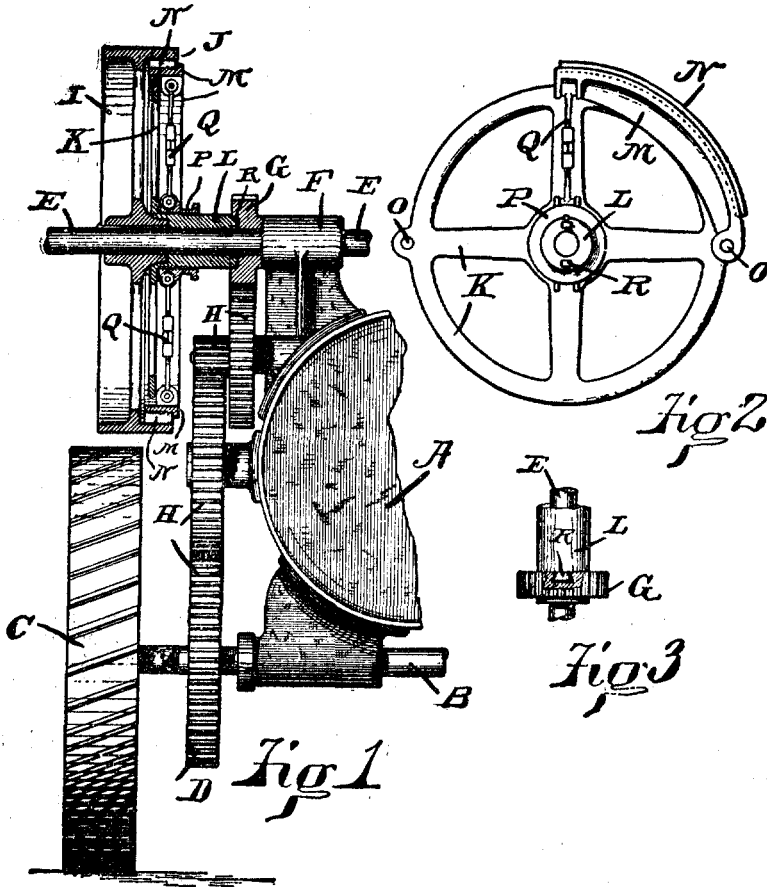
The patent has a single claim, which reads thus:

"In a traction engine, the combination of the following elements, namely, two supporting and driving wheels which can rotate independently of each other, a compensating gearing through which power may be applied to both driving wheels equally when they are rotating at different speeds, a driving engine, and a friction-clutch mechanism interposed between the driving engine and the compensating gearing mechanism, whereby the engine may be put into full motion and its momentum then transferred equally to both driving wheels, substantially as set forth."

There is, I think, no force in the suggestion that the claim does not specify a fly wheel. It calls for a driving engine which contains a fly wheel as one of its constituents. The specification speaks of the "usual" fly wheel carried on the end of the main shaft, and the patent drawings show the fly wheel as thus described. It was no more necessary to specify the fly wheel in the claim than it was thus to particularly name any other part of the driving engine. If the patent is valid, there is no serious question as to the infringement of it by the defendant. It quite plainly appears that each of the three styles of traction engines sold by him, namely, the Frick, the Huber, and the Gaar-Scott, embodies the improvement described in Elward's patent and covered by his claim. The utility of Elward's described and claimed construction is not disputable under the proofs. Its great practical success and its recognized advantages over all traction engines previously used are clearly shown. I do not find in any of the prior patents an anticipation of the subject-matter of Elward's patent of February 20, 1883,—the patent in suit. Not one of the machines of the earlier patents shows the construction of this Elward patent. The proofs justify the affirmation that, regarded as an entirety, the claim of this patent covers a mechanical arrangement absolutely new. No traction engine so constructed and operating was previously known.

But the defendant's counsel earnestly contend that Elward's claim is not for a legitimate combination of co-acting elements, but covers a mere aggregation of old mechanical devices, and therefore is void. This is the main defense now pressed against the Elward patent. A careful examination of the patent and the proofs, however, has satisfied me that the defense is not well founded. While the constituents entering into Elward's organization may there each perform its own special function, yet they also co-operate to a common end otherwise not attainable. By their associated action a new and useful result is brought about. The elemental parts specified in the claim stand in peculiar relationship. The friction-clutch mechanism is interposed between the driving engine and the compensating gear, and must be so placed to accomplish the desired object. Through the instrumentality of the friction clutch so located, the machine is always under the positive control of the operator, who, according to the emergency, can raise the speed of the crank shaft and its fly wheel when disconnected from the traction gear, and then make this increased energy effectively available through the compensating gear train upon the driving wheels. I am, then, of the opinion that we have here a true combination in the sense of the patent law. This view is sustained by the authorities. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177; *National Cash-Register Co. v. American Cash-Register Co.*, 3 U. S. App. 340, 355, 3 C. C. A. 559, 53 Fed. 367. This precise question was raised in the patent office by the primary examiner before the issuing of the patent, and after investigation was decided,—I think, rightly,—in favor of Elward by the appeal board of examiners in chief.

We are now brought to the consideration of the Giddings patent. While this patent, both as to date of application and issue, is later than the patent to Titus, yet the evidence establishes, and, indeed, it is conceded, that as between these two patents priority of invention is to be accorded to Giddings. The proofs show—and I do not understand it to be denied—that the traction engines of the “Frick” style sold by the defendant embody the subject-matter of the first claim of the Giddings patent, which claim is the only one now pressed by the complainant. The specification of this patent states that the “invention pertains to traction engines in which a friction clutch is employed in the mechanism transmitting motion from the engine shaft to the traction axle, and relates particularly to the arrangement and construction of parts,” as described.



The clutch of this patent is so constructed and operated that momentum is taken directly from the rim of the fly wheel by means of friction shoes movable radially, at the will of the operator, into and out of engagement with the inner side of the rim, and stationary

when out of engagement with the rim, even though the fly wheel is rapidly revolving. The rotary power transmitter or motor pinion is loose upon the shaft, but is without sliding movement longitudinally, and permanently preserves its position with reference to the gearing. The sliding part of the clutch, by which the motor pinion is thrown into and out of rotation, is the collar, P, which moves longitudinally upon the hub, L, of the clutch; the hub and the motor pinion being rigidly connected, both being integral parts of the clutch spider, K. A portion of the descriptive part of the specification may here be quoted:

"G represents a pinion loose upon the motor shaft; H, a train of gearing adapted to transmit rotary motion from the pinion, G, to the axle gear, D; I, a fly wheel fast upon the motor shaft; J, a portion of the rim of the same, bored so as to present a true interior surface; K, a clutch spider located within the bored portion of the fly wheel, and fitted to be free upon the motor shaft; L, the hub of the clutch spider, formed solid with the clutch spider, loose upon the motor shaft, and rigidly connected with the motor pinion, G; M, a pair of segmental shoe holders pivoted to the clutch spider, as indicated in Fig. 2; N, wooden shoes held one in each shoe holder, and having a peripheral surface fitting the interior of the bored portion of the fly wheel; O, the pivots connecting the shoe holders with the spider; P, a collar sliding longitudinally upon the hub of the spider, and adapted to be operated by an ordinary clutch-shifting device; Q, toggle rods pivoted to ears formed upon the sliding collar, and upon the free end of the shoe holders; and R, dovetail projections cast upon the face of the hub of the spider, and babbitted into dovetail recesses cast in the contiguous face of the motor pinion G."

The specification thus states the mode of operation and effects:

"The sliding collar, with its rods, forms a toggle system. When the collar is moved to the right, viewed as in Fig. 1, the toggle becomes shortened, and the shoes drawn inward. In this condition the motor shaft, with its fly wheel, may be revolved, while the clutch spider, with all of the transmitting gearing and traction apparatus, remains motionless. When the collar is moved to the left, the shoes are pressed forcibly against the rim of the fly wheel, and the effect is to lock the motor pinion to the fly wheel. Under such conditions rotary motion is transmitted from the motor shaft to the traction apparatus. The shoes, N, being of wood, are somewhat elastic. This elasticity permits the sliding collar to be pushed to the left a trifle past the center of oscillation of the toggle rods, in which position the toggle system remains self-locked. In moving the sliding collar to the left, the pressure with which the shoes engage the fly wheel is under perfect control, and this pressure may be so controlled as to permit a certain degree of slippage between the wheel and shoes, whereby a portion only of the rotary motion of the fly wheel is transmitted to the spider. The result of this arrangement is that the motor shaft, E, running at a constant speed, may be caused to transmit a variety of speeds to the traction apparatus."

The first claim of the patent—the only one now in question—is as follows:

"(1) The combination, with the shaft, the fly wheel, and hub, of the collar, P, the shoe supports, the shoes, and rods, Q; all of the above parts combined and adapted to operate as described."

Without undertaking to discuss at length the voluminous proofs bearing upon the subject, I content myself with stating the conclusions to which they have brought me. I am of opinion that the improvement of Giddings disclosed in and by his patent and covered by his first claim was patentably new and useful; that he was not anticipated by any of the anterior patents contained in this record,

or by any earlier structure; that his first claim is for a patentable combination, and that it has been infringed by the defendant.

At final hearing a question was raised growing out of the peculiar form of the assignment of the Giddings patent by the patentee to J. B. Bartholomew, through whom the complainant claims. The assignment is unto "J. B. Bartholomew (et al.), * * * said right to be held and enjoyed by the said J. B. Bartholomew et al., his or their heirs and assigns," etc. Assuming that under the pleadings this question is properly before the court, I am of opinion that it does not bar a decree against the defendant. There is no evidence dehors the assignment that the parties thereto intended to invest any particular person other than Bartholomew with title. It would be a strained inference to deduce such purpose from the mere use of the vague addition "et al." But indisputably "all the right, title, and interest whatsoever" of the patentee in and to the patent passed from him by his assignment, and it is very clear that the whole legal title to the patent vested in Bartholomew, who conveyed that title to the complainant; and this, it seems to me, is sufficient to enable the complainant to maintain a bill against a naked infringer.

The claim of the Titus patent alleged to be infringed is the second, which is as follows:

"(2) The combination, with the crank shaft, a traction wheel, and intermediate gearing, of the fly wheel, sleeve, E, provided with a pinion and with arms, E¹, block supports guided on said arm, friction blocks, and devices, substantially as described, for moving the blocks in contact with the wheel, substantially as set forth."

This claim relates, it is true, to a detail of construction only, but the evidence shows that the invention possesses real novelty and substantial merit. The proofs also show that in the Frick machine sold by the defendant this invention is employed. The defendant's position that Giddings, because prior in time to Titus, defeats the latter, is not, I think, well taken. Undoubtedly these two inventions are upon the same general line, and it may be conceded that the Giddings invention is the broader. Nevertheless the specific device disclosed by Titus, and covered by his second claim, is not shown in the Giddings patent. Giddings describes a "toggle system" whereby his friction shoes are drawn inward and thrown outward. Titus, however, does not employ the hinged shoes of Giddings, but centrifugally acting sliding shoes. The precise improvement made by Titus is not met by any earlier patent. I see no good reason for refusing to sustain the specific grant to him contained in his second claim. There is no inconsistency in upholding these two patents and in finding that there is infringement of both. The two inventions are distinct, and therefore each is valid, although Giddings may dominate Titus. Let a decree be drawn in favor of the complainant in accordance with the conclusions expressed in this opinion.

SWAIN v. HOLYOKE MACH. CO.

(Circuit Court, D. Massachusetts. June 1, 1900.)

No. 658.

1. PATENTS—PRIOR PUBLIC USE—EXPERIMENTAL USE.

The construction for, and absolute sale to, a customer of a turbine wheel, and its installation in the manufactory of the purchaser for actual use in driving the machinery therein, more than two years prior to an application for a patent for such wheel, constitutes a prior public use which will defeat the patent, although one of the objects of the inventor may have been to have a practical test made of the machine for experimental purposes.

2. SAME—TURBINE WATER WHEELS.

The Swain patent, No. 535,467, for turbine water wheels, as to claims 1 and 3, is void on account of prior public use, and claim 2 is void because the distinctive feature therein shown lacks invention.

In Equity. Suit for infringement of a patent. On final hearing.

Charles F. Perkins and Chas. H. Drew, for complainant.

Elmer P. Howe and Benj. Phillips, for defendant.

LOWELL, District Judge. This is a bill in equity for an injunction to restrain the defendant from infringing the first, second, and third claims of letters patent No. 535,467, for improvements in turbine water wheels. The claims are as follows:

"(1) Two vertical turbine water wheels in one machine, discharging their effluent water towards each other, combined with a common receptacle into which the water from both wheels is discharged, said receptacle being so constructed on the inside as to form a partition or obstruction therein, located between the wheels, whereby the direction of the stream from each wheel is diverted, and its action against the stream of the other wheel is wholly or partially obviated, substantially as described.

"(2) Two turbine wheels, provided with a surrounding flume case and induct passages, each wheel discharging its effluent water into a quarter turn, A, having its top surface curved outwardly and downwardly from said wheel, said quarter turns being located between the wheels, in combination with said quarter turns, A, A, and a draft pipe, O, having a vertical partition, I, throughout its entire length, which is practically a continuation of the central walls between the quarter turns, whereby the entire educt is divided into two separate passages, substantially as described.

"(3) The combination of two turbine wheels provided with a surrounding flume case and induct passages, and arranged to discharge the water into a common educt passage located between them, and provided with a dividing partition which curves outwardly and downwardly from each wheel, substantially as described."

Several defenses have been set up, but it is necessary to consider only one of them.

More than two years before the patent in suit was applied for, the following transaction took place: One Chaffee, the agent of a corporation having its manufactory at Moodus, Conn., having heard that the patentee had set up at Ticonderoga, N. Y., certain turbine wheels, which need not further be described, wrote to him—

"Stating the desire of said corporation of substituting a pair of wheels for the wheel then in use at Moodus, and visited the plaintiff by appointment, at

his home at Chelmsford, Mass., for the purpose of consulting him about the matter. That the plaintiff then went to the mills of said corporation at Moodus, and after ascertaining the conditions under which it was required that the wheels should be operated, and the location in which they were to be placed, and the work which was required to be done, agreed with said Chaffee to put in place of the wheel then in use a pair of wheels to be connected with the supply and draft tubes which had been employed with the old wheel. In compliance with this agreement, a pair of turbine water wheels and their equipments were delivered in the latter part of December, 1878, at the mills of said corporation at said Moodus, and the wheel then in use was removed, and said wheels then delivered were duly installed and set up in the location theretofore occupied by said former wheel, the supply and draft tubes as originally built and located being utilized. These two wheels were mounted on a horizontal axis, arranged in a casing so as to discharge towards each other; a depression in the casing, and a partition extending downward therefrom, being provided to prevent the action of the stream from one wheel upon the stream discharged from the other. That the plaintiff, Asa M. Swain, superintended and assisted in the installation of said wheels. That the water was turned onto said wheels, and they were set in motion, without connection with the mill which they were designed to operate, on the 3d day of January, 1879, and on Saturday, the 4th day of January, 1879, the regulator and main belt were connected with said wheels, and said wheels were operated to run the shafting and a part of the machinery in said mill. That on said 4th day of January, 1879, the said Swain left Moodus, and on the following Monday, to wit, on the 6th day of January, 1879, the machinery in said mill was connected with said shafting and operated by said wheels. That the wheels and other new parts were built by Silver & Gay, of North Chelmsford, Mass, under the direction of said Swain. On January 9, 1879, said Chaffee made a draft (for \$654.42) on said Demarest & Joralemon, payable to the order of said Silver & Gay, and mailed the same to the latter. On the 10th day of January, 1879, said Silver & Gay received said draft, at North Chelmsford. Silver & Gay sent said draft to New York for collection through the Railroad National Bank, Lowell, and the National Hide & Leather Bank, Boston, and it was paid at the Hanover Bank, New York, on January 13, 1879, by the check of said Demarest & Joralemon. That for the labor personally performed by said Swain at Moodus, in superintending and assisting in the installation of said wheels, payment was made by said corporation directly to said Swain from time to time as the work progressed, before said Swain left Moodus, as heretofore stated."

The application for the patent in suit was dated January 10, 1881. The machine thus set up embodied the first and third claims above mentioned. The complainant seeks to overcome the force of this evidence of public use by showing that the establishment of the machine at Moodus was solely for the purpose of experiment. He testified substantially as follows:

"I had conversation with Mr. Chaffee at North Chelmsford, before going to Moodus, and also while I was there. Mr. Chaffee explained to me how he was situated, the kind of wheel he had in use, the difficulties he had with it, and I think gave me the size of his feed pipe or feeder, also his draft pipe, the head under which the wheel was working, and the height of the tail water. He also stated if it were possible he desired to retain the old feeder and draft pipe. He also stated that what had induced him to apply to me to help him out of his difficulty was chiefly the reputation and successful installation of a double vertical wheel at Ticonderoga, N. Y.; that his superintendent, Mr. Pollock, had visited that mill, and was very much pleased with the operation of those wheels. I told him that that style of wheel, with the outward discharge, would not be applicable to his place if he insisted upon making connection with his old feed pipe and old draft pipe. I told him that I had a plan, and sketched it on paper with a pencil, and which I had no doubt would

answer every purpose, provided he would provide the suitable feed pipe and draft pipe. The old feed pipe, being only twenty inches in diameter, I insisted was much too small to supply the pair of wheels which was proposed. The old draft tube was also too small, and I thought it very doubtful if one wheel could be run to advantage with the water shut off from the other wheel, and with a sharp angular contraction from twenty inches, the size of the proposed new draft tube, to sixteen inches in diameter, the size of the old one. He wanted to know if I couldn't make my new work so that the proper feed pipes and draft tubes could be supplied at some future time without disturbing the setting of the wheels. I told him they could be so arranged. He wanted to know what the probabilities were of being able to run his mill, as then constituted, using the old pipes, and saying that he intended to fill it to its fullest capacity as soon as the business would warrant, and that he would then put in a draft tube and feeder, as recommended. He said he didn't know for himself, but had sufficient confidence in my judgment and experience to leave it to me to do as I thought best, except to use his old feeder and draft tube, and until such time as he could fill his mill with additional machinery. I told him this was an experiment, and that I had been looking for a chance to try it; that I had no property of my own, having lost it all the year before, and I didn't want to make a failure of it. I told him I knew the machine could not be properly tested without a change in those pipes. He then assured me that that was fully his intention, and that the change should be made to conform to my recommendations. Upon this assurance, and believing, after looking over his mill, that with all the disadvantages in small pipes he would have no trouble in running his mill, I consented to his proposition. Business continuing dull, and, after a time, having been troubled with the breaking of the guides and floats, after replacing them a number of times, he, after about four years' use, took out all the inside works, and replaced them with a machine made by the Humphrey Machine Company."

He further testified that he discussed thoroughly with Mr. Chaffee the losses and disturbances caused by the size of the feeder and of the old draft tube at Moodus; that he knew these objections before the installation of the Moodus wheel; that he doubted if the machine would work with the old pipe; that he had some conversation with Mr. Chaffee before leaving Moodus, in which the latter promised to report to him the result of the experiment so far as could be known under the existing conditions; that he received a letter from Mr. Chaffee, since lost, some five or six weeks after leaving; what were the contents of this letter he did not state; that the proposed test upon which he relied at Moodus was "driving the mill in a successful manner, when it was filled in with machinery, or when the supply of water became so small that it could be used upon one wheel to better advantage than when distributed upon both"; that such a test would not be sufficient to determine the precise advantage of his invention; that such a test "is what is called a 'practical test' by many millwrights and manufacturers, and by them considered sufficient for all practical purposes, and was entirely sufficient in the case of one manufacturer, together with the general reputation of the Swain wheel for first-class results, to induce manufacturers to adopt them in a large number of cases, the largest manufacturing concern in Rhode Island having purchased twelve pairs. While this adoption is very satisfactory as far as it goes, a complete test in every respect and of the most scientific character is the only test that entirely satisfies me." Complainant further testified that from Mr. Chaffee's representations he hoped that the changes in the feeder and draft tube would be made in

a year; that he estimated the loss by back pressure at five or six feet; that he made improvements in his machine after the installation at Moodus; that he did not think the wheels would do the work with the old feeder and draft tube; that the calculations and drawings for the Moodus wheel took nearly all his time for four months; that an assistant was employed to make the quarter turns; that the pattern drawings were not included in the manufacturer's bills, which included the ironwork alone; that the entire amount paid by Chaffee for the machine, including that paid to Swain for labor and services, was less than the cost of the ironwork. On this point there was contradictory evidence given by a witness for the defendant, and the undisputed facts, as first above stated, should be referred to.

Mr. Chaffee testified that at the time he first saw Mr. Swain he was intending to increase the capacity of his mill, and that he stated this to Mr. Swain; that he contemplated building an addition, and that Mr. Swain planned the wheel with reference to doing the work that Mr. Chaffee expected to do; that he (Chaffee) hoped to make the change in 1879, but that in fact it was not made till 1880; that it was Mr. Swain's wish to have a larger draft pipe; that the reason why the larger pipe was not employed at first was that the 16-inch pipe was already in place, and Mr. Swain thought it would do the work all right,—would run the mill as it was then previous to the proposed addition; that he reported to Mr. Swain as to how the wheels were operating about January 25, 1879; that Mr. Swain was three or four times at the mill to make repairs or changes upon the wheels after they were installed; that Mr. Swain wanted a 20-inch draft pipe and a 24-inch supply pipe, and very strongly objected to connecting to the old pipes, for the reason that his wheel would not do its best work as so connected; that he consented to use the old pipes in that way, because Mr. Chaffee told him that an addition was soon to be built, and the wheels were to be used nearly to their full capacity; that Mr. Swain thought it would not give the wheels a fair chance to do their best work on the old pipes; Mr. Swain had what he thought was a very nice machine, and wanted to put it in to the best advantage possible; that he (Swain) consented to connect onto the old supply and draft pipes; that it was done in that way.

"Int. 51. State whether or not his objections were withdrawn after or in consequence of any statements or assurances made by you, and, if so, what they were. Ans. I told him that we were intending very soon to build onto the mill, and I had before told him that the wheel must be sufficient to do the work after the mill was built onto. Int. 52. Did you tell him whether or not you would substitute or adopt the size of pipes advised by him? Ans. Oh, yes; I expected to put in the pipes that he advised, as soon as it became necessary. Int. 53. Whether or not the substance of that was stated to Mr. Swain by you. Ans. Of course, I can't tell exactly what we said twenty years ago. I have no doubt that I did, although I can't state it exactly, although I know that we had it in our minds all the time. Int. 54. Did Mr. Swain state whether or not larger pipes would be required when the contemplated addition was made to your mill? Ans. I am not sure that he did, although I think so. Int. 55. State whether or not you told him that the larger pipes, as advised by him, would be put in as required, when the contemplated addition was made to the mill. Ans. Yes."

It must be borne in mind that Swain is the complainant seeking to meet a fatal objection to this bill by giving testimony of events about 20 years old, and that Chaffee, though apparently disinterested, is manifestly a friendly witness called by the complainant to corroborate testimony already given.

From all this evidence I conclude that Mr. Swain sold to Mr. Chaffee a machine embodying the first and third claims of the patent in suit; that the sale was without restriction, though Mr. Swain doubtless asked for larger pipes, and Mr. Chaffee informed him that when the proposed addition to the mill was made such pipes would be put in; that Mr. Swain's reasons for making the sale were—First, a desire to introduce his invention and make it known to the public; second, a desire to see how his invention would work, with a view to improving the same. I doubt if Mr. Chaffee thought or cared anything about the experimental features of the plan. That which Swain represents as promises made to him by Chaffee I believe to have been statements of intention made by Chaffee in answer to Swain's expression of opinion, and his advice concerning the shape and size of draft and supply pipes. In fact, no experiment was ever made or attempted, and Swain made no attempt to induce Chaffee to alter the pipes so as to make an experiment possible. Finding his experiment interfered with by the smallness of the pipes, as he says, Mr. Swain ceased to have any interest in the Moodus installation, and left the property, without more, to Mr. Chaffee. The latter was entirely at liberty to sell the machine separately or in situ to any purchaser he could find.

Rev. St. § 4886, authorizes the patenting of a machine "not in public use or on sale for more than two years prior to his [the patentee's] application." A certain kind of experimental use is held to be without the language just quoted, but it seems to me that the sale to Chaffee and the use at Moodus were within the statutory exception. *Fruit-Jar Co. v. Wright*, 94 U. S. 92, 24 L. Ed. 68; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *Hall v. MacNeale*, 107 U. S. 90, 2 Sup. Ct. 73, 27 L. Ed. 367; *Manning v. Glue Co.*, 108 U. S. 462, 2 Sup. Ct. 860, 27 L. Ed. 793; *Manufacturing Co. v. Sprague*, 123 U. S. 249, 256, 8 Sup. Ct. 126, 31 L. Ed. 143.

In the last case it was said:

"A use by the inventor for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principal, and not the incident, must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition. The language of section 4886 of the Revised Statutes is that 'any person who has invented or discovered any new and useful * * * machine, * * * not in public use or on sale for more than two years prior to his application, * * * may * * * obtain a patent therefor.' A single sale to another of such a machine as that shown to have been in use by the complainant more than two years prior to the date of his application would certainly have defeated his right to a patent,

and yet, during that period in which its use by another would have defeated his right, he himself used it for the same purpose for which it would have been used by a purchaser. Why should the similar use by himself not be counted as strongly against his rights as the use by another to whom he had sold it, unless his use was substantially with the motive and for the purpose, by further experiment, of completing the successful operation of his invention?"

See, also, *Henry v. Soap-Stone Co.* (C. C.) 2 Fed. 78; *Delemater v. Heath*, 7 C. C. A. 279, 58 Fed. 414.

The cases cited by the complainant are for the most part easily distinguishable. In *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000, there was no sale of the patented article, and the use made of it was after the filing of a caveat:

"Had the city of Boston or other parties used the invention, by laying down the pavement in other streets and places, with Nicholson's consent and allowance, then, indeed, the invention itself would have been in public use, within the meaning of the law. But this was not the case. Nicholson did not sell it, nor allow others to use it or sell it. He did not let it go beyond his control. He did nothing that indicated any intent to do so. He kept it under his own eyes, and never for a moment abandoned the intent to obtain a patent for it."

In *Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074, there was no sale of the patented article, and no use made of it except by himself, and for the benefit of the soldiers of the regiment of which he was in command. The court said (page 77, 122 U. S., page 1093, 7 Sup. Ct., and page 1076, 30 L. Ed.):

"There is no evidence in the record of any use or sale of the invention by Green before his application for a patent, and no evidence from which to conclude that any use of any driven well by others before his application was consented to or allowed by him, except in the instances mentioned at Cortland, which were merely experimental tests, made by himself. Much less is there any evidence to show that there was any use of the invention by others for more than two years prior to his application."

In *Pitts v. Hall*, 2 Blatchf. 229, Fed. Cas. No. 11,192, and *McCormick v. Seymour*, 2 Blatchf. 240, Fed. Cas. No. 8,726, the question was of the use of an invention within two years of the date of the application. In *Harmon v. Struthers* (C. C.) 57 Fed. 637, there was no sale of the patented article, and no money paid for its use. In *Graham v. McCormick* (C. C.) 11 Fed. 859, the strongest case which the complainant has been able to find, the sale was on trial and warranted by the patentee. In *Innis v. Boiler Works* (C. C.) 22 Fed. 780, the sale was not absolute, but with the right of return. In *Eastern Paper-Bag Co. v. Standard Paper-Bag Co.* (C. C.) 30 Fed. 63, it was held that a process patent was not avoided by the sale of imperfect machines which would not work the process.

In *Sinclair v. Backus*, 5 Ban. & A. 81, 84, 4 Fed. 542, Judge Lowell said:

"Another question, which always arises, is whether the use was within the limits of a justifiable test or experiment. I have read the evidence with great care, and am satisfied that Moore did not make a wrench for sale until within two years before his application. As the value of his invention was not for his personal use, as is often the fact with manufacturers who improve a machine used in their particular business, so much as for the sale of the

tools or the royalties, I consider this fact very important. * * * The point which the defendant takes as to the use by Edminster is that Moore permitted him to try the wrench in order to induce him or his father to take an interest in it and help Moore in procuring a patent. The witness so puts it; but I consider it too nice a point to say that the future patentee, when he permits a person to test his tool by a short use, with a view to interest him in its being patented, is not testing his tool, but only the mind of the borrower. I do not know that an inventor is bound to satisfy his own mind alone by his experiments. The question to be determined is not only whether the tool will work, but in what modes and with what advantages over old tools; how well it will work and how cheaply; and I am of opinion that he may, in such a case as this, test not only its patentability, but the degree of it, if I may so say,—that is, whether it is worth while to patent it. I must not be understood as speaking of a case in which the tool or thing patented has been sold more than two years before the application."

Experimental use is of two sorts: (1) In order to enable the inventor to test the practicability or utility of his invention, and to prove and perfect the same. Experiments of this sort cannot, in the nature of things, always be made by an inventor alone, but must sometimes be carried out by placing the invented article in the hands of others. A use solely for experiment of this sort to satisfy the inventor, and, perhaps, as Judge Lowell suggests, to satisfy some one from whom the inventor hopes to receive aid in patenting the invention, is not deemed a public use, within the meaning of the statute. (2) In order to satisfy the public that the article invented is adapted to meet a public need. To secure public favor for the invention, the inventor commonly desires to secure, even at some pecuniary sacrifice, a considerable amount of this sort of experimental use, but, in my opinion, an experiment of this sort, when carried out by means of an unrestricted sale to and unrestricted use by a stranger, is not the less a public use, within the meaning of the statute.

The installation at Moodus, therefore, disposes of the first and third claims in suit. The second claim differs from the third only in the prolongation of the partition through the entire length of the educt. In this prolongation there appears to me to be no invention. Bill dismissed, with costs.

PELOUZE SCALE & MFG. CO. v. AMERICAN CUTLERY CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1900.)

No. 644.

1. PATENTS—DESIGNS.

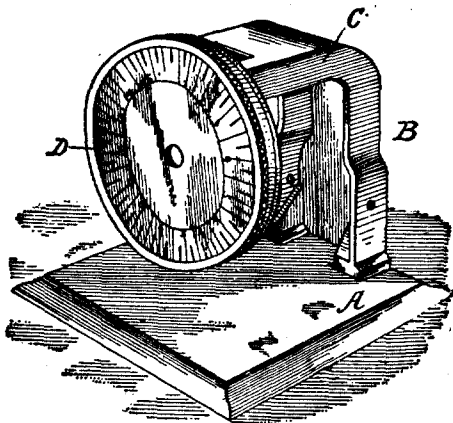
The essence of a design in the view of the patent law resides, not in the elements individually, nor in their method of arrangement, but in the impression made through the eye on the mind of the observer, either of gracefulness or strength, or both combined, but, in any case, of the uniqueness and character of the structure as a whole.

2. SAME—INFRINGEMENT—DESIGN FOR SCALE FRAME.

The Giffillan design patent No. 25,327 for a design for a scale frame held not infringed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill is to restrain infringement of Letters Patent, Design No. 25,327, dated March 31, 1896, and issued to Essington N. Gilfillan for Design for a Scale Frame. The drawing accompanying the patent is as follows:



The effective portion of the Letters Patent is as follows:

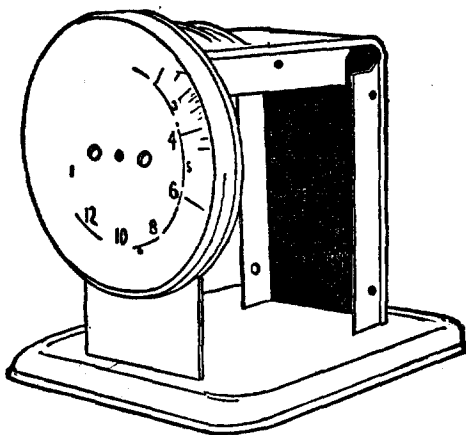
"The leading features of my design consist of a plate A and a standard or upright portion B, having a laterally-projecting arm C, carrying a scale plate or dial D.

"The plate A forms the foot of the scale frame and is arranged in a substantially horizontal position, and from the edge of this plate rises the standard B of frame, from the upper end of which the arm C of frame projects in a substantially horizontal direction. The scale plate or dial D is round or circular and is apparently supported in a vertical plane or upright position at the end of the arm C a short distance above the plate A.

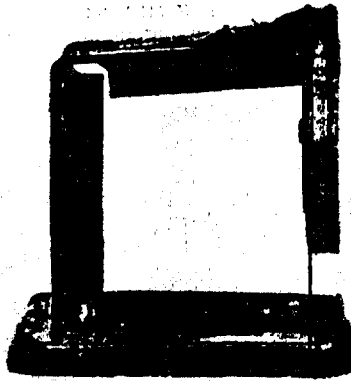
"Having thus described my design, what I claim as new, and desire to secure by Letters Patent, is—

"The design for a scale frame, substantially as herein shown and described."

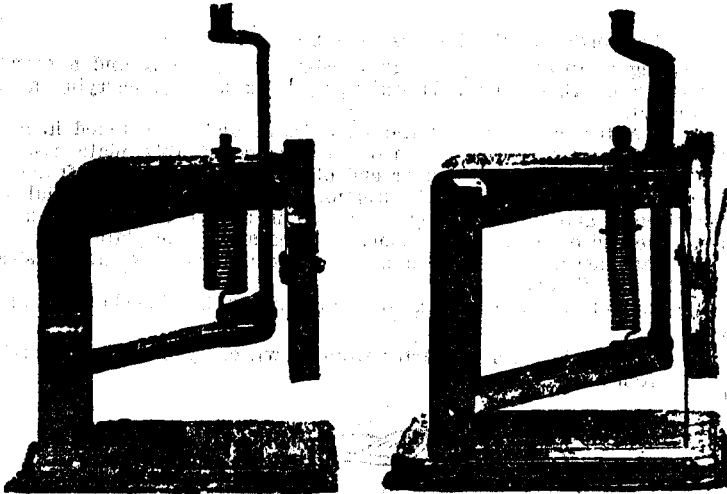
The appellees' Scale Frame (quarter front view), charged to be an infringement, is as follows:



A side view of the same Scale Frame is as follows:



The first of the following cuts is a side view of appellant's Scale Frame, with mechanism assembled; the second a side view of appellees' Frame, with mechanism assembled, and side plates left off:



F. A. Hopkins, for appellant.

P. C. Dyrenforth, for appellees.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

Design, in the view of the patent law, is that characteristic of a physical substance which, by means of lines, images, configuration, and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer. The essence of a design resides, not in the elements individually, nor in their method of arrangement, but in the tout ensemble—in that indefinable whole that

awakens some sensation in the observer's mind. Impressions thus imparted may be complex or simple; in one a mingled impression of gracefulness and strength, in another the impression of strength alone. But whatever the impression, there is attached in the mind of the observer, to the object observed, a sense of uniqueness and character.

The pith of the design under consideration does not reside alone in the upright standard with its laterally projecting arm. Like standards and arms—for instance, in sewing machines and notarial stamps—are common in the useful arts. The standard, the arm, and the dial, as a whole, conveying the impression that the dial, with the weights common to a scale, is supported by the unaided strength of the standard and arm alone, is the underlying concept of the design. Its claim to novelty and merit as a design, as expressed in the terms of the patent, resides in this appearance of strength.

A single glance at the appellees' Scale Frame reveals the absence of such appearance. The observer's mind sees at once that the attenuated elbow—a single thickness of sheet metal—would not bear the weights ordinarily imposed upon scale frames. The web leading from the dial to the base is neither a non-essential nor a subterfuge—it is seen instantly to be a necessary aid in the task of upholding the load. The impressions conveyed by a look at the two designs are entirely dissimilar; one is that of a strong arm held out to support the load and sufficient to its purpose; the other that of a box-scale frame, each part of which—the frontal sheet included—is essential to support the weight. No one who has caught a sense of the individuality of the former could be misled into confounding it with the latter.

There is, in our opinion, no infringement shown in this case, and the decree of the Circuit Court must, therefore, be affirmed.

SCOTTISH UNION & NATIONAL INS. CO. v. HAGAN et al.

(Circuit Court of Appeals, Third Circuit. June 1, 1900.)

No. 5.

INSURANCE—CONSTRUCTION OF POLICY—SUBSEQUENT TRANSFER OF PROPERTY.

The fact that a policy insured the owner of a tugboat "for account of whom it may concern" is not inconsistent with, and does not abrogate, a further printed provision of the policy that it should be void "if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance," where it is not shown that the owner in fact intended to insure the interest of any subsequent purchaser, since the retention of the printed clause precludes any inference of such an intention; and, a subsequent sale by the owner of a half interest in the boat and in the insurance, without the knowledge or consent of the insured, invalidated the policy.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Henry R. Edmunds, for appellant.

Horace L. Cheyney, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. By the libel in this case the appellees, Peter Hagan and Edward F. Martin, claimed to recover from the appellant, the Scottish Union & National Insurance Company, upon a fire policy on a tugboat, insuring Peter Hagan & Co. for account of whom it may concern. The court below entered a decree for the libelants (98 Fed. 129), and thereupon the insurance company appealed.

The policy provided that it should be entirely void "if the interest of the insured be other than unconditional or sole ownership, * * * or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance, * * * whether by legal process or judgment, or by voluntary act of the insured, or otherwise, or if this policy be assigned before a loss." A change did take place in the interest, title, and possession of the boat; for Hagan, during the life of the policy and before loss, sold a one-half interest therein (including a half interest in the policy) to Martin, and Martin became master of the boat. The company had no knowledge of this transaction, and, of course, did not consent to it. Soon thereafter the boat was destroyed by fire, and, the company having refused to pay, Hagan and Martin filed this libel, alleging that at the time of the fire each of them was the owner of one-half part of the tug. Were they entitled to recover? They certainly were not, unless the provisions of the policy which have been referred to were superseded and wholly set aside by the words "for account of whom it may concern"; and, in our opinion, they were not. It is true that the written terms of the policy will control where they are in plain conflict with its printed clauses; but no part of the instrument is to be rejected if it can be maintained as a whole, and in the present instance the printed provisions in question and the written words "for account of whom it may concern" are not irreconcilably repugnant. That the policy was issued for account of whom it might concern is undeniable, but whom could it concern? Possibly, the then existing or future creditors of the boat, or, perhaps, the constituents of Peter Hagan & Co.; but, no matter for whose account the insurance may have been effected, it cannot be supposed that it was taken for the benefit of any one who, by the express, though printed, terms of the contract, was distinctly excluded from having or acquiring any interest under it. It is not necessary to our conclusion that we should question the rule of law which was applied by the court below, and we do not do so. It is not doubted that a policy in the name of a special party, on account of whom it may concern, will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known; but we find nothing in this case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein. On the contrary, we think, as we have already said, that the retention in the policy of the provision that it should be entirely void if any transfer in interest, title, or possession should be made, absolutely precludes the inference of an intent to make the policy applicable to any person claiming under or by virtue of such a transfer. Stipulations of this sort are of no little importance. It is manifest that insurers

regard them as quite material, and the courts, we think, should not hesitate to enforce them wherever it is reasonably possible to give them effect. *Schroedel v. Insurance Co.*, 158 Pa. St. 459, 27 Atl. 1077; *Oldham v. Insurance Co. (Iowa)* 57 N. W. 861. The decree of the district court is reversed, and the case will be remanded to that court, with directions to enter a decree dismissing the libel, with costs.

THE N. AND W. NO. 2.

(District Court, E. D. New York. June 2, 1900.)

1. TUG AND TOW—GROUNDING OF TOW—FAULT.

A tug with two heavily laden tows on a line, the whole extending 2,400 feet in length, was passing through a channel near the northern limit, which curved so as to require the tug to keep continually changing her course to the southward. There was sufficient room to pass through in safety, but the first tow, which was a schooner converted into a coal barge and in charge of a master, failed to follow closely the changing course of the tug, and got beyond the limits of the channel, grounding in the shallow water. *Held*, that the tug was in fault because of the failure of the master to keep watch to see that the tows were following so as to keep inside the channel, and that the master of the tow was also in fault for not using the helm, as he might have done, to keep her in the course of the tug, and within the line of buoys which marked the channel.

2. SAME—PROXIMATE CAUSE OF LOSS OF TOW.

The tug having afterwards made an attempt to rescue the tow, which was unsuccessful owing to a severe storm, because of which the failure could not be attributed to the fault of either vessel, the original grounding must be regarded as the proximate cause of the subsequent loss of the tow and cargo in such storm, and the damages divided accordingly.

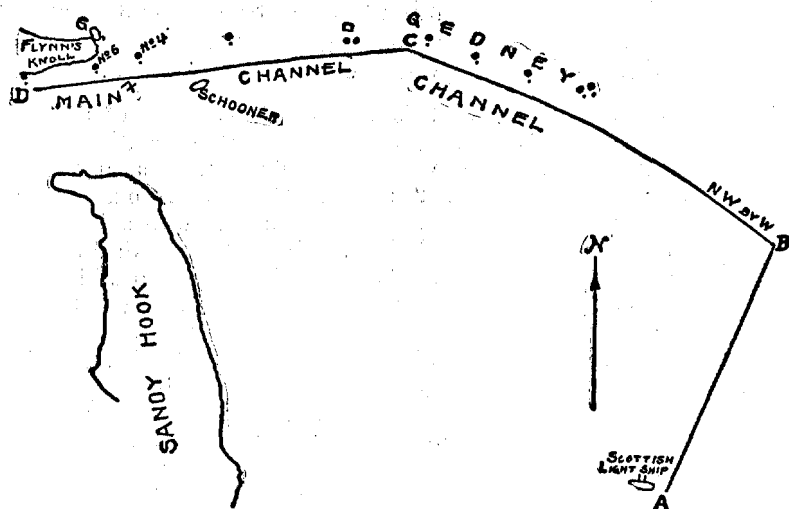
In Admiralty. Suit against a tug to recover for the loss of her tow.

Robinson, Biddle & Ward, for libellant.

Butler, Notman, Joline & Mynderse, for claimant.

THOMAS, District Judge. This action is for the loss of the barge *Crockett* and her cargo from grounding by the alleged negligence of the tug which had her in tow. On February 11, 1899, at 11 a. m., the steam tug *N. and W. No. 2* arrived off Sandy Hook. She had in tow the *David Crockett*, converted from a ship into a barge, and after her was the barge *N. and W. No. 4*, both laden with coal. The *Crockett* was 218.8 feet in length, 41 feet in breadth, and 27 in depth, and drew 24 feet, while the barge *N. and W. No. 2* drew 19 feet of water. The hawser between the *Crockett* and the tug was 200 fathoms in length, and that between the *Crockett* and *N. and W. No. 4* was 175 fathoms in length. The day immediately preceded the several days of severe storm of February, 1898, and the captain of the tug apprehended difficulty on account of the ice which was coming out on the ebb tide. Therefore, he turned back to sea, and, circling the lightship, came back again to the entrance of *Gedney's Channel*, at about half after 2 o'clock, when the strength of the ebb tide was spent, the wind light from the northwest, and the weather clear. The northern limit of the channel is indicated by a series of buoys, and the tug *N. and W. No. 2* followed the course of such buoys, at a distance of 300 or 400 feet therefrom, until the

Crockett suddenly brought up aground; whereupon the barge N. and W. No. 4 continued her forward movement past the port side of the Crockett, and thereafter sagged down, under the influence of the wind and tide, upon the schooner Helen, at anchor in the main channel. Inasmuch as the channel at this point is at least 3,000 feet wide, the tug is accused of negligence in selecting a course so near its northern limit, while there was ample space to the southward. Indeed, shortly preceding the N. and W. No. 2, and within her sight, were the tug Ice King, with a coal laden barge in tow, and the tug N. and W. No. 1, towing two large, coal-laden barges, who safely passed south of the schooner. The reason assigned by the master of the tug for failure to pursue this same course was that the schooner Helen had been seen by him, apparently drifting southerly across the channel, and that he feared to go south of the Helen, lest the latter might continue her drifting, and come in contact with some portion of the tow. It is undoubted that there was more space and ampler opportunity to pass to the southward of the schooner; but the schooner had been drifting, and the master of the tug N. and W. No. 1 passed southerly of the schooner, and stated that, from knowledge derived during such passage, he would, if in command of No. 2, have tried to go to the northward. There is other evidence justifying the conclusion that the mere selection of the passage north of the schooner was not negligent in itself, and that there was reasonable opportunity for a competent navigator to make the passage. The question follows, why did the Crockett ground? The course of the tug and tow, and the places of the various happenings, are illustrated by the sketch included herein:



- A—B. Course of tug and tow to entrance to Gedney's Channel.
- B—C. Course of tug and tow through Gedney's Channel.
- C—F. Course of tug and tow when entering main channel.
- O—D. Course of tug and tow projected when Crockett grounded.
- M. Place where Crockett grounded, as claimant states.

The tug was steered so as to make a course parallel with the buoys, and the above delineation was made by the master of the tug at the time of trial. In the main channel that course is given as W. by S., but on account of the set of the tide the heading of the tug was W. $\frac{1}{2}$ N. But the precise headings need not be determined accurately. The tug was near the north line of the channel, and the important consideration is that the tug was from time to time changing her course.

From the foregoing statements it appears that the conditions were these: A powerful tug, with a tow 2,400 feet in length, proceeding westward on a clear day, encountered a channel 3,000 feet wide, whose waters were disturbed only by the last of the ebb tide, setting southeasterly, and by a light wind from the northwest. The only obstacle to the passage was a schooner at anchor, which had drifted across the northern limit of the channel, but was now stationary, although the master of the tug apprehended that it was still drifting. But the master states that there was quite room enough to go to the northward of it, and there was certainly space enough to the southward; hence there were no impediments to a safe passage. Yet with all this opportunity the Crockett brought up on a shoal beyond the northern boundary of the channel. The grounding of her tow, under circumstances so fair, would seem to suggest negligence on the part of the master of the tug, in the absence of accusatory acts or omissions on the part of the master of the Crockett, for the fault must lay with one or both of these officers. The tug, following a practice which is somewhat customary, makes accusation that the barge sheered to the starboard, and went 400 feet out of her course. It seems improbable at the outstart that the Crockett, compelled forward along the course of, and by, a powerful tug, and steadied aft by a large, heavily-laden barge, deflected to the northward along the line of greatest resistance, against the combined adverse forces of tide and wind, unless (1) the master of the Crockett, by accident or design, steered her out of her course, of which there is no evidence; or (2) the Crockett did not follow the tug as she gradually turned to the southward. It appears that either the tug drew the Crockett upon or too near the shoal place, not making sufficient allowance for her turning, or the master of the Crockett failed to steer her after the tug, or both these faults existed. It is not believed that the Crockett "sheered," according to the usual meaning of the term, although she would appear to sheer if she was not kept behind the tug. The fact seems to be that the Crockett did not follow the tug, as the evidence tends strongly to show that she was on her starboard side at the time of the accident. But why did the Crockett, when she was grounded, bear on the starboard quarter of the tug? At this time the tug had changed her course to the southward, and it is apprehended that she may not have made due allowance for the Crockett, which was 1,200 feet behind, and which would not continue upon a correct course unless duly and sufficiently influenced by the swinging tug, or by her own helm, or by both. But the master of the Crockett seems not to have starboarded his wheel, although he must have seen, or at least he should have seen, the necessity of directing his course so as to follow the tug, which was obliged to

change, from time to time, to follow the line of buoys. The very fact that the tow was of such length, and that it was in such proximity to the northerly shore, imposed upon the tug the observance of increased care, and if the passage seemed perilous, as the libellant now claims, the master of the Crockett himself was bound to use some special prudence in the performance of his well-defined duty of keeping the Crockett in the wake of the tug. Nothing but the momentum given to the Crockett carried her forward, and she would not have gone sufficiently forward to strike, if the course upon which she had been placed had not been near—it need not be adjudged dangerously near—the shoal places; and she would have been deflected from, or would not have continued upon, her final course, had the master of the tug kept the Crockett under observation and made proper allowance for her turning, or had the master of the Crockett been alive, as he seemed not to be, to the fact that his vessel was not following, and had starboarded with reference to that condition. It will be observed that the master of the Crockett states that his vessel did not sheer,—did not deviate from an accurate traction after the tug,—and hence he took no measures in steering which would be suitable in such event. It seems fairly inferable that the Crockett was for this reason in fault, and, considering the circumstances, the tug should not be exculpated. The master of the tug was aware that he was near the northern limit of the channel. He knew that his tow, nearly equal in length to the entire width of the channel, and upon his own estimate nearly $3\frac{1}{2}$ times longer than the space between the schooner and the limit of the northern channel, was to be carried between such schooner and such limit, and yet his view of his boat was obscured by the back of the pilot house, which was without windows. His crew was forward, no person was on the stern of the tug to watch whether the tow was following, and this continued so long that the Crockett went off the desired course 400 feet, and grounded, before her aberration was discovered by the master of the tug. In making his way it was necessary for such master to calculate both for his tug and tow; to observe, or to be advised, whether his calculations were sufficient and effective. But he did nothing to verify the safety of his course, and left the tow to go where it might be carried. The fact was that it was carried too far northward; it did not follow the tug with sufficient quickness for safety. So, little by little, the Crockett went off until she was outside of the proper channel. Now, the master of the tug should have made better allowance of space for the Crockett to come around, and he should have kept watch himself, or he should have placed another on watch, for the purpose of seeing how the provision he had made was availing. He did neither. To this he would answer that he was privileged to rely upon the master of the Crockett for the proper traction of the vessel. Indeed, that person did have a duty in that regard; but it is considered that the schooner was quite too near the northern limit of the channel, and the tow was quite too long and cumbersome, to permit the sole responsibility of its correct following to be laid upon the masters of the vessels in tow. It was the duty of the master of the tug to be vigilant in observing where his tow was. He was not permitted to look forward alone. His

task was to take along the tow, and he should have been watching, or have placed another to watch, how he was effecting the result.

But the Crockett was not lost at this time. She grounded, and the libelant claims that she never substantially changed her position until she went to pieces, in consequence of the storm that followed for several days. If so, the influences already considered were the proximate cause of the disaster, and the libelant may not claim further fault on the part of the tug. But the claimant's witnesses show that the Crockett drifted further northward, and about a mile from the first place of grounding, and that the tug, on the second day of the accident, in a blinding snowstorm, pulled her off and towed her to the main channel, and that thereupon the Crockett violently crossed from the port side of the tug, taking a sheer to the northward, drawing the tug after her, and finally brought up near Flynn's Knoll, north of buoy No. 6. The tug's statement seems to be more credible, for it is quite improbable that the tug's witnesses could have imagined that they towed the Crockett a mile, and into the main channel, unless there was something of truth behind the statement. They were the active agents; the master of the Crockett was passive, and unconscious of the event and the arduous labors of those on the tug. The storm was raging, and little could be seen, and what was done or left undone seems to add or detract nothing from the credit or discredit of either party, as it theretofore existed. The first grounding, considering the tempestuous weather in which the rescue was undertaken, should be regarded as the proximate cause of the Crockett's loss. The conclusion that the master of the tug was negligent, if not in permitting the barge to go too near the northerly limit of the channel, yet at least in failing to make any observation of his tow, and that the master of the barge contributed to the grounding by failing to observe the position of his vessel, and to put his wheel to starboard to correct a deviation that should have been apparent, must lead to a division of the damages, with costs.

ERRATT v. HUMPHREYS.

(District Court, N. D. California. June 22, 1900.)

No. 11,995.

ADMIRALTY—COSTS—SETTLEMENT OUT OF COURT.

In a suit in admiralty, *in forma pauperis*, to recover for services rendered by libelant as master of a vessel, the officers of court cannot be deprived of their fees by a settlement out of court; and where the defendant makes such settlement without the knowledge of the libelant's proctor, and obtains a writing dismissing the suit, he will be taxed with the costs.

In Admiralty.

H. W. Hutton, for libelant.

Charles F. Humphreys, pro se.

DE HAVEN, District Judge. This is a libel in personam, in which the libelant seeks to recover a balance alleged to be due him from the defendant for services rendered as master of the schooner Mil-

dred E. upon a voyage from San Francisco to Alaska. At the time of the commencement of the action the libelant filed an affidavit stating his inability to pay costs or to give security therefor, as provided in the act of July 20, 1892 (27 Stat. 252), and was thereupon allowed to commence and prosecute the action without prepayment of fees or costs or giving security therefor. The defendant answered, and the action was subsequently compromised and settled without the consent or knowledge of the proctor for libelant. By the terms of the settlement no provision was made for the payment of costs, and the libelant executed and delivered to the defendant a writing in these words:

"In the District Court of the United States in and for the Northern District of California. In Admiralty.

"Frederick A. H. Erratt, Libelant, v. C. F. Humphreys, Defendant.

"Now comes the libelant above named, and files this, his dismissal of said action; hereby certifying that the claim of said libelant against said defendant has been satisfied. Wherefore libelant asks that the said action be dismissed.

"F. A. H. Erratt, Libelant."

Thereafter the cause was, on notice, brought on for hearing, and the only question presented for decision is whether the defendant is liable for the costs of the action notwithstanding his settlement with the libelant.

In actions by seamen for the recovery of wages, both in rem and in personam, the rule most generally followed in courts of admiralty is that officers of court cannot be deprived of their fees "by an out-door settlement with a seaman, where his right is clear, and where he must have recovered debt and costs in the prosecution." *The Sarah Jane*, 1 Blatchf. & H. 401, Fed. Cas. No. 12,348; *The Victory*, 1 Blatchf. & H. 443, Fed. Cas. No. 16,937; *The Ontonagon*, 19 Fed. 800; *Angell v. Bennett*, 1 Spr. 85, Fed. Cas. No. 387; *Collins v. Nickerson*, 1 Spr. 126, Fed. Cas. No. 3,016. I am unable to distinguish this case in principle from those above cited. The defendant knew that the action was commenced without the prepayment of fees and costs, and without giving security therefor, and such costs ought to have been provided for in the settlement. To hold otherwise, and permit the payment of costs incurred by a litigant suing, as in this case, in forma pauperis, to be evaded by an "out-door settlement," would be unjust to the clerk, marshal, and proctor of the libelant, and would, in the language of Judge Coxe in delivering the opinion of the court in the case of *The Ontonagon*, 19 Fed. 800, "encourage practices which the court should be slow to sanction." Judgment will be entered against the defendant for costs.

MUNSON v. STRAITS OF DOVER S. S. CO., Limited.

(Circuit Court of Appeals, Second Circuit. May 24, 1900.)

No. 162.

1. ARBITRATION—BREACH OF AGREEMENT TO ARBITRATE—RECOVERY OF DAMAGES.

Substantial damages are not recoverable for breach of an agreement to arbitrate any dispute which might arise under a contract, where such agreement remains wholly executory, because there is nothing by which the

damages can be measured; the fact that one party, refusing to abide by the agreement, brought a suit upon the contract, in which he was defeated, but was not required to pay the costs, does not entitle the other party to recover the costs expended in defending the suit, as damages for breach of the agreement to arbitrate.

2. ADMIRALTY—DISMISSAL OF SUIT.

In admiralty, as in equity, it is within the discretion of the court to dismiss a suit without costs, where the complaining party is entitled to nominal damages only.

Appeal from the District Court of the United States for the Southern District of New York.

Charles S. Haight, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The court below dismissed the libel in this cause upon sustaining the exceptions of the respondent. 99 Fed. 787. The decision proceeded upon the theory that the libelant was not entitled to recover any damages by reason of the breach by the respondent of the arbitration covenant in a charter party entered into between the libelant and the respondent. The charter party contained, among others, the following clause:

"That, should any dispute arise between the owners and the charterers, the matter in dispute should be referred to three persons at New York, one to be appointed by each of the parties hereto and the third by the two so chosen; that their decision, or that of any two of them, shall be final, and, for the purpose of enforcing any award, this agreement may be made a rule of the court."

Differences arose between the parties as to the liability of the libelant, under the terms of the charter party, for the detention of the vessel beyond the period for which it had been chartered. The libelant thereupon notified the respondent that he was willing to arbitrate, and requested him to comply with the provisions of the charter party in that regard; but the respondent refused, and brought an action in admiralty to enforce the liability, claiming a recovery of about \$8,000. In that action the court decided that the present libelant was not liable for the detention of the vessel, and decreed in his favor, but without costs. He was subjected to necessary expenses in defending the action amounting to over \$500. The libel alleges these facts, and also alleges that the expenses of arbitrating the dispute would not have exceeded \$50.

Covenants in contracts to arbitrate any disputes that may arise in fulfilling the obligations of the parties are common, but it is significant that there are no adjudged cases in which there has been a recovery when the breach consisted merely in the refusal to enter upon an arbitration. The explanation is doubtless to be referred to the impossibility of proving substantial damages. There are many cases in the books where, there having been an actual submission, damages have been allowed for a subsequent revocation. In such cases the receding party has led the other into the expense of making a futile experiment, and the expenses incurred thereby result directly from his act, and can be definitely ascertained. But where

nothing has been done in partial execution of the covenant, and the covenant does not fix anything by way of penalty or liquidated damages, the loss arising from a refusal to fulfill is usually wholly conjectural, because it is impossible to prove that the party would have profited by the arbitration. *Livingston v. Ralli*, 5 El. & Bl. 132, is the only reported case in which the action was for the breach of the covenant while purely executory; but that case arose upon demurrer, and the court did not have occasion to consider the rule of damages. Two other decisions are cited for the appellant. *Hawley v. Hodge*, 7 Vt. 237, and *Day v. Bank*, 13 Vt. 97. In the first of these cases it was agreed that a pending action between the parties should be discontinued and submitted to arbitration, and, the defendant having subsequently revoked the submission, the court held the plaintiff entitled to recover the costs and expenses which he had incurred in the discontinued suit. The case falls within the principle of those where the expenses of the revoked arbitration are allowed. The defendant had induced the plaintiff to abandon one experiment upon the promise that he would abide the event of another, and the plaintiff's loss was the necessary outlay he would be obliged to incur a second time to reinstate himself in his original situation. In the second of the cases the plaintiff had released a cause of action against a third person upon the agreement of the defendant to pay such a sum as arbitrators should award. The defendant revoked the submission, and the court held the plaintiff entitled to recover, not only for his costs incurred in the arbitration, but also for the amount of his claim against the sheriff. In this case there was, besides the expenses of the arbitration, the basis for a substantial recovery because the plaintiff had lost his cause of action.

Upon the facts stated in the libel, we are unable to see how the appellant is entitled to more than nominal damages. While he has been subjected to the expenses of defending an action in admiralty, and while we are to assume as true the statement in the libel that the costs of an arbitration would have been much less, it does not follow that he has sustained any loss by the breach of the covenant to arbitrate, because it is intrinsically impossible to ascertain what decision the arbitrators would have reached. Non constat that the award would have been in his favor, or that it might not have been against him in an amount much larger than his expenses of the action.

Taking a broader view of the case, there seems to be no sound reason for allowing as damages for the breach of such a covenant the expenses incidental to a hearing and decision by judicial tribunal, —a mode of adjudicating the rights of the parties under the contract, which is, theoretically, at least, the safest and best devised by the wisdom and experience of mankind.

Without concurring in all of the views expressed in the opinion of the learned judge in the court below, we think his decision was substantially correct, and that the decree should be affirmed. In admiralty, as in equity, it is in the discretion of the court to dismiss a suit, where the party is entitled to nominal damages only, without costs, as was done in this case. *Barnett v. Luther*, 1 Curt. 434, Fed. Cas. No. 1,025; *Herbst v. The Asiatic Prince* (D. C.) 97 Fed. 343.

The decree is accordingly affirmed.

OTAHEITE GOLD & SILVER MIN. & MILL. CO. v. DEAN.

(Circuit Court, D. Nevada. July 2, 1900.)

No. 646.

1. WATER COURSES—RIGHTS OF MILLOWNERS—MINING—POLLUTION OF WATER OF CREEK.

Where there are two ore mills in operation on the same stream, the lower proprietor may be compelled to take some steps and be at more expense than he would if he were the only proprietor on the stream; and it is the duty of the upper proprietor to use great care and caution, and to take such action as will avoid, as far as possible, any injury occurring to the lower proprietor by the flow of tailings from his mill.

1. SAME—INJUNCTION—EVIDENCE.

In making preparations to start up a mill for the reduction of gold and silver ores, which had been idle for a number of years, plaintiff found the water at the settling tank, from which the supply of water for operating the mill was obtained, contained a quantity of tailings, and that after being cleaned out the tailings and débris from above came into the tank in such quantities as might, if continued, prevent the mill from being run. Thereupon plaintiff demanded of defendant, who was operating a mill above the plaintiff's on the same creek, that he prevent his tailings from polluting the water, and was given assurance that by the time he got ready to start up this would be done. At the time this suit was commenced defendant was not discharging tailings or sediment into the stream sufficiently to interfere with plaintiff's using its waters for his mill, and had constructed a series of reservoirs by which he impounded the tailings, and prevented any injurious matter flowing from his mill into the creek. *Held*, that plaintiff was not entitled to an injunction restraining defendant from polluting the stream.

3. SAME.

Defendant's denial in his answer in such case "that he threatened or threatens or intends to dump any tailings or débris from his mill into said stream or water of said creek," does not entitle plaintiff to an injunction against the pollution of the waters of the creek by defendant, on the grounds that the injunction cannot injure defendant under such circumstances, and that plaintiff is entitled to protection against defendant's pollution of such waters in the future.

D. S. Truman, for plaintiff.

Edward J. McCutchen, Henry Mayenbaum, and Torreyson & Sumnerfield, for defendant.

HAWLEY, District Judge (orally). This is a suit in equity to obtain a decree enjoining and restraining the defendant from "in any manner using, wasting, obstructing, hindering, delaying, or preventing" the waters of Lewis creek, in Lander county, Nev., from running to, into, upon, and across the lands of complainant, "and to and into the complainant's mill," or from diverting from their usual or natural channel and course any portion of the same, or "from polluting the same." The pleadings herein are voluminous, presenting many issues upon which much testimony was offered. The entire case is, in several of its features, exceedingly interesting, and in many respects important. Great latitude was allowed both parties in the introduction of their testimony.

In my opinion, the case must stand or fall upon an issue of fact concerning the tailings, and the references made to other issues will

be simply for the purpose of giving a more intelligent and better understanding, not only of the facts, but also of the contention of counsel and of the circumstances surrounding the case. As a general rule, it may be said that, where there are two mills in operation on the same stream, the lower proprietor may be compelled to take some steps and be at more expense than he would if he were the only proprietor on the stream, and that it becomes the duty of the upper proprietor to use great care and caution, and to take such action as will avoid, as far as possible, within the bounds of reason, any injury occurring to the lower proprietor by the flow of tailings from his mill. It is, among other things, alleged in the complaint:

"That said defendant, as aforesaid, is carrying on the business of mining and milling of ores, rock, and earth of gold, silver, and other metals at a point in said Lewis cañon higher up said stream and water course herein mentioned as Lewis creek, and, in so carrying on and conducting the milling of his said ores, uses the waters of said Lewis creek in so operating said mill; that, by the process of working said ores in use by this defendant, all of the refuse of the ores so worked by said defendant in the operation of his mill becomes what is known as 'tailings,' which, as the ore aforesaid, after being crushed, pulverized, and roasted, and chemically treated, to extract the metals therefrom, and after such extraction of said metals therefrom, said tailings are allowed and permitted by this defendant to escape to and into the waters of said Lewis creek at a point above the lands and mill of this plaintiff; that, by reason of the said acts of this defendant, the waters of said stream, and the whole thereof, become and are so polluted and contaminated and impregnated with said tailings that the same cannot be used by this plaintiff in its mill boilers for making steam wherewith to run its machinery, or in the working or reduction of its ores, at all, to the great and irreparable injury and damage of plaintiff, and to such an extent that, if permitted to continue upon the part of the defendant, the business of milling ores of this plaintiff will be greatly impaired or wholly destroyed."

The defendant in his answer admits:

"That he is carrying on the business of mining and milling ores, rock, and earth of gold and silver in said Lewis cañon, and he alleges that he uses the water of the westerly branch of the eastern fork of said creek situated in Pittsburg mining district, in said county and state, on the mountain, at or near the head of said Lewis cañon, which said branch is fed by the water of springs in said mountain, and which said branch and springs are herein designated as the 'Dean Branch and Springs.' The said defendant denies that by any process of working ores by said defendant, all or any refuse of ores worked by him in the operation of his mill, or otherwise, or of any tailings or débris thereof, are by him allowed or permitted to escape to or into the waters of said creek, and into the said alleged lands, mill, or premises of said plaintiff. The said defendant denies that, by reason of any act or acts of this defendant, the waters of said stream, or any part thereof, running into said alleged lands, mill, and premises, become or are in any wise polluted or contaminated or impregnated with any tailings, or that the same cannot be used by plaintiff in its alleged mill boilers for making steam wherewith to run its alleged machinery, or in the working or reduction of its alleged ores, to the great or irreparable or any injury or damage of plaintiff, or to such an or any extent that, if permitted to continue the alleged business of milling ores by plaintiff, will be greatly or at all impaired, or wholly or partially or at all destroyed. The said defendant denies that he threatened or threatens or intends to dump any tailings or débris from his mill into said stream or water of said creek, to flow into or upon said land or mill or premises of said plaintiff, or to divert said waters of said stream other than the waters of said Dean branch and springs, and denies that the using of said water of said Dean branch and springs by said defendant does in any wise diminish the quantity of water in said creek that would flow on said land, mill, and prem-

ises, or either thereof, of said plaintiff, if the water of said Dean branch and springs were not used by said defendant. * * * And defendant denies that the use by the defendant of the water of said Dean branch and springs in any wise affects the water of said creek for the uses or purposes for which the said plaintiff claims the same in its said bill of complaint."

There are other allegations of the complaint which were evidently drawn upon the theory that the plaintiff was entitled to all the waters of the stream, and to deny the right of defendant to divert any water therefrom for any purpose. These averments were denied in the answer. The testimony shows that, prior to the commencement of this suit, Mr. Thorp, the president and secretary and principal stockholder of plaintiff, visited San Francisco, Cal., and called upon the defendant for the purpose of adjusting the difficulties concerning the water. Upon this point Mr. Thorp testified: "I wanted him, if he would, to impound the tailings, and do it properly, and I would give him a lease for a dollar a year." Upon the refusal on the part of defendant to accept such a lease, this suit was commenced.

The evidence clearly and satisfactorily shows that defendant had a legal right, by appropriation and beneficial use, to the water to the extent required to enable him to properly run and operate his mill. The fact is that both parties are entitled to the waters of the stream for operating their respective mills. This right must be exercised with reference to the general condition of the country and the necessities of both parties, and not so as to deprive the other of its reasonable use. Water in this state is too scarce and valuable, and the necessity of its use in milling, crushing, and reducing gold and silver ores too great, to allow either an upper or lower proprietor, in a case like this, to absorb it all, or to pursue such a course or contend for any doctrine that would prevent its reasonable use by the other, provided it can be used by both, by ordinary care and caution, and without unusual expense, serious detriment, or material injury to either.

It may not be an easy task to define with such clearness as to make it applicable to all cases the rights of mine and mill owners, situated in cañons and ravines through which streams of water flow, who are occupied in extracting the ore from their mines, crushing and reducing the same in their mills, and producing the precious metals therefrom; especially as to the rights of the upper and lower proprietors on the stream, where both parties have an equal right, under the law, to the use of the water of the stream. Perhaps the safest rule would be to cling with pertinacity to the old and oft-repeated maxim, "*Sic utere tuo ut alienum non lædas*," and hold that such property rights are always subject to it. One thing is certain,—that its application in the present case would preserve the rights of both plaintiff and defendant, and work no injury to either. The defendant in operating his mill is therefore bound to so use the water appropriated by him for that purpose as not to interfere with the rights of the plaintiff in operating its mill by discharging into the stream tailings, debris, or other deleterious matter in quantity or quality which would, to any material extent, injuriously affect the rights of the plaintiff to the water necessary for the purpose of operating its mill.

It is not absolutely essential that water should be perfectly clear and pure in order that it may be used for ordinary milling purposes. If it

were, but few mills could be operated, especially on the banks of the mountain streams like the one in question; for the natural flow of the water over a sandy or loose soil would gather up more or less sediment, while, in the case of heavy freshets, which occur every spring, from the melting of snow in the mountains, rocks, tailings, sand, and other debris will cause more or less inconvenience, detriment, and injury to every quartz-mill owner, whether there are any mills above him or not. No injunction could be broad enough or strong enough to prevent such injury. Equity does not require the water to be sent away from a mill as pure and unadulterated as it was when it left the springs or creek before being used in the mill.

The plaintiff's mill (Highland Chief) is situate about three miles below the defendant's mill. It appears that as early as 1882 there were several mining companies working different mining claims in that locality, in which Mr. Thorp, the president of plaintiff, was interested as an owner or stockholder, and that mills known as the "Highland Chief" and "Eagle" were erected for the purpose of crushing ores from these mines; that the mills were operated for a few weeks in 1882, when they were closed down, and remained idle until 1886, when they were started up and operated in the crushing of ore for a few weeks, and were then again closed down, and, for various causes, remained idle until the summer of 1897; that the plaintiff was incorporated in 1888. The plaintiff failed in its efforts to connect itself by title from the original owners, but did show that it was in possession of the Highland Chief Mill, and some of the other property referred to as having been worked, owned, and operated in 1882 and 1886, under claim of title. The complaint in this suit was filed in the state court July 21, 1897, before the Highland Chief commenced crushing ore in that year.

The testimony on behalf of the plaintiff is, in substance, to the effect that in making preparations, in the spring of 1897, to start up the Highland Chief Mill, the water at the settling tank, above the mill, from which the plaintiff derived its supply of water for the purpose of operating its mill, was found to contain a large quantity of tailings, and, after being cleaned out, the tailings and debris from above came into the tank in such quantities as might, if continued, prevent the mill from being run; that the debris and tailings were of such a character, and came in such quantities, as would be liable to choke up the pipe, and, even if the water flowed to the mill in that condition, its effect would be to form a scale which might cause the boilers at the mill to be burned; that the boilers would be liable to explode; and that it would probably require 50 per cent. more fuel to get up steam. Mr. George, who was then in the employ of plaintiff, in charge of its property, testified that he went up to defendant's mill, and saw Mr. Bousfield, the superintendent of the Dean Mill, and told him "that we thought of starting up down there, and that the tailings were coming down, and asked him if he could do anything to prevent it; and I told him, if they would pipe from the tank house up to the big tree, I thought it would be about 1,500 feet; that we could get clear water for the mill at the lower place, and the tailings would not bother us, and it would not be a great expense. He said, 'Well, you will not be ready to start up until June or after, and by that time the tailings will

not be running down there.' He said, 'It will cost over \$1,000 to do that work, and it is too great an expense.' That was about the amount of the conversation we had." Thereafter he served upon Mr. Bousfield the following notice:

"Lewis, June 5, 1897.

"W. E. Dean, per J. D. Bousfield, Agent—Dear Sir: You will take notice that I am ready to make use of the waters of Lewis creek, but, owing to the tailings from your mill in said water, am unable to do so. You will therefore prevent said tailings from polluting said water immediately, or I shall have to take the necessary steps to compel you to do so.

"S. B. Thorp,

"Per E. T. George."

This notice was served more than a month prior to the time when Mr. Thorp visited San Francisco.

On behalf of defendant it was shown that the Dean Mill was erected in 1892, and had been continuously operated since that time, except when stopped, for very short periods, by the inclemency of the weather or inability to obtain men to work; that after the water was used for running the mill it flowed out from the mill, and the tailings were deposited in a reservoir, which would approximately contain about 2,500 tons of tailings; that after the liquid material passed from this main reservoir it went into a second reservoir, capable of holding 100,000 gallons of water; that it passed into a third reservoir, of sufficient size and capacity to settle 50,000 gallons of water, and then passed into a fourth reservoir, which had a capacity of settling 200,000 gallons of water, and from that reservoir the water flowed down into Lewis creek in a practically clear and pure condition, so that it could be used for any purpose, and would not in any manner interfere with the proper working, running, and operating of plaintiff's mill; that the second and third reservoirs were constructed in May or June, 1897, and completed before the bringing of this suit, and the fourth was commenced in July or August, 1897, but not fully completed until after this suit was brought. The Highland Chief Mill was started up in the latter part of July or 1st of August, 1897, and ran a few weeks in August, and again during the months of October and November, and was closed down the last of November, not on account of any difficulty with, or interference from, the tailings in the creek, but from other causes.

From the entire testimony, I find the established facts to be (1) that at the time this suit was commenced the defendant was not discharging tailings or sediment from his mill into the stream to such an extent as to interfere with the use by the plaintiff in its mill of the water flowing down the natural channel of Lewis creek; (2) that the defendant, after using the water from the Dean branch and springs in his quartz mill by means of reservoirs built and constructed by him for that purpose, impounded the tailings so that the waters from said stream when they left the defendant's premises were reasonably fit for use in the plaintiff's mill; (3) that the means used by the defendant to impound the tailings from his mill are ample and sufficient to prevent any injurious matter flowing from his mill into the creek.

There is always more or less light substances, deleterious in their nature, carried in suspension, flowing with the water, which only set-

ties, if at all, when deposited in the settling tank or cribs, and then only where the water is comparatively still. Annoyance from this source cannot be avoided.

There was a conflict in the testimony as to whether or not the character of tailings testified to by Mr. George was, in quality or extent, such as would materially interfere with the running of plaintiff's mill. It is unnecessary to discuss this question or to decide it. There was a mass of testimony introduced by defendant as to the various causes which had produced the deposit of tailings in the creek below the works of defendant, and above the plaintiff's mill. Among other things, it was shown that several years ago a dam or reservoir had been erected on the banks of the creek for the purpose of saving the tailings from the old Pittsburg mill; that at different times a portion of the waters of the creek flowed over said reservoir, carrying more or less sediment and tailings directly into Lewis creek; that in 1895 or thereabouts a cyanide plant was constructed by the Nevada Reduction Company, and was operated at different times during the years 1895 and 1896, for the purpose of working the tailings; that in the spring of 1897 the reservoir or dam of said company broke, and a great quantity of tailings from the same was carried down the stream, and deposited above the settling tank from which the plaintiff obtained the water for use in its mill.

It is claimed that the accumulation of the tailings in plaintiff's settling tank can only be accounted for on the theory that the debris and tailings must have come from the defendant's mill, because there were no other parties at that time at work on the stream above the plaintiff's mill. The testimony, when carefully weighed and considered, does not, in my opinion, sustain this theory. There is no positive evidence that the flow of tailings or sediment from the defendant's mill at that time contributed to any appreciable extent to the accumulations of the tailings found in the plaintiff's settling tank.

The plaintiff claims that the defendant, in his answer, having denied "that he threatened or threatens or intends to dump any tailings or debris from his mill into said stream or water of said creek, to flow into or upon said land or mill or premises of said plaintiff," the court ought to grant the injunction prayed for herein, because by so doing the defendant would not in any manner be injured, and because the plaintiff is entitled to be protected, and ought not to be compelled to bring another suit, in the event that the defendant should at any time in the future allow any tailings or debris from his mill and reservoirs to flow into the creek so as to result in injury and damage to the plaintiff. This contention cannot be sustained, under the evidence in this case. It is well settled that a court of equity may grant or withhold its aid according to the particular facts and circumstances of each case. This being true, it naturally follows that its intervention ought not to be procured except by the presentation of a substantial case; where there is a clear and palpable violation of a right. Wherever it affirmatively appears that the plaintiff has been injured or damaged in his rights by the wrongful acts of the defendant, an injunction should be issued. Where some degree of injury has been shown, the court would, naturally, have the right to consider the

probability of its continuance, and many cases might be found where it has been held that, if the injury seems likely to continue, the court may grant an injunction. If there was any satisfactory evidence that defendant had permitted the mud, sand, sediment, or tailings to flow down the stream from his mill in such quantities as to injure the plaintiff in the operation of its mill, and had taken no steps or precaution to prevent such flow, and claimed the right to continue so to do, this court would not hesitate to grant the injunction, although the injury to plaintiff was very slight, if there was a reasonable probability of its continuance or increase. But no authority has been cited which would justify this court in issuing an injunction in a case like this, where no injury has been occasioned, and no reasonable probability that any will occur, on the bare ground that some time in the future the defendant might change his mind, and do some act which might result in an injury to the plaintiff. Let a decree be entered in accordance with this opinion, denying the injunction.

THALLMAN et al. v. THOMAS.

(Circuit Court, D. Colorado. July 17, 1900.)

No. 3,795.

MINING CLAIM—CORRECTION OF CALLS.

A patent to a mining claim will not be reformed in equity, so as to make the calls therein correspond with alleged monuments located on the ground, where it appears that for about 16 or 18 years preceding the filing of the bill the alleged monuments were not in place, and there is as much doubt as to where the monuments were first located as there is whether the course is correct.

Charles J. Hughes, Jr., for complainants.

S. R. Fitzgerrald and Thomas, Bryant & Lee, for defendant.

HALLETT, District Judge. Ernest Thallman and another against T. E. Thomas is a bill to correct the calls in a patent to a mining claim. Complainants aver that a mining claim owned by them in the county of Ouray (No. 1,902, and called "Nellie") has courses and distances in the north and south side lines which do not correspond with the monuments as located on the ground; and they desire to have the patent corrected in respect to the courses between corners 1 and 2, and 3 and 4, so that they shall correspond with the monuments. The difference in the course as claimed by the complainants, and as recited in the patent, is $1^{\circ} 49'$. According to the patent, the course from corner No. 1 to corner No. 2 is S., $76^{\circ} 5' W.$ As claimed by the complainants, the course should be S., $77^{\circ} 54' W.$ The error alleged to be in the courses places the west end of the claim 43 feet south, as to corners 1 and 4, from that which is given by the courses in the patent. The testimony is not much in conflict in respect to what occurred in the location of the corners. The surveyor who surveyed the claim for location in the year 1881 also made the survey for patent in the year 1883. He changed the courses very materially in 1883 from those

which had been given in the first survey in 1881. In neither of the surveys was there any location of the monuments by actual measurement upon the lines of the claim. In other words, the west end corners, 1 and 4, were located by triangulation. The ground is very precipitous from east to west, the claim running up the side of a mountain which is said to be a declivity of 35° or more; and the monuments at the west end are upon ground which is overrun by snow slides nearly every winter, so that stakes put up in the usual manner are swept away the following winter. Indeed, the only corner which seems to be accepted by all parties as capable of ascertainment, and having a bearing tree which would enable them at all times to determine its position, is corner No. 2, which is at the east end of the claim. About that there is no dispute. Mr. Mathis, who made the first and the second surveys, is not very clear whether the corners 1 and 4 were established in 1883, when the patent survey was made. He testifies that they were set up at the first survey, and that the second survey was according to the monuments as first located. Corner No. 1 is also a corner of the Ella claim, which lies west of the Nellie. In locating that corner for the Ella survey, reference was made to the Ella discovery cut, which was 180.7 feet from this corner. Complainants contend that this is the most satisfactory call which can be found for the location of this corner, but it was not made a call at all in the Nellie survey. The calls in that survey are more distant, and entirely different. If those calls be observed, apparently the courses in the patent are correct. No witness testifies, and there is no claim made, that the corner has ever been in place since 1883. The rule that monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained. If there be doubt as to the monuments, as well as to the course and distance, there can be no reason for saying that monuments shall prevail, rather than the course given in the patent; and that is this case. There is just as much doubt where this monument was first located as there is whether the course is correct, and therefore it is not possible to say that we shall first determine a doubtful point, as to where the monument was in fact located, and then give it effect to control what is expressed in the patent. Furthermore, it is believed that in any case in which parties claim that they shall hold by monuments, rather than by the description given in the patent, they must maintain the monuments in the position in which they are placed. For some time—something like 16 or 18 years—before this bill was filed, this monument was not in place. Indeed, the complainants did not discover the error in all that time in their survey. Under such circumstances, it is impossible to entertain the bill, and it will be dismissed at the costs of the complainants.

BURT v. C. GOTZIAN & CO.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1900.)

No. 1,349.

1. APPEAL—PLEADING AND PROOF—VARIANCE—HARMLESS ERROR.

Where the ultimate facts which warrant a decree for plaintiff are clearly alleged in the bill, a variance between the evidential facts alleged and those proved, which has not misled or surprised defendant, nor prevented a fair trial of the issue presented by the proofs, is not fatal to the decree, and will not require its reversal.

2. ASSIGNMENT OF ERROR—CONSTRUCTION.

A specification of error that the court erred in admitting any testimony under the bill merely challenges the sufficiency of the facts stated in the bill to constitute a cause of action, and, where the ultimate facts pleaded are proved, it does not reach the objection that there was a variance between the evidential facts charged and those established by the evidence.

3. FRAUDULENT CONVEYANCES—ASSIGNMENT OF SHERIFF'S CERTIFICATE.

A. was the real owner of about 6,000 acres of land and some stock and machinery thereon, which appeared of record in the name of his brother B., but which had been conveyed by the latter to a sham corporation which A. controlled; and the deed and bill of sale were in A.'s possession, but were not recorded. A. then purchased goods of C., a corporation, and of other merchants, whom it represents, in the name of his brother B., and on the credit of his title to this property, with the intent never to pay for them, and caused B. to further cover it up with fraudulent mortgages. Other creditors of B. fastened the lien of their judgment upon these lands before some of the fraudulent deeds and mortgages were recorded, sold the land under an execution on their judgment, and obtained a sheriff's certificate from which the owner of the land could redeem by the payment of about \$800, while the title maturing under it was worth more than \$30,000. Three days before the expiration of the year of redemption, A., who still controlled and really owned the lands, subject to this sheriff's certificate, purchased the certificate, and caused it to be assigned to D. for the purpose of defrauding C. and the creditors it represents, and then failed to redeem from the sale under it, so that the title vested in D., who knowingly took the assignment and title to aid and abet A. in his scheme to defraud the creditors. C. obtained a judgment against B., and brought this creditors' bill against D. and others to avoid the assignment of the sheriff's certificate, and to subject the lands to the payment of the claims of the creditors. *Held*, that the assignment of the sheriff's certificate was fraudulent and voidable as to C. and the creditors it represents, and their claims are superior in equity to the title of D. thereunder. While it is conceded that the sheriff's certificate was valid, and that if A. had bought it in his own name or in the name of B. for his own benefit, without any intent to defraud the creditors, the title of the assignee would have been invulnerable to their attacks, yet the facts that he purchased it in another's name, for the purpose and with the intent to defraud these creditors, and that the assignee knew this, and took the assignment and the title to aid and abet him in his fraudulent scheme, are fatal to its validity as against the creditors whom they sought to defraud.

4. SAME.

The use of a valid judgment or sheriff's certificate of sale to defraud creditors is as futile as the use of a deed or mortgage for that purpose.

5. CREDITORS' BILL—DECREE.

A decree on a creditors' bill to subject lands, the title to which was in defendant, to the payment of plaintiff's judgment, on the ground that defendant knowingly took the title under an assignment of a sheriff's certificate of sale fraudulent and void as to plaintiff, which merely adjudges such assignment void as to plaintiff, and that the lien of the latter's claim is superior to defendant's title under the assignment, presents no question

of rescission, and is therefore not erroneous on the ground that it rescinds the assignment without requiring a return of its purchase price, or of the moneys subsequently expended in payment of taxes and incumbrances.

6. FRAUDULENT CONVEYANCE—KNOWLEDGE OF GRANTEE.

One who knowingly takes a conveyance to aid and abet a scheme to defraud creditors cannot hold the fraudulent instrument, or any interest thereunder, as against such creditors, to secure the amounts paid therefor, or for the satisfaction of taxes or incumbrances on the property.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of North Dakota.

U. M. Rose (W. E. Hemingway and G. B. Rose, on the brief), for appellant.

George S. Grimes (Seth Newman, Burleigh F. Spalding, and Winfield S. Stambaugh, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The appellee, C. Gotzian & Co., a corporation, was a judgment creditor of Bartholomew Pickert. It brought a creditors' bill against him, the Pickert Land, Grain & Stock-Raising Company, of North Dakota, a corporation, Flora J. Burt, Fannie Snow, and Eldridge Gerry Snow, her husband, and Herbert Ernest Matthew Davies. All the defendants answered except the defendant Davies. A large amount of testimony was taken, the case went to final hearing, and the court made written findings of fact and conclusions of law, and rendered a decree to the effect that a certain deed of lands in North Dakota, dated January 20, 1892, made by Bartholomew Pickert and his wife to the stock-raising company, a certain mortgage of some of those lands for \$5,500, made by Bartholomew Pickert and his wife to Fannie Pickert, now Fannie Snow, and an assignment of a sheriff's certificate of sale of all the lands in controversy from George S. Grimes to the appellant, Flora J. Burt, were fraudulent as to the appellee, and that these lands should be sold to satisfy its superior lien. This appeal challenges that portion of the decree which adjudges the assignment of the sheriff's certificate to Flora J. Burt fraudulent, and the assignment of errors which she has filed is limited to the claim that the court erred in its findings of fact that the purchase and assignment of this sheriff's certificate were brought about through the efforts of one R. F. Pickert; that he furnished the purchase money therefor; that in this purchase the appellant acted at his instigation and for his benefit; that the assignment was procured, and the sheriff's deed subsequently issued thereon was obtained, for the purpose and with the intent to thereby place the record title of all the lands in question beyond the reach of the creditors of Bartholomew Pickert; that the appellant took the assignment in her name to aid and abet the Pickerts in this fraudulent scheme; and that the court also erred in its conclusion of law that the assignment was fraudulent and void as to the appellee, and that the title of Flora J. Burt to the real estate was inferior in equity to the lien and claim of C. Gotzian & Co.

The question which this assignment presents is chiefly one of fact,

and that question can only be determined by a careful consideration of the testimony and acts of the parties to the transaction, of their relation to each other, and of the circumstances which surrounded them when the assignment was made. Fortunately that portion of the findings of the chancellor which has not been challenged by the appellant presents with admirable clearness the situation of the parties, and the circumstances surrounding them at the time of the transaction. From that part of the findings we draw these facts: R. F. Pickert was a brother of Bartholomew Pickert, and throughout all the transactions hereafter mentioned he held a power of attorney from his brother Bartholomew, and pretended to act for him as his agent and attorney in fact, but in truth Bartholomew Pickert was the mere tool of R. F. Pickert, and in all he did and said relative to the property that was in his name or possession, or relative to the debts that were contracted in his name, he was under the control and acted by the direction of R. F. Pickert, and for his benefit. R. F. Pickert was the real owner of all the property which Bartholomew ever appeared to own or possess. On January 20, 1892, Bartholomew Pickert appeared by the record to be the owner of all the lands described in the bill, which comprise about 6,000 acres, situated in Steele county, N. D., and of a stock of machinery, tools, and merchandise thereon, and he had no other property. The lands were worth \$35,000, and the stock \$6,000. On January 20, 1892, Bartholomew Pickert and his wife made a deed of nine sections of this land, which comprised all of it but one section and a quarter section, to the stock-raising company, and on the same day he made a bill of sale of all his personal property to the same company. This deed and bill of sale were placed in the hands of R. F. Pickert, who kept the possession of them and concealed them from the creditors hereafter mentioned until they were recorded,—the bill of sale on February 12, 1893, and the deed on March 1, 1893. On April 19, 1892, Bartholomew Pickert made a chattel mortgage upon nearly all his stock and machinery to James W. Gillies for \$15,500. On April 22, 1892, he made a chattel mortgage for \$10,000 upon the balance of his personal property to A. E. Gillies, the wife of James W. Gillies. On May 13, 1892, he and his wife made a mortgage for \$25,000 to the same A. E. Gillies upon the real estate covered by their deed to the stock-raising company. On October 10, 1892, they made a mortgage for \$5,500 on the section and quarter section of the land described in the bill, which was not covered by the deed to the stock-raising company, to Fannie Pickert, the daughter of R. F. Pickert, who afterwards married Eldridge Gerry Snow and became Fannie Snow. All these mortgages and the deed and the bill of sale of January 20, 1892, were given without any consideration, with the intent on the part of R. F. Pickert and Bartholomew Pickert of covering up the property described therein, of placing it beyond the reach of the creditors, and of defrauding them out of the goods they sold to the Pickerts, and out of the purchase price thereof. R. F. Pickert and Bartholomew Pickert never intended to pay for the goods which they bought of the appellee and the other creditors whom it represents, when they purchased them; and the Pickert Land, Grain &

Stock-Raising Company was organized by them as a corporation under the laws of New Jersey about September, 1892, for the sole purpose of defrauding the creditors by covering up the property that had been in the name of Bartholomew Pickert in the name of this corporation, which never had any other property, never took possession of this property, and which was controlled and managed throughout its brief nominal existence by R. F. Pickert. In order to carry out this nefarious scheme, Bartholomew Pickert on April 21, 1892, after he had placed the deed and bill of sale of January 20, 1892, in concealment, in the possession of R. F. Pickert, made or caused to be made to the R. G. Dun & Co. Mercantile Agency a written statement that he owned the real and personal property heretofore mentioned, and other property, which he stated was all together of the value of \$287,900, and that his liabilities were \$14,250. Immediately after this statement was received at St. Paul, Minn., R. F. Pickert, acting as the pretended agent of Bartholomew Pickert, but in fact for himself, applied to the appellee and to various other merchants in St. Paul and Minneapolis to purchase goods and merchandise on credit in the name of Bartholomew Pickert. These merchants applied to the R. G. Dun & Co. Mercantile Agency, and obtained the information set forth in the written statement of Bartholomew Pickert, before they sold their goods; and then, in reliance upon this statement, and upon representations made by R. F. Pickert along the same line, they sold goods on credit, nominally to Bartholomew Pickert, at the request of R. F. Pickert. In October, 1892, the purchase price of these goods had not been paid, and R. F. Pickert represented to some of these creditors that Bartholomew Pickert was in embarrassed circumstances, and induced them to extend the time of payment of their claims in consideration that he would turn over some valuable assets to a trustee to secure their payment. In carrying out this proposition a promissory note for \$11,208.52, which represented the amount of the claims of 26 of these creditors, was made by Bartholomew, payable on May 1, 1893, to the order of the appellee, C. Gotzian & Co., and some property was turned over to a trustee to secure the payment of this note. The property delivered to the trustee, however, proved to be so heavily incumbered that less than \$100 above the expenses of the trust was realized from it. Thereupon C. Gotzian & Co. brought an action and recovered a judgment on October 11, 1893, against Bartholomew Pickert on this promissory note, and the creditors' bill in this suit is founded upon that judgment.

While the transactions we have narrated were going on, the proceedings out of which the relation of the appellant, Flora J. Burt, to this litigation arose, were approaching their consummation. They ran in this way: On September 28, 1892, Allen, Moon & Co. obtained a judgment for \$533.40 against Bartholomew Pickert in the district court of Cass county, in the state of North Dakota. On October 1, 1892, they filed a transcript of this judgment in Steele county, in the state of North Dakota, and thereby fastened the lien of their judgment upon the lands described in the bill in this suit. On June 12, 1896, they caused these lands to be sold under an execution issued upon their judgment, and George S. Grimes, their attorney, bid them

in in his own name, but for the benefit of Allen, Moon & Co., for the amount of their judgment, and the sheriff who made the sale issued to him the proper certificate thereof. On June 9, 1897, three days before the year of redemption from this sale expired under the laws of North Dakota, George S. Grimes assigned this sheriff's certificate to the appellant, Flora J. Burt, for the sum of \$790.34, and no redemption was made from that sale. At the time this assignment was made, the lands described in the sheriff's certificate were worth \$60,000, and the only incumbrance upon them superior to the lien of that certificate was the mortgage for \$25,000 to A. E. Gillies, which had been assigned to a bona fide purchaser. The certificate matured into a sheriff's deed, and a complete record title to all the lands in dispute was thereby vested in Flora J. Burt, the appellant.

We are now ready to consider the contention of the appellant that the findings of the court below that R. F. Pickert procured this assignment, and the sheriff's deed which followed it, in the name of Flora J. Burt, in pursuance of his scheme to defraud the creditors whom he had induced to sell goods to Bartholomew Pickert, and for the purpose of concealing the ownership of the lands; that he paid for this assignment; and that the appellant took it, and the sheriff's deed which followed it, at his instigation, for his benefit, and for the purpose of aiding and abetting him in delaying and defrauding the appellee and the other creditors whom it represents,—were erroneous. This contention of the appellant is sustained by her positive testimony that she bought this assignment with her own money, that she did not do so to delay or defraud these creditors, and that since her purchase of it she has expended about \$6,000 in paying taxes and incumbrances upon the lands described in it. It is sustained by the testimony of Bartholomew Pickert that he did not furnish the money with which the assignment was purchased, and that it was not bought for him. R. F. Pickert did not testify. On the other hand, the testimony of these witnesses, and of others who acted with or for them, establishes these significant facts: There was a large farm in operation upon these lands, with the necessary stock of machinery and tools to carry it on. The appellant, Flora J. Burt, was not a farmer or a dealer in farm lands. She had never bought or owned any other land. She had never examined and had never seen, to her knowledge, any of the lands described in this sheriff's certificate, or any lands in the county in which these lands were situated, before she took this assignment. She was a young woman, who prior to 1895 had been employed in restaurants and dry-goods stores in the city of St. Paul, where she resided, at rates of wages which she could not remember. In the year 1893 she made the acquaintance of R. F. Pickert, who, with his brother Bartholomew Pickert, had been engaged in selling prize packages of tea, some of which were advertised to contain jewelry. This business was conducted by advertising the sales of these packages in various cities, and carrying on the business in each city in turn until the residents became familiar with its character, and then proceeding to another location. About two years after the appellant made the acquaintance of R. F. Pickert, and in December, 1895, or January, 1896, she entered upon this

business of selling prize packages of tea under the name of the Globe Tea Company. When she commenced this business she employed R. F. Pickert as her advertising agent, made him her attorney in fact, verbally empowered him to act for her in all general matters, including the tea business and the subsequent purchase of the sheriff's certificate of sale of these lands. Later, when he had purchased the assignment of the sheriff's certificate for her, she gave him a written power of attorney to act in her behalf in matters pertaining to this real estate. From the time she embarked in the business of selling prize packages of tea, in 1895 or 1896, until the commencement of this suit, the acts of the appellant and those of her agent and attorney in fact, R. F. Pickert, are almost, if not altogether, indistinguishable. The capital required to operate the tea business was from \$350 to \$500. She bought her first stock of goods and shipped it to Columbus, in the state of Ohio. R. F. Pickert was her advertising agent, and at the same time was in business for himself. Together they moved the business from city to city and conducted it. In its conduct he sold goods for her, and he sold goods for himself. She testified:

"I used to send his mail, and send his samples and other things. What I did for him offset part of what he did for me. We changed about. Judge Hamilton: You don't mean to say what you did for him offset all he did for you? No; he took it as a part of his salary. He got more than I did out of it."

Together this agent, R. F. Pickert, and his principal, Flora J. Burt, carried on their tea and jewelry business in turn in the cities of Columbus, Toledo, Dayton, Youngstown, Massillon, Steubenville, and Cleveland, in the state of Ohio, between December, 1895, and March, 1899. In the early part of June, 1897, while this close business relation existed between Flora J. Burt and R. F. Pickert, and while she was in the city of Wheeling, in the state of West Virginia, R. F. Pickert appeared in the city of St. Paul, Minn., and went with Mr. James D. Denegre, an attorney at law of that city, to Steele county, in North Dakota. Mr. Denegre testifies that he did not go there to examine, and that he did not examine, the title to any of these lands, but that he went there to examine, and that he did examine, the proceedings which culminated in the sheriff's certificate of sale under the judgment of Allen, Moon & Co. against Bartholomew Pickert, and that he found those proceedings regular. Thereupon he returned to Minneapolis, and bought of Mr. Grimes the sheriff's certificate of sale under that judgment, and took the assignment of it to Flora J. Burt. He paid for it with \$40.97 in cash and six drafts which were handed to him by R. F. Pickert. One of these drafts, which was for \$250, was payable to the order of R. F. Pickert, and was indorsed by him. The other five were payable to the order of Flora J. Burt, were indorsed by her to R. F. Pickert, and by Pickert to Mr. Denegre, or to his law firm. It was in this way that the appellant bought and paid for this assignment of the sheriff's certificate. She testified that she might have borrowed some of the consideration which she paid for it from R. F. Pickert, but that the drafts and money which Pickert gave for it were hers, and that she bought it for herself, not for any other person, and without any

notice that the purpose of the purchase was to cover up the property in her name, or to defraud the creditors who had sold their goods to Bartholomew Pickert at the request of her agent and attorney in fact, R. F. Pickert. Her testimony is positive, but how can it be credited, in the face of these established facts? She was not a farmer or a dealer in real estate. She knew nothing about this property. She knew nothing about the title to it, and she had no attorney examine its title before she acted. R. F. Pickert was the real owner of it. In three days the title to it was to pass beyond his reach, unless he or the corporation which he controlled redeemed from the sale evidenced by this sheriff's certificate. That title, subject to the incumbrances upon it, was worth more than \$30,000, and it required less than \$800 to save it. R. F. Pickert knew this. He was the agent and attorney in fact of the appellant. He had unlimited power to act for her in all her business transactions, and their social and business relations were intimate and friendly. Notice to her of facts suggesting inquiry relative to the title of these lands and the claims of these creditors was notice of all the facts which a diligent investigation would disclose. The notice and knowledge of her agent and attorney in fact, R. F. Pickert, constituted notice and knowledge to her. It is incredible that she could have acted and bought this assignment without a reliance upon the knowledge and information of her agent, and, if she acted through him, she was charged under the law with full knowledge of the fraud he was perpetrating, and of the part which this assignment played in its consummation. In this state of facts, the court was unable to believe that a young woman of limited means, who had never bought a foot of land, had invested \$790.34 in a sheriff's certificate of sale of lands of which she had no knowledge, without any examination of the lands or of their title, in the absence of some agreement or understanding that the investment should be for the benefit of some one who had more knowledge, and more motive for making it. Nor was it able to believe that the real owner of these lands, who had plotted and schemed for five years to hide them from these creditors and to save them for himself, had suddenly lost his interest, changed his character, procured the assignment of this certificate to an innocent purchaser, and then permitted a title worth \$30,000 to slip from his grasp through a failure to pay the paltry sum of \$800 to redeem it. A careful reading of the entire testimony has not inspired in our minds a greater faith in the theory of the appellant than that possessed by the chancellor below. Her testimony is evasive, elusive, unsatisfactory, and her memory upon important issues strangely deficient. Many of the letters which she testified she wrote, and many of the acts which she swore she did, proved to be the letters and the acts of R. F. Pickert. The entire record, taken together, has convinced us that he was the player, and she, like his brother Bartholomew, was a mere pawn in the game of fraud and conspiracy he was conducting. Her theory of this case, and of the purpose and effect of the purchase of the certificate, is contrary to the common observation and experience of the motives and acts of mankind, and is too incredible for belief. We are unable to persuade ourselves that she bought and paid \$790.34 for an as-

signment of a sheriff's certificate worth \$30,000, without any knowledge or examination of the lands it described or the title it conveyed, and without notice of the claims of the creditors which her agent and attorney had been seeking for four years to avoid, and that he abandoned to an innocent purchaser a title worth \$30,000, which he controlled, when he knew all the facts, and could have redeemed and saved it for himself with \$800. The specifications of error which challenge the findings of fact relative to the claim and title of Flora J. Burt to the lands in controversy cannot be sustained.

Turning from the facts of the case, our attention is challenged to certain questions of law upon which some reliance seems to be placed to obtain a reversal of this decree. It is urged that there is so wide a variance between the pleadings and proof that the decree cannot be sustained. It is said that the bill alleges that the appellant bought the sheriff's certificate with the money of Bartholomew Pickert, and took the title to the lands in her name in trust for him, for the purpose of defrauding these creditors, while the proofs were, and the facts found by the court are, that R. F. Pickert bought it in her name with his money, and she took it and the title to it for his benefit, for the purpose of defrauding the same creditors. It is true that the bill alleged that Bartholomew Pickert owned the land, conceived and executed the scheme to defraud these creditors, and furnished the money to buy the sheriff's certificate in the name of the appellant, and that it contained no allegations regarding R. F. Pickert, or his acts concerning or in relation to the property. It is also true that the proof was that R. F. Pickert was the real owner of the property; that he had pretended to act as the agent and attorney of Bartholomew Pickert and of Flora J. Burt, but that he was in reality himself the principal, while they were his tools; that he had conceived and carried out the scheme to defraud these creditors, from whom he had bought the goods in the name of his brother; that his brother did not furnish the money to purchase the assignment, but that he bought and paid for it, and Flora J. Burt took it, and the title to the lands under it, at his instigation, to defraud the same creditors. The court found the facts which the evidence established, and rendered the decree which those facts demanded. The question is, should this decree be reversed because it was alleged that the chief conspirator was Bartholomew Pickert, while the proof was that the perpetrator of the fraud was R. F. Pickert? It will be noticed that the ultimate fact upon which the decree and the demand for relief in the bill rest was clearly alleged,—the fact that the assignment of the sheriff's certificate and the title to the lands were taken in the name of the appellant, and that she received them for the purpose and with the intent to delay and defraud the creditors whom the appellee represents. It will be noticed that the variance between the bill and the proof is not in the end accomplished, but in the means used to bring about the fraudulent result. The means alleged were the money and the acts of Bartholomew Pickert. The means proved were the money and the acts of R. F. Pickert. Moreover, this proof was presented in the opening of the appellee's case. The appellant was not surprised by it. She was not misled by the pleading in the bill. She

had full opportunity to meet this proof, and she did not neglect her opportunity. After the proofs of the appellee were made, she was sworn, and testified at large twice concerning the charge which these proofs presented. That charge was fairly tried upon the merits, and no exception was taken in the court below to the introduction of any of the evidence which sustains it. The appellee was entitled to the same relief against the appellant if the assignment to her was procured by R. F. Pickert and taken by her to defraud these creditors that it would have been entitled to if the assignment had been procured by Bartholomew Pickert and had been taken by her for this purpose. The material averment of the bill here was not that which named the person who instigated the appellant to take this assignment, but it was the fact that she did take it, at the expense and by the procurement of some wrongdoer, for the purpose of defrauding these creditors. That allegation alone was sufficient to warrant the relief sought and the decree rendered against her, regardless of the identity of the instigator of the fraud. As the bill clearly charges the fraudulent character of the assignment which this appellant took, and since she was not surprised, misled, or deprived of a full opportunity to rebut the evidence relative to the man and means which procured it, but presented her evidence and tried that issue on the merits, without taking any exception to the introduction of the testimony which presented it, there cannot be said to be any such variance between the allegata and probata in this case as will warrant a reversal of the decree. Where the ultimate facts which warrant the decree are clearly alleged in the bill, a variance between the evidential facts alleged and those proved, which has not misled or surprised the appellant, nor prevented a fair trial of the issue presented by the proofs, is not fatal to the decree, and will not require its reversal. *Moore v. Crawford*, 130 U. S. 112, 142, 9 Sup. Ct. 447, 32 L. Ed. 878; *Wallace v. Loomis*, 97 U. S. 146, 160, 24 L. Ed. 895. There is another reason why this objection to the decree cannot be sustained. It is that it has not been assigned as error. The only specification which in any way challenges the relevancy of the evidence or the sufficiency of the bill in this case is in these words: "The court erred in admitting any testimony under the complaint in the above-entitled cause." The only effect of this specification is to challenge the sufficiency of the facts stated in the complaint to constitute a cause of action, and there is no ground whatever for that challenge.

Another position of counsel for appellant is that R. F. Pickert had the right to purchase the sheriff's certificate of sale either in his own name, or in the name of Flora J. Burt for his benefit, and that if he did so the assignment was unassailable by the creditors of Bartholomew Pickert. This position would be sound if R. F. Pickert had been a stranger to the property and to the creditors, and if he had purchased the assignment without any intent or purpose to defraud them. But when the facts are that he was the actual owner of the property, which he had kept of record in the name of Bartholomew Pickert until he had purchased the goods on credit in Bartholomew's name; that he controlled the sham corporation in whose name he

placed the title to the lands; that he purchased and placed the assignment of the sheriff's certificate in the name of Flora J. Burt for the purpose of defrauding these creditors,—the transaction takes on a different hue, and the assignment, like every other mortgage and deed of this property which he procured to be made for the purpose of defrauding the creditors, becomes fraudulent as to them, and inferior in equity to the lien of their judgment. Fraud vitiates every transaction, at the suit of the party injured. Equity looks through forms and appearances to the true nature of the act, and seeks to grant appropriate and adequate relief. There is no scheme so deep, no device so cunning, as to be impervious to its remedies. *R. F. Pickert* bought the goods for whose purchase price the judgment in favor of *C. Gotzian & Co.* was rendered on the faith of a title to lands which he owned, but which he caused to appear in the name of his brother; and equity will follow those lands through every fraudulent mortgage, deed, bill of sale, assignment, and device which he concocts, and through the names of every agent and tool he employs, until they are subjected to the payment of the claims of the creditors he planned to defraud. His purchase of the sheriff's certificate in the name of the appellant to defraud these creditors was as vulnerable to their attack as was the fraudulent deed and mortgage he caused his brother to make to the sham corporation for the same purpose. Each was a device to place this property beyond the reach of creditors who were entitled to subject it to the payment of their claims. As to them, each was fraudulent, and each conveyed a title inferior in equity to their rights. The use of a valid judgment or sheriff's certificate of sale to defraud creditors is as futile as the use of a deed or a mortgage for that purpose. *Decker v. Decker*, 108 N. Y. 128, 135, 15 N. E. 307; *Stovall v. Bank*, 8 Smedes & M. 305, 316; *Haas v. Haas*, 35 La. Ann. 885.

Finally it is contended that the decree is erroneous because it rescinds the assignment of the sheriff's certificate, without a return of the purchase price paid for it, or of the moneys subsequently expended by the appellant in the payment of taxes and incumbrances upon the property. The contention is based upon a misapprehension of the effect of the decree. It does not rescind the assignment, or leave the title to the lands in the assignor, *Grimes*. It merely adjudges that as to the appellee the assignment is fraudulent and void, that the lien of its claim is superior to the title of *Flora J. Burt* under the assignment, and that the lands shall be sold to satisfy that lien. The legal effect of the decree is to leave the title to the lands in the appellant, subject to the lien of the appellee for the amount of its judgment, interest, and costs. The result is that no question of rescission is presented by the record or the decree. This was not a suit for rescission, and no rescission was adjudged. It was a creditors' bill to subject these lands, the title to which is in the appellant, to the payment of the judgment of the appellee, on the ground that she knowingly took the title to them under an assignment which was fraudulent and void as to the appellee and the creditors whom it represents. It does not appear from the findings of the court below, nor is it certain from the evidence, that the appellant ever paid any-

thing on account of this property which she did not receive from R. F. Pickert. The court below found that he paid the purchase price of this assignment, and that finding has been affirmed. The testimony strongly indicates that much, if not all, that she claims to have paid for taxes and incumbrances upon the property was paid or furnished by Pickert. But it is unnecessary to investigate or to consider this question. She knowingly took this assignment to defraud these creditors. If she had paid the purchase price for it, and if she had paid \$6,000 on account of taxes and incumbrances upon the lands, she would not be entitled to any allowance for or reimbursement of these sums, as against the creditors represented by the appellee. One who knowingly takes a conveyance or assignment to aid and abet a scheme to defraud creditors cannot hold the fraudulent instrument, or any interest under it, as against the creditors, to secure the amounts paid for it, or for the satisfaction of taxes or incumbrances he has paid upon the property it affects. *Sands v. Codwise*, 4 Johns. 598; *Railroad Co. v. Soutter*, 13 Wall. 517, 20 L. Ed. 543; *Thompson v. Bickford*, 19 Minn. 17 (Gil. 1); *Roller Mills v. Ward*, 6 N. D. 317, 328, 70 N. W. 271; *Davis v. Leopold*, 87 N. Y. 620, 622; *Swinford v. Rogers*, 23 Cal. 234. There was no error in the decree of the court below, and it is affirmed.

STUDEBAKER v. PERRY.

(Circuit Court of Appeals, Seventh Circuit. June 23, 1900.)

No. 672.

NATIONAL BANKS—LIABILITY OF STOCKHOLDERS—SUCCESSIVE ASSESSMENTS.

The purpose of the provisions of the national banking law relating to liability of stockholders is that, in case of the insolvency of the bank, its shareholders shall be liable for its debts to the extent of the amount of their stock, and the law is to be construed in view of such purpose. The comptroller has power to order successive assessments, in the aggregate within the limit of the stockholders' full liability; and this power cannot be affected, and the purpose of the law defeated, by the fact that a receiver, in enforcing a first assessment, has sued at law rather than in equity, and has recovered a judgment which has been satisfied.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Hugh C. Ward, for plaintiff in error.

George W. Wall, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This action was brought by the receiver of the National Bank of Kansas City against the plaintiff in error, Clement Studebaker, to recover the amount of an assessment of \$7 per share upon the capital stock of the bank, of which plaintiff in error is alleged to have held 189 shares. The declaration shows a previous assessment of \$16 per share, which the plaintiff in error had paid.

The court overruled a demurrer to the declaration, and, the plaintiff in error refusing to plead further, gave judgment against him.

The only question urged upon our consideration is whether the comptroller of the currency has power, under sections 5151, 5234, Rev. St., to make, and to enforce by a suit at law, more than one assessment upon the shareholders of an insolvent national bank, if necessary to pay the debts thereof. The argument for the plaintiff is, in substance, the same as that of Judge Philips in *De Weese v. Smith* (C. C.) 97 Fed. 309, where the ruling was that, having recovered against a stockholder a judgment at law for the amount of an assessment, the receiver could not maintain against him a second action to recover a further assessment. The chief grounds of the decision were that the stockholder's liability is upon contract, and cannot be split, and that in making and directing the enforcement of an assessment the comptroller performs a quasi judicial function, and by one exercise exhausts the power conferred upon him by the statute. Weight was also given to the statement in the report of the comptroller for 1898 (volume 1, p. 36), "that, for 33 years after the adoption of the national banking act, by all his predecessors in office this statute had received the construction, in practice, that but one assessment was enforceable"; but in the main the conclusion declared was deduced from the opinion of the supreme court in *Kennedy v. Gibson*, 8 Wall. 498-505, 19 L. Ed. 476. The weight of authority and the better reason seem to us to be in favor of the comptroller's right to make successive assessments, as found necessary, which may be enforced in equity or by actions at law, at the option of the receiver. It was conceded at the hearing that an action at law upon an assessment for less than the par value of the stock is maintainable. In *Kennedy v. Gibson* it was said:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. * * * This action on his part is indispensable, * * * and must precede the institution of suit by the receiver. * * * The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. * * * When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot, for that reason, be made co-defendants. * * * The receiver is the statutory assignee of the association, and is the proper party to institute all suits. They may be brought, both at law and in equity, in his name, or in the name of the association for his use."

Following this, in an opinion written by the same judge, in *U. S. v. Knox*, 102 U. S. 422, 26 L. Ed. 216, is a distinct recognition of the power of the comptroller to make successive assessments, and it is an anomalous proposition that the power may be affected or cut off at the will of the receiver, by proceeding to collect an assessment by an action at law instead of a suit in equity. Indeed, the contention here is that merely by making one assessment for less than the entire amount of the stock the comptroller deprives himself of the power to

make another, and that no more than one assessment can be collected, unless the shareholders shall refuse to pay the first, and the receiver shall choose to proceed in equity to collect it, and so give the court opportunity to hold the case "for further action." See, also, *Bank v. Case*, 131 U. S. Append. cxliv., 23 L. Ed. 961. The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts "to the extent of the amount of their stock therein," and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the comptroller the receiver is authorized to enforce the shareholder's liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design. In the case of *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663, the suit was to enforce a second assessment, the first having been fully paid, and the power of the comptroller to make successive assessments, though not denied, was considered and affirmed. In *Aldrich v. Yates* (C. C.) 95 Fed. 78, the power, though denied, was affirmed by the circuit court for the district of Kentucky, and like rulings in unreported cases have been made at circuit in Indiana and elsewhere.

If the statute were one whose meaning could be sought in contemporary construction, there is nothing in the practice of the comptrollers to affect our conclusion. The comptrollers have had the power to make assessments, either for the entire amount of stock or for less, and the evidence is abundant in the reported cases of the exercise of the power in both ways. Of the effect of proceeding in one way or the other, the question was not, and in the nature of things could not have been, for their decision, and it does not appear that any of them ever assumed to decide it. The judgment is affirmed.

ATHERTON MACH. CO. v. ATWOOD-MORRISON CO.

(Circuit Court of Appeals, Third Circuit. June 14, 1900.)

No. 13.

1. JURISDICTION OF CIRCUIT COURTS—SUIT ARISING UNDER PATENT LAWS.

Where a contract, the validity of which is involved in a suit for infringement of a patent, is not one between the parties to the suit, it is collateral thereto, and cannot characterize the suit as on the contract, and not one arising under the patent laws, and therefore not within the special jurisdiction of the circuit courts of the United States.

2. SAME.

A suit in which the relief sought is an injunction, and the recovery of damages for the infringement of a patent, is one arising under the patent laws of the United States, and for that reason within the jurisdiction of a circuit court, although it incidentally involves a determination of the question of the ownership of the patent, which is claimed by both complainant and defendant under separate assignments from the patentee; such question itself being one to be determined under the patent laws.

3. SAME—PLEADING—ALLEGATIONS OF BILL.

Where a bill sets forth a case within the jurisdiction of the court, the jurisdiction cannot be ousted by the anticipation and denial in the bill of possible defenses which may not be made.

4. PATENTS—SUIT FOR INFRINGEMENT—ALLEGATIONS OF TITLE.

A bill in a suit for infringement of a patent which sets out complainant's title as derived through an assignment by the patentee and a second assignment by his assignee, both made while the application was pending in the patent office, and the latter of which, only, is alleged to have been recorded, sufficiently states title in the complainant to give it a standing in court.

5. EQUITY—PLEADING—PROFERT.

If profert is made in a bill of any document of which it is not necessary, it will be treated as surplusage, and does not entitle the defendant to oyer.

6. PATENTS—SUIT FOR INFRINGEMENT—PLEADING.

A bill in a suit for infringement of a patent is not multifarious because it sets out, by way of anticipation, a claim of defendant to ownership of the patent through an assignment alleged to be void, and prays that such assignment be held of no effect as against the rights of the complainant, and the record thereof canceled.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Edward Q. Keasbey, for appellant.

Frederick P. Fish, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the court below sustaining a demurrer to the bill. 99 Fed. 113. The bill was for an injunction, and accounting for the infringement of a patent. The facts, as stated by the bill, are briefly as follows: The title of the complainant is derived from the inventor, Jean Schweiter, of Bergen, Switzerland. It is alleged that the inventor made application in due form for letters patent of the United States, on July 17, 1896, and the application was numbered with the serial number 599,484, and afterwards, in August, 1896, the inventor, being the owner of the invention, by a valid agreement in writing, for a valuable consideration, assigned the invention and the letters patent issued thereon to Henry Schrader, requesting the commissioner to issue the letters to him; that Schrader, being the owner of the invention, by assignment in writing referring to the application by its serial numbers, and reciting the assignment from the inventor to him, assigned the invention to the Schrader Improved Quilling-Machine Company, requesting the commissioner to issue the letters patent to them, and this assignment was recorded in the patent office June 20, 1897. After this, the bill says, the letters were duly issued to Jean Schweiter, January 4, 1898, and thereupon, by reason of the grant to Schweiter and by virtue of the assignment, all the rights conferred by the letters patent were vested in the quilling-machine company, and they acquired the exclusive right to make, use, and vend the patented machine. After this, on August 18, 1898, the quilling-machine company, by assignment in writing duly recorded in the patent office the same day, assigned the invention and letters patent to the complainant, which thus acquired the exclusive right to make, use, and vend the machine covered by the patent. The machine constructed by the quilling-machine company had already been marked, "Patent applied for," and the complainant since the assignment has been making the machines, marking them "Patented," and giving due notice to the public; and the bill avers that the complain-

ant, having a legal as well as an equitable title to the invention and letters patent, is now engaged in the business of making and selling the machines embodying the invention, and is well able to supply the market; and the complaint is that the defendant, having no title, is guilty of infringement, and is making and selling machines containing the invention, and is issuing circulars insinuating that the complainant has not a valid title, and threatens to continue the infringement. The bill then goes on to say, by way of replication to an anticipated defense, that the defendant pretends that the inventor on October 8, 1898, assigned the invention and letters patent to the defendant; and the bill charges that, if such an assignment was made, it was invalid as against the complainant, and was obtained after the inventor had parted with all interest in the invention and application for a patent, and that when the letters patent issued thereon the title vested in the quilling-machine company, as assignee of the inventor, and also that the defendant had taken the assignment with actual as well as constructive notice of all the rights of the complainant and of the facts above set forth; and the bill avers that the complainant has both the legal and equitable title to the letters patent and invention, and that any claim or pretended right the defendant may have was subject to the rights of the complainant, and that the complainant has an exclusive right, which the defendant persists in infringing. The bill prays for an injunction and an accounting, and that the pretended assignment be declared to be of no effect, and the record thereof canceled. The defendant demurred, and the circuit court sustained the demurrer and dismissed the bill. The ground on which the demurrer was sustained was that the suit was not a suit at law or in equity arising under the patent or copyright laws of the United States, and that therefore the court had no jurisdiction of the case. The court held that the question whether the complainant was entitled to relief did not involve the consideration of any law of the United States, and that the title to the patent rested solely in contract, in the interpretation of which the general principles of equity and common law are applicable, and that as both complainant and defendant are corporations of the state of New Jersey, and as such citizens and inhabitants of that state, it had no jurisdiction of the case.

The act of congress of 1870, as embodied in section 629 of the Revised Statutes, provides that the "circuit courts shall have original jurisdiction as follows: * * * of all suits at law or in equity, arising under the patent or copyright laws of the United States." The jurisdiction thus conferred is exclusive. All questions, therefore, which concern the infringement or validity of, and the title to, patents granted under the patent laws of the United States, must be litigated in the circuit courts of the United States. "It is perfectly well settled," however, "that where a suit is brought on a contract, of which a patent is the subject-matter, either to enforce such contract or to annul it, the case arises on the contract or out of the contract, and not under the patent laws." Thus, in the earliest case in which this distinction was made (*Wilson v. Sanford*, 10 How. 101, 13 L. Ed. 344), the bill set forth a patent, and an assignment by the patentee of all right and interest in said patent to complainant, and a license from com-

plainant to defendants, to use one machine upon payment of a certain sum, part in cash, and part secured by notes falling due at different times. These notes contain the following provision:

"And if said notes, or either of them, be not punctually paid upon the maturity thereof, then all and singular the rights hereby granted are to revert to the said Wilson [the complainant], who shall be reinvested in the same manner as if this license had not been made."

The first of these notes was not paid when due, and, payment having been demanded and refused, this bill was filed, insisting that the license was forfeited by the failure to pay the notes, and that the licensor (the complainant) was fully reinvested, at law and in equity, with all his original rights. The bill further alleged that defendants nevertheless were using the machine, and thus were infringing the patent. The prayer was for an injunction pendente lite, for an account of profits since the forfeiture of the license, for a perpetual injunction, for a reinvestiture of title in complainant, and for other and further relief. Defendants demurred to the whole bill, and also (saving their demurrer) answered the whole bill. They admitted all the facts alleged, and averred on their part that the contract set forth in the bill had been modified and varied by a new contract, which the complainant had broken, and that the respondent, being in the lawful use of a planing machine at the expiration of the patent, had a right to use such machine without license, and consequently that the notes were without consideration. The demurrer having been overruled, the case was heard on bill, answer, and replication. The bill was dismissed for want of jurisdiction. On appeal to the supreme court, that court, by Taney, Chief Justice, said:

"The object of the bill was to set aside a contract made by the appellant with the appellees, by which he had granted them permission to use, or vend to others to be used, one of the [patented] planing machines, in the cities of New Orleans and Lafayette, and also to obtain an injunction against the further use of the machine, upon the ground that it was an infringement of his patent right. The appellant states that he was the assignee of the monopoly in that district of country, and that the contract which he had made with the appellees had been forfeited by their refusal to comply with its conditions. The matter in controversy between the parties arises upon this contract, and it does not appear that the sum in dispute exceeds two thousand dollars."

No appeal, therefore, could be allowed, unless the case came within the description contained in the act of 1836, "of all actions, suits, controversies in cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries." The court then say:

"Now, the dispute in this case does not arise under any act of congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon the common-law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited, and the prayer is 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction, unless the contract is set aside."

It will be observed that in this case there was a contract between the parties to the suit, which the complainant sought to set aside, in accordance, as he alleged, with the terms of the contract itself.

The next case is that of *Brown v. Shannon*, 20 How. 56, 15 L. Ed. 826. As in the case last cited, the question before the supreme court was whether it had, or not, appellate jurisdiction of the case. If it was a controversy arising under the patent laws of the United States, the jurisdiction of the court would attach, without regard to the amount in dispute; but if it were only a suit upon contract, between the parties, though the subject-matter of the contract were a patent, then it was necessary to the jurisdiction of the court that the matter in controversy should exceed \$2,000. Chief Justice Taney, in delivering the opinion of the court, says:

"From the manner in which the bill is framed, there is some difficulty in determining whether the complainants are seeking the aid of this court to prohibit the infringement of a patent right assigned to them, or to enforce the specific execution of two contracts that the appellant exhibited with the bill; * * * and the first question, therefore, for this court to determine, is, upon which of these two grounds does the bill seek relief? * * * Upon looking, however, carefully into the bill, we think it must be regarded and treated as a proceeding to enforce the specific execution of the contracts referred to, and not as one to protect the complainants in the exclusive enjoyment of a patent right."

After considering at length the terms of the agreements involved, the chief justice proceeds to say:

"And the gravamen of the bill, and the ground upon which relief is sought, is summed up in the paragraph immediately preceding the prayer for relief, in the following words: 'And your orators are further advised that the misconduct of the said Brown in the premises is a fraud upon the parties to the agreement of the 19th of January, 1853, as well as upon the parties to the agreement of the 15th of June, 1853, which it is the peculiar province of a court of equity to restrain.' It is to prevent the fraudulent violation of these contracts, therefore, that the complainants seek the aid of the court, and ask for an injunction; and, it being a proceeding founded on a contract between the parties, this court has no appellate power, unless the matter in controversy is of the value of more than two thousand dollars."

The next case in the supreme court of the United States was that of *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357, much relied upon by the appellee in his argument. This was an appeal from the circuit court of the United States for the Eastern district of Pennsylvania, in which both parties were citizens of that state. Mr. Justice Miller, in delivering the opinion of the majority of the court, states the case as follows:

"His bill begins by a statement that he is the original inventor and patentee of a process for cutting and engraving stone, glass, metal, and other hard substances. It is the one known as the 'sand-blast process.' He then sets out what we understand to be a contract with defendants for the use by the latter of his invention. He declares that defendants paid him a considerable sum for the machines necessary in the use of the invention, and also paid him the royalty which he asked, for several months, for the use of the process, which he claims to be the thing secured to him by patent. He alleges that after this defendants refused to do certain other things which he charges to have been a part of the contract, and thereupon he forbade them further to use his patent process, and now charges them as infringers. The defendants admit the validity of plaintiff's patent. They admit the use of it, and their liability to him for its use under the contract. They set out in a plea the contract as they

understand it, and the tender of all that is due to plaintiff under it, and their readiness to perform it. What is there here arising under the patent laws of the United States? What controversy that requires for its decision a reference to those laws or a construction of them? There is no denial of the force or validity of plaintiff's patent, nor of his right to the monopoly which it gives him, except as he has parted with that right by contract."

In this case, which goes to the very verge of the doctrine invoked by the appellee here, the complainant, according to the statement of Mr. Justice Miller, sets out in his bill a contract with the defendants for the use of complainant's invention, and then alleges that defendants refused to do certain things required by their contract, and that thereupon he forbade them further to use his patented process, and then seeks to charge them as infringers. There was, therefore, a subsisting contract, not denied by defendant, but as to the terms or requirements of which the parties complainant and defendant differed. The supreme court, according to the opinion by Mr. Justice Miller, considered the suit to be one for the rescission of the contract set out in the bill, and that it could not be a suit for infringement until after such rescission. At the conclusion of the opinion, he proceeds to say:

"Where, the contract being in parol, the parties differ about one or two of its minor terms, we do not agree that either party can of his own volition declare the contract rescinded, and proceed precisely as if nothing had been done under it. If it is to be rescinded, it can be done only by a mutual agreement, or by the decree of a court of justice. If either party disregards it, it can be specifically enforced against it, or damages can be recovered for its violation. But, until so rescinded or set aside, it is a subsisting agreement, which, whatever it is or may be shown to be, must govern the rights of these parties in the use of complainant's process, and must be the foundation of any relief given by a court of equity. Such a case is not cognizable in a court of the United States, by reason of its subject-matter; and as the parties could not sustain such a suit in the circuit court, by reason of citizenship, this bill should have been dismissed."

The next case in the supreme court was *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295. The question before the court was whether the case was properly removable from the state to the United States courts, as one arising under the laws of the United States. The court say:

"It is clear, from an inspection of the bill and answers, that the case is founded upon the agreement in writing between the appellee and the appellants, * * * by which the former, for a consideration therein specified, transferred to the latter his interest in certain letters patent. The suit was brought to recover the consideration for this transfer, and was not based on the letters patent."

In the case of *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683, there was a writ of error to the court of appeals of the state of New York, where the jurisdiction of the state court had been affirmed. The supreme court of the United States, in an opinion by Mr. Justice Gray, says:

"The action was upon an agreement in writing by which the plaintiff, as owner of letters patent already once reissued, granted to the defendant an exclusive license to make and sell the patented article within a certain territory during the term of the patent and of any extension or renewal thereof, and the defendant expressly acknowledged the validity of the letters patent, and stipulated that the plaintiff might, without prejudice to this agreement, obtain

further reissues, and promised to pay to the plaintiff certain royalties so long as no decision adverse to the validity of the patent should have been rendered. The defendant contended that this was a case arising under the patent laws, of which the courts of the United States have exclusive jurisdiction. Rev. St. § 629, cl. 9; Id. § 711, cl. 5. But it is clearly established by a series of decisions of this court that an action upon such an agreement as that here sued on is not a case arising under the patent laws."

In *Marsh v. Nichols*, 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413, the scope of the decision is, for our purpose, sufficiently set out in the syllabus, which is as follows:

"A bill in equity in a state court, with jurisdiction over the parties, brought to enforce the specific performance of a contract whereby an inventor, who, having taken out letters patent for his invention, agreed to transfer an interest therein to the plaintiff, and proceedings thereunder involving no question arising under the patent laws of the United States, and not questioning the validity of the patent, or considering its construction or the patentability of the device, relate to subjects within the jurisdiction of that court; and its decree thereon raises no federal question for consideration here."

In these cases the jurisdictional limits laid down by the supreme court are easily discerned, except, perhaps, in the case of *Hartell v. Tilghman*, which, as we have said, went to the verge of the jurisdictional line, and neither the supreme court nor the other federal tribunals have shown a disposition to press that case further than it necessarily goes. In the case of *White v. Rankin*, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. Ed. 569, the supreme court, after quoting the syllabus of *Hartell v. Tilghman*, to the effect that "a subsisting contract is shown, governing the rights of the parties in the use of the invention," proceed to point out, by a recital of the facts in the case, that the complainant, having set up a contract between himself and the defendant in regard to the use of the patented machines, was seeking to show a breach of that contract, and a consequent forfeiture, which he asked the court to sanction; the efficient existence of the contract being the only matter in controversy. In the other decisions of the supreme court above referred to, and in which jurisdiction was declined, the *lis mota* was clearly a contract between complainant and defendant, which was sought to be either enforced or set aside, and could not in any sense be said to arise under the patent or copyright laws of the United States. Where a bill in equity states a contract between complainant and defendant, and which it seeks to have set aside in order to pursue the defendant as an infringer, or where the bill states a contract between complainant and defendant, which it seeks to enforce, as giving complainant title to the patent, the case cannot be said to arise under the patent laws. In either case the court is called upon to administer the law of the contract, and not the patent law of the United States, or rights claimed under them. But, where the contract set up or stated is not between the parties to the suit, it is collateral thereto, and cannot, therefore, give character to the case as being on the contract, and not one arising under the patent laws. In the case before us the action was not brought to enforce a contract or to set aside a contract between defendant and complainant. In other words, it was not a suit upon a contract between the parties to the suit, within the scope of the decisions referred to. The appellee is mistaken in its contention that questions of title to patents, such as

are raised in this case, cannot be questions arising under the patent laws of the United States; because they involve the derivation of title from a contract. The complainant in this case has stated in its bill that it is the owner of the patent in suit, and derives title through an assignment from the patentee. An averment of title in the complainant must necessarily be made, and is the necessary foundation for all rights asserted or litigated by the complainant. It is an averment without which complainant has no proper standing in court. It matters not whether the title be that of the patentee, derived directly from the grant made by the government, or that of an assignee of the patentee or the assignee of an assignee. In either case it is the statement of a *prima facie* qualification to institute the suit, and such title, whether direct to the patentee, or derivative from him by assignment or assignments, is the creature of the patent law, and not of the common law; and, whether admitted or attacked by the opposing party, the questions raised are raised under the patent laws, and are, therefore, within the meaning of the Revised Statutes of the United States, justiciable in the circuit courts.

In the present case the appellant, who was complainant below, properly and necessarily made good its standing in court by stating its title to the patent in suit as derived by assignment from the inventor and patentee. As seen in the summary of the statement of the bill heretofore made, the assignment from the inventor was after he had made application, and before patent issued, as was also the intermediate assignment to the quilling-machine company, which was assignor to complainant. These assignments show a *prima facie* title in complainant, but they are all provided for and regulated by the patent laws of the United States, and any question as to the title claimed under them is a question arising under those laws. See sections 4895-4898, Rev. St. After this necessary and preliminary statement, the complainant proceeds to the gravamen of his bill, which is the averment that the original assignor and inventor was manufacturing in violation of complainant's title to the monopoly, and praying for the usual relief,—of accounting and injunction. It might have stopped there, and waited for the defendant to raise the defense which it thought it probable it would make, to wit, that the original inventor, after the issuance of the letters patent to him, notwithstanding the previous assignments already referred to, had assigned, or attempted to assign, the letters patent to the defendant. It, however, took another course that was clearly open to it to take, and that was to state the defense of this pretended assignment by way of anticipation in the bill, in order that it might make special answer thereto, and thus avoid the disadvantageous position in which it would be placed by the forty-fifth equity rule, by which special replications are prohibited. If the bill sets forth a case within the jurisdiction of the court, the jurisdiction cannot be ousted by the anticipation and denial of possible defenses that may or may not be made. Even if the title of complainant, as set forth in the bill, were put in issue by plea or answer, the question would still be one arising under the patent laws of the United States. Such an issue would be incidental and collateral to the main purpose of the suit. In this case the patentee and original

assignor is not a party to the suit, and the suit could not, therefore, be said to be upon the contract with him. This is not a suit to enforce a contract or to avoid one, but is a claim of ownership under the laws of the United States, which is properly justiciable in the federal circuit courts.

The appellee and defendant below also contends that the demurrer in the court below should be sustained because it does not appear that the complainant has a valid title. From what has already been said, it is apparent that the bill sufficiently states a title in the complainant to give it a standing in court; but the appellee further contends that the assignments referred to should have been set out in the bill, for the inspection of the court, and that the complainant was bound to do so by reason of having made profert of the same in the stating part of its bill. We do not find that this is so. If it were so, such profert was unnecessary to be made, as none of the assignments of the patent referred to are required to be under seal. If profert is made of any document, of which it is not necessary, it will be treated as mere surplusage, and will not entitle the defendant tooyer. Walk. Pat. § 433; 1 Chit. Pl. 366. The complainant was entitled to stand upon its *prima facie* case as to title, and the failure to set out the assignments referred to could not, under the circumstances, be taken advantage of by demurrer.

Another ground assigned for the demurrer is that the bill is multifarious. The view we have taken and already expressed as to the jurisdiction of a circuit court over the anticipated controversy as to the pretended assignment to the defendant will dispose of this objection:

"The bill does not ask that the assignment be set aside or canceled. The assignor is not a party to the suit. The prayer is merely that the complainant may have an accounting, and, incidentally, that the assignment of the letters patent be declared to be of no effect, as against the right of the complainant to the protection of the laws of the United States for this invention, and that the record of it, improperly made under the same laws, be canceled."

All these matters are properly questions under the patent laws of the United States. We think, therefore, the court were wrong in sustaining the demurrer, and that the decree to that effect should be reversed.

OVERWEIGHT COUNTERBALANCE ELEVATOR CO. v. HENRY VOGT
MACH. CO.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1900.)

No. 770.

1. PATENTS—INVENTION.

There is no invention in merely selecting and putting together the most desirable parts of different machines in the same art, making a new machine, in which each part operates in the same way as it did in the old, and effects the same result.

2. SAME—ANTICIPATION—FREIGHT AND PASSENGER ELEVATORS.

The Hinkle patent, No. 257,943, for an improvement in freight and passenger elevators, is void for anticipation.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a suit in equity brought originally against Kate P. Leaman for the alleged infringement of letters patent No. 257,943, for an improvement in freight and passenger elevators, issued to Philip Hinkle, May 16, 1882, upon an application filed September 27, 1881, assigned to O. M. Weymann, March 1, 1897, and by him assigned, on the 17th day of the same month, to the complainant, the Overweight Counterbalance Elevator Company. The infringement complained of consisted of the alleged use of the invention in an elevator used by the original defendant in the "Lancaster Building" at Cincinnati. After the filing of the bill, and before appearance by the above-named defendant, the Henry Vogt Machine Company, a Louisville corporation, which had manufactured and put up the said elevator in the Lancaster Building, was by the agreement of counsel for all the parties substituted in place of the original defendant, and thereafter the proceedings went on under the title of the suit thus constituted. The bill contained the allegations usual in such bills, and prayed for an injunction, and for a recovery of profits and damages. In addition to this, the bill alleged that the complainant had previously brought suit on the same patent in the circuit court of the United States for the Northern district of California against one Mark Sheldon, a purchaser and user of a machine of identical construction with that here complained of, from the Sulzer-Vogt Machine Company, under which name the Henry Vogt Machine Company was formerly incorporated; that the Sulzer-Vogt Machine Company assumed the defense of the suit, and contested it, in a trial before the court and a jury; and that a verdict and judgment were entered in favor of the plaintiff. The answer denied that Hinkle was the first inventor of the supposed improvements described in the patent, and set up various anticipations by earlier patents, and various prior uses by several different persons, at places which were specified. Infringement was also denied. The answer further averred that the defendant had no knowledge, except as it was informed, of the suit in California, mentioned in the bill, but that it was informed and believed that such a suit had been brought by the plaintiff against Sheldon; that it was determined without a trial of the merits of the controversy, and judgment entered for the plaintiff by consent of the defendant therein; that the Sulzer-Vogt Machine Company did not assume the defense of that suit; and that Sheldon, the defendant, refused to permit the case to be appealed. The complainant filed a replication to the answer, and proofs were taken by the respective parties. The patent in suit contained two claims, both of which were alleged to have been infringed. The first consisted of a combination in an elevator of a hoisting drum, a cage with a rope supporting it attached to one side of the drum, and an overbalance weight, with a rope supporting it attached to the other side of the drum. The second consisted of the same elements, and a worm wheel mounted on the same shaft as the drum, and a worm meshing with it mounted on a shaft transverse to that of the drum. These claims are more fully explained in the opinion which follows. The case having been brought to a hearing, it was held by the circuit court that the first claim of the patent was void by reason of anticipation by former patents; that it was unnecessary to determine the validity of the second claim, for the reason that in the opinion of the court it was not infringed by the use of the elevator complained of. It resulted that the bill was dismissed. The complainant appeals from the decree. Further facts are stated in the opinion.

Charles M. Peck, for appellant.

Edwin H. Brown and Arthur Stem, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

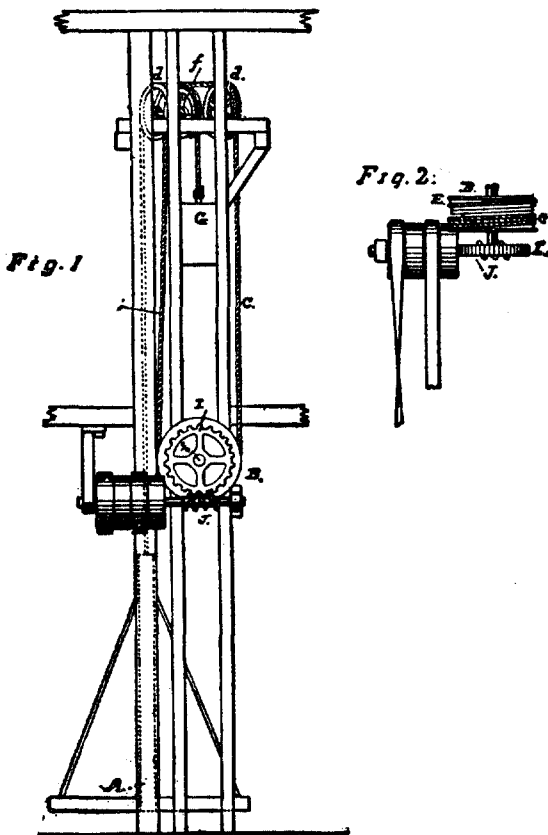
SEVERENS, Circuit Judge, having stated the nature of the case as above, delivered the opinion of the court.

The Hinkle patent, on which this suit is founded, relates to the construction of elevators used for carrying passengers and freight

in a cage or upon a platform moving up and down through a shaft adapted to the purpose. Many different styles of apparatus had been employed prior to his application, based upon the same general ideas, and some of them having such close resemblance to his own as to make it necessary to institute a sharp comparison in order to ascertain what, if any, advance in the nature of invention he made over the prior condition of the art. He gives the following statement of what he regarded as the characteristics of his invention:

"My invention has reference to an arrangement for re-enforcing the lifting power of any given freight or passenger elevator without increasing the working power of the engine or motor that drives it; and it consists in the application of an overbalance counterweight for overbalancing the weight of the cage, and in the interposition between said counterweight and the cage of a self-acting brake, which prevents the superior weight of the counterbalance from being transmitted to the cage and engine power when the engine and cage are standing at rest. The self-acting brake which I use is a worm wheel and worm, which also serves as a gearing for transmitting the power of the engine or motor to the cage and counterweight."

The following Figs. 1 and 2 illustrate his construction:



Referring to the figures illustrated, he says:

"Let A represent the cage, which is suspended in the usual way from the hoisting drum, B, by means of the rope, C, which passes up over pulleys, dd, as shown. A rope, E, is also secured to the opposite side of the drum, B, and passes up over a pulley, f, and to the opposite end of this rope the counterweight, G, is suspended. The drum, B, is secured upon a horizontal shaft, h, which is properly supported in bearings, and to this shaft is also secured a worm wheel, I. A transverse worm or screw shaft, J, is mounted in bearings, either below or above the worm wheel, at right angles to the shaft, h, so as to engage with the worm wheel, I, and to this shaft the power of the engine or other motor employed is applied. It will now be seen that this worm wheel and worm serve two purposes—First, as a gearing for transmitting the motion and power from the shaft, J, to the shaft, h, and drum, B; and, secondly, as a self-acting brake, which acts instantly when the rotation of the worm shaft ceases, and prevents the superior weight of the counterweight from reacting against the weight of the cage, so that both will remain at whatever position they are in when the rotation of the worm shaft ceases."

Then he goes on to describe how this construction can be utilized, and the advantage of it, as follows:

"I can now make the counterweight, G, as much heavier than the cage as I wish, and its overweight will assist in raising the loaded cage, while the power of the engine or motor is only required to overcome the difference in resistance between the weight of the cage and counterweight. When the empty cage is lowered again, the power of the engine is still required to overcome the superior weight of the counterweight on the opposite side, thus producing a uniform strain upon the engine without overstraining it. Suppose, for instance, that the cage weighs two hundred pounds, and suppose that the counterweight weighs four hundred pounds, and suppose that the worm can bear with safety a load of two hundred pounds, I can then raise four hundred pounds in the cage, besides the weight of the cage itself, and the engine will have only two hundred pounds to lift when the cage is raised, and the same amount when the cage is lowered, and the worm gears will at no time be subjected to a strain of more than two hundred pounds; whereas, with a simple balance weight, such as has heretofore been used, no more than the weight of the cage could be used as a counterbalance without having it react to lift the cage as soon as the application of the power to the driving shaft ceased. In this latter case I would be able to raise a weight of only two hundred pounds on the cage. It is therefore evident that I am able, by using my overbalance counterweight, to raise twice the amount of weight on a certain size machine as heretofore; or, in other words, it enables me to do the same amount of work with an engine of half the capacity as has been heretofore required."

And he adds:

"In case it is desired to raise a load of more than ordinary weight, additional weight can be applied to the overbalance to any desired extent within the limits of strength of the rope and mechanism."

His claims are these:

"(1) In an elevator, the combination, with the hoisting drum, B, of the cage, A, and rope, C, thereof attached to one side of the drum, B, and the overbalance weight, G, and rope, E, thereof attached to the opposite side of the drum, B, substantially as set forth. (2) The combination, with the drum, B, and ropes, C and E, attached to the opposite sides thereof, and suspending the cage and overbalance weight, respectively, of the power shaft, J, provided with the worm, as described, and the worm wheel, I, mounted on the same shaft with B, as set forth."

From this it appears that the features which he contemplated as new were the overweighting of the counterbalance, and the em-

ployment of the worm gear to lock fast the elevator whenever the motive power applied to the worm shaft should be suspended.

With regard to the overweighting of the counterbalance, the inventor nowhere states the extent to which he proposes the overweighting shall go, except as he shows by an illustration what, by his method, a certain proportion of overweighting will accomplish. He says it may be increased as one wishes. It is left to the judgment of the user. Counsel for the appellee contend with much force that this lack of definiteness leaves the user to the necessity of experimenting to find out how the apparatus must be constructed and arranged in order to realize the contemplated advantage, and that the statutory requirement (Rev. St. § 4888) in this regard is not fulfilled; citing *Howard v. Stove Works*, 150 U. S. 167, 14 Sup. Ct. 68, 37 L. Ed. 1039; *In re Incandescent Lamp Patent*, 159 U. S. 465, 16 Sup. Ct. 75, 40 L. Ed. 221, and the cases cited by Mr. Justice Brown in delivering the opinion of the court in the latter case. It is clear that the only escape from this criticism is to construe the patent broadly enough to cover any appreciable overweight beyond a mere balance, and possibly enough more to overcome the friction of the elevating apparatus. Perhaps, if that would save the patent, we might be authorized to adopt that construction upon the principle recognized by this court in *Soehner v. Range Co.*, 54 U. S. App. 389, 28 C. C. A. 317, 84 Fed. 182. But, as we think that for other and more certain reasons the patent cannot be sustained, we pass the question suggested without deciding it.

It is shown by the evidence that several patents had been issued in this country a considerable time prior to Hinkle's supposed invention, for elevators and improvements therein, in some of which the motive power was communicated through worm gearing, having so slight a pitch in some cases as to operate as a deadlock when the movement of the machinery should be suspended, and in which also the counterbalance (a thing used in all of them) was so overweighted as to help in moving the load on the platform or cage, in both these respects performing the same functions as Hinkle points out to be the peculiar characteristics of his own, and in the same way. It is to be noted, however, that no express mention of the worm gear being so pitched as to operate as a deadlock was made in the description of the invention in such former patents. Others show the presence of one of the above-mentioned characteristics without the other. But this last-mentioned circumstance is not material. These parts of the machine are so far separated and out of relation to each other that it would require only the commonest kind of skill to borrow from one well-known style of elevator a part of the operating machinery and put it into another elevator, to there perform the same function that it did in the first. There is no invention in merely selecting and putting together the most desirable parts of different machines in the same art, where each operates in the same way in the new machine as it did in the old, and effects the same result. No principle of the patent law stands on plainer reasons than this. A somewhat leading case on this subject is *Hailes v. Van Wormer*, 20 Wall. 358, 22 L. Ed. 241, and the

principle is illustrated by the decisions of this court in the following cases: *Manufacturing Co. v. Robbins*, 43 U. S. App. 391, 21 C. C. A. 198, 75 Fed. 17; *Stearns v. Russell*, 54 U. S. App. 591, 29 C. C. A. 121, 85 Fed. 218; *Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* (decided at this term) 101 Fed. 282.

It is, of course, conceded that when the assembled old elements effect a new mode of operation, producing a more beneficial result, this rule does not hold. In such case a deeper insight leading to the perception of new results from new co-ordinations of old elements may be exercised in a degree amounting to invention. The distinction is clear, though it may happen, as it constantly does in the application of other principles, that difficulty may be found in cases which hover along the line between the mere assembling of old elements and the putting them into such relations that, co-acting, they have a different and more beneficial mode of operation.

Counsel for the appellant contends that claim 1 of the Hinkle patent, when properly construed, is co-extensive with claim 2, because he says the parts of claim 2 omitted in claim 1 are included by implication. We should have some difficulty in agreeing to this conclusion; but we do not think it important to settle the question, because, if the counsel is right, the benefit of the patent is fully protected by claim 2.

Referring, now, to the prior patents shown in the record, we notice, first, the reissued patent No. 4,270 to Otis, of February 21, 1871. This patent was for an improved hoisting apparatus, and the patentee says that his "improvement consists in the combination of a counterpoise with the hoisting platform or cab through the intervention of the hoisting drum, whereby a counterpoise of as great a weight as, or of a greater weight than, the platform or cab is permitted to be used." The ropes carrying the platform and the counterpoise, respectively, were attached to the drum so as to wind thereon in opposite directions. Thus, when the drum was turned one way, the platform would be raised and the counterpoise lowered, and vice versa when the drum was turned the other way. The patentee says of this construction, that "it affords the advantage of enabling a counterpoise of greater weight than the platform to be used, so that not only can the platform or cab, but the load upon it, or a portion of such load, be counterbalanced." He also refers to a "brake or stop mechanism used in connection with the hoisting drum," but does not specify what kind of a brake.

It is clear that his construction was an anticipation of so much of Hinkle's patent as relates to the hoisting apparatus, as distinguished from that part of his elevator in which the worm gear is located. If, at the time when Otis made his application, no brake in connection with the hoisting drum had ever been used, his patent might have been available to cover a brake of the kind employed by Hinkle. Or, if worm gearing had been previously used for that purpose, it would come within the suggestion of the Otis patent that such a brake would fulfill his requirements.

Another patent was that to Reedy, No. 160,469, of March 2, 1895. This patent shows the same general arrangement of a cage or plat-

when it should be brought to rest, it would seem that his first thought would be to make the pitch of the gear slight enough for that purpose. However, as we have already shown, the problem, if such it was, had already been worked out, and a gear of the requisite form and for the purpose had for some time been in use. Several well-authenticated prior uses of elevators of similar construction to those of the patents last mentioned, and to that of the patent in suit, are shown by the proofs, some of them having most of the features of the Hinkle patent, and some of them having all. We shall not take space to describe each. One of them was installed in the Equitable Building in New York in 1870, and continued in use for many years. It is shown by the testimony of men who put it in, by the original engineer who operated it, and by his successor and others familiar with it, that it contained a counterbalance overweighted at times as much as 1,000 pounds, and at others in different degrees, according to the requirements. It was driven by worm gear, having, as we infer, a pitch of about one-half of that at which the gear would lock, and was therefore ample to accomplish the purpose. It appears to have been the sole reliance for arresting the reverse movement of the elevator when the forward movement of the machinery should be suspended. It would seem that this elevator embodied all the features for which novelty is claimed in the Hinkle patent, as well as all the elements in the combination claimed. There were other subsidiary features, but the dominant characteristics were the same as those of the patent in suit.

The bill of complaint charges that in a former suit brought by the complainant in the circuit court for the Northern district of California against Mark Sheldon, of which it is alleged the predecessor of the defendant herein, and with whom it is in privity, took charge and assumed the defense, the validity of the Hinkle patent was found and determined by the verdict of a jury and the judgment of the court. In the answer of defendant it is denied that the defendant, or its predecessor, participated in the proceedings in that case, and it is claimed that for that and other reasons the judgment therein cannot be used as an estoppel. It is not proven that the defendant herein, or its predecessor, did in fact assume the defense in such former suit, nor is any point now made of it by counsel for the appellant.

If we were to assume, as the court below did for the purpose of its decision, that the Hinkle patent was not anticipated by the former patents shown in the record, we should still think that its standing is on such narrow ground that the use complained of was no invasion of the rights secured thereby, agreeing in this respect with the view of the judge in the circuit court. The decree of the court below will therefore be affirmed.

JOHNSON et al. v. McCURDY.

(Circuit Court, D. Indiana. July 6, 1900.)

1. PATENTS—PATENTABLE NOVELTY—FLUID MOTORS.

The Bardsley patent, No. 509,644, for a rotary fluid motor, is void for lack of patentable novelty in view of the prior art.

2. SAME—INFRINGEMENT.

If such patent be conceded validity, it has necessarily a very narrow range, and is not infringed by the Hurlbut self-cleansing dental spittoon, which is designed for use in a different art, and not for the purpose of generating power.

In Equity. Suit for infringement of a patent.

Chapin & Denny and R. S. Taylor, for complainants.

Coburn, Hibben & McElroy, for defendant.

BAKER, District Judge. This is a suit brought by the complainants against the defendant for the infringement of letters patent No. 509,644, issued on November 28, 1893, to Edward E. Bardsley, for improvements in rotary fluid motors. The alleged infringing device is the Hurlbut self-cleansing dental spittoon. The defenses are want of patentable novelty and noninfringement. The object of the invention is said to be "to construct a rotary fluid motor of an extremely cheap and simple character, compared with its efficiency, and one which can be run in either direction at will; a further object being to provide for the ready changing of the direction of the motor." It is further stated that:

"The nozzle is so disposed that the jet therefrom will be delivered parallel with a line tangential to the periphery of the disk, and will strike the surface of the disk close to the outer flange, the force of the water being exerted upon the disk and flange, and the stream spreading upward on said flange, to which it clings by reason of capillary attraction until it is finally discharged by centrifugal force over the edge of the flange. The water is thus caused to act upon the disk and flange throughout a considerable portion of the entire circumference of the disk, so that I am enabled to obtain almost as high a degree of power as in a bucket motor operated by a jet, especially in cases where the jet is very small, and issues with great velocity from the nozzle."

The patent contains three claims, all of which are alleged to be infringed. These claims follow:

"(1) A fluid motor, consisting of a disk or plate, and a nozzle located above the plate, but inclined downward towards the same, and also occupying a position parallel with a line tangential to the periphery of the plate, so that it will discharge downward upon the face of the plate, adjacent to the periphery of the same, a jet parallel to such tangential line, substantially as specified. (2) A fluid motor, in which are combined a disk or plate, having an upturned flange upon its outer edge, and a nozzle located above the plate, but inclined downward towards the same, and also occupying a position parallel with a line tangential to the periphery of the plate, whereby it will discharge downward upon the face of the plate, adjacent to the periphery of the same, and within the flange, a jet parallel to such tangential line, substantially as specified. (3) A fluid motor, in which are combined a disk or plate, and a nozzle located above the plate, but inclined downward towards the same, said nozzle being pivoted to the supply pipe, and capable of being moved thereon to right or left, so as to occupy, when in either extreme of movement, a position parallel with a line tangential to the periphery of the plate, substantially as specified."

The Bardsley motor consists of a revoluble flat disk, with an up-turned flange rotated by a jet of water directed against the face of the disk near the flange. So far as the evidence in the record shows, this motor has been applied exclusively to the generation of power to be communicated to outside mechanism, and has never been used in this or any kindred art prior to its use in the alleged infringing device.

The first duty of the court in determining the validity of the patent is to ascertain and determine the true scope of the invention as set forth in the claims. Bardsley does not claim to have invented any new type of water wheel, disk, or flange, nor to have originated the reversible nozzle. All of these were common in the art prior to his invention. All that he supposed he had invented, and all that he has claimed as his discovery, was a fluid motor having a particular location and inclination of the nozzle, and a particular place of impingement of the water jet. Each of the claims specifies a nozzle located above the disk, and inclined downward towards the surface of the same. The result of this location, as stated in claims 1 and 2, is that the nozzle will discharge downward upon the face of the disk, adjacent to the periphery of the same, and within the flange, a jet parallel with a line tangential to the periphery of the disk. The complainant's expert correctly concedes that claims 1 and 2 are limited to the location of the nozzle and to the place of impingement of the water jet upon the surface of the disk, as distinguished from its flange, in case the flange is employed. It is contended, however, that claim 3 is not so limited, because it does not say in terms that the jet will strike the face of the disk. This contention is indefensible. The third claim specifies "a fluid motor, in which are combined a disk or plate and a nozzle located above the plate, but inclined downward towards the same." With a nozzle so located and inclined, the jet of water must of necessity impinge upon the surface of the plate. Thus construed, the patent, if valid, necessarily has a very narrow range. In view of the prior art, the court is of opinion that it must be held invalid for want of invention. Any water motor having a disk or plate, whether provided with buckets or not, having a nozzle inclined downward towards the disk so as to discharge a jet of water upon the surface of the disk, thereby causing it to rotate, fully satisfies all the elements of the claims of the Bardsley patent. Several patents in the record disclose these elements so clearly and fully as to deprive the Bardsley invention of patentable novelty. The alleged infringing spittoon consists essentially of an outer bowl connected with a waste pipe, and supporting an inner bowl, which is revoluble, and provided with central outlet holes. A small, gentle stream of water is projected against the inner bowl near its outer edge, primarily to cleanse the bowl, and incidentally to revolve it. The revolution of the bowl forms a thin sheet of water over the entire area of its inner surface. The expectoration is received upon the sheet of water, and is carried to the outlet holes, so that the spittoon is perfectly self-cleansing with a small supply of water. The defendant's spittoon is not in any just sense a motor, and it is incapable of successful use as a motor. It embodies no idea of the generation of power. The purpose of the revolution of the inner bowl is not the

production of power, and the power produced is but an incident to the cleansing of the bowl. The revolution of the bowl is necessarily slow. A small, gentle stream of water must be used, which is to be wholly discharged through the central outlets. A rapid revolution of the bowl, so as to discharge the water peripherally, would destroy the utility of the defendant's spittoon. The Bardsley fluid motor embodies the idea of producing power to be communicated to outside mechanism. No other purpose is disclosed. The defendant's revolving bowl embodies no such idea. The Bardsley fluid motor and the defendant's revolving bowl are used, and were intended for use, in two alien arts, and the successful operation of each depends upon exactly opposite ideas and forces. I see nothing in the defendant's device which is covered by the Bardsley patent, when construed as narrowly as that patent must be construed. The bill will be dismissed for want of equity, at the complainants' costs.

'FALK v. CURTIS PUB. CO.

(Circuit Court, E. D. Pennsylvania. July 2, 1900.)

No. 8.

COPYRIGHT—INFRINGEMENT OF COPYRIGHTED PHOTOGRAPH—SUIT TO RECOVER PENALTY.

Under Rev. St. § 4965, as amended by Act 1895 (2 Supp. Rev. St. p. 437), no penalty is recoverable for infringement of a copyrighted photograph or other publication, except for such sheets of the infringing publication as have been found in the defendant's possession, for the purpose of forfeiture and condemnation. What is the appropriate procedure where it is sought to both enforce the forfeiture and recover the penalty (whether by a single suit in the nature of replevin, or by separate suits) has not been conclusively determined; but where two suits are brought (one in replevin to recover the sheets, and the other in assumpsit to recover the penalty) the cause of action in the latter suit does not accrue until the infringing sheets have been found in the defendant's possession and seized in the former, and a suit to recover the penalty, brought at the same time as the one in replevin, is premature.

Action in assumpsit to recover the statutory penalty for reproducing a copyrighted photograph. On motion by defendant for judgment non obstante veredicto.

For former reports, see 98 Fed. 989, and 100 Fed. 77.

Samuel M. Hyneman, for plaintiff.

J. Martin Rommel and Hector T. Fenton, for defendant.

James M. Beck, for the United States.

McPHERSON, District Judge. This is an action of assumpsit to recover from the defendant the statutory penalty for reproducing a copyrighted photograph without the owner's consent. A verdict has been rendered for the plaintiff, and the pending motion is based upon the following reservation of a question of law:

"Upon the 29th day of September one copy of the October number [of the infringing magazine] was bought by the office boy of Mr. Hyneman, and at a somewhat later hour of the same day the deputy marshal went to the office

of the defendant with two writs,—one a writ of replevin, and the other a summons in the present case,—and these two writs were served at the same time. Under the writ of replevin a certain number of copies were found. Upon these facts, the court reserves the question of law raised by the defendant's tenth and eleventh points, namely, whether any pecuniary penalty at all is enforceable in this action."

The points referred to are as follows:

"(10) The pecuniary penalty sued for does not attach to alleged infringing copies that may have been printed, sold, offered for sale, or at some time in possession of defendant, but solely to those infringing copies, if any, which were actually found in possession of defendant, and became the property of plaintiff by actual seizure before suit brought.

"(11) In the statute imposing the pecuniary penalty sued for, the word 'found' means that there must be a time before the cause of action accrues at which the infringing copies are actually found in the possession of defendant, for the purposes of forfeiture and seizure. In other words, the pecuniary penalty does not accrue, nor the cause of action arise, until such forfeiture and seizure."

The question for decision arises under section 4965 of the Revised Statutes, concerning the infringement of copyright in photographs and other publications, now amended in certain respects by the act of 1895 (2 Supp. Rev. St. p. 437). This section has frequently been before the courts, but its precise meaning and scope have not yet been definitely ascertained. In some respects, however, its meaning has been determined by recent decisions. In *Thornton v. Schreiber*, 124 U. S. 612, 8 Sup. Ct. 618, 31 L. Ed. 577, the supreme court of the United States, in considering the phrase "found in his possession," used this language:

"Counsel for defendants in error, *Schreiber & Sons*, insist that the words 'found in his possession' are to be construed as referring to the finding of the jury; that the expression means simply that, where sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit one dollar for each sheet so ascertained to have been in his possession. We, however, think that the word 'found' means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant."

No doubt, this was a dictum, but it was evidently pronounced with deliberation, and it has since been followed in two decisions, both delivered in the case of *Bolles v. Outing Co.* In the first decision (23 C. C. A. 594, 77 Fed. 966) the court of appeals of the Second circuit, in a very careful opinion, referred to the foregoing quotation, and then went on to say:

"We are of the opinion that the section means to affix the penalty only when the sheets are shown to have been discovered or detected in the possession of the defendant prior to the bringing of the suit. The statute is apparently framed to give the party whose copyright has been invaded complete relief, by an action in which he can procure a condemnation of the infringing sheets, and at the same time recover, by way of compensation, a penalty for every sheet which he is entitled to condemn. The words 'found in his possession' aptly refer to a finding for the purposes of forfeiture and condemnation. The remedy by condemnation and forfeiture is only appropriate in a case where the property can be seized upon process; and where, as here, the forfeiture declared is against property of the 'offender,' it is only appropriate when it can be seized in his hands. The section contemplates two remedies, enforceable in a single suit, each of which depends upon the same state of facts. The

aggrieved party may, at his election, pursue either one or both remedies. But it does not contemplate a recovery of penalties, except in respect to the sheets which can be condemned."

The case was afterwards taken to the supreme court of the United States, and the judgment was affirmed in the second decision to which I have referred (175 U. S. 262, 20 Sup. Ct. 94, Adv. S. U. S. 94, 44 L. Ed. —), Mr. Justice Brown saying:

"Had congress designed the extended meaning claimed for these words 'found in his possession,' it would naturally have used the expression 'found or traced to his possession,' or 'found to be, or to have been, in his possession.' It is only by interpolating words of this purport that the statute can receive the construction claimed. We concur with the learned judge who spoke for the court of appeals that the words 'found in his possession' aptly refer to a finding for the purpose of forfeiture and condemnation. 'The remedy by forfeiture and condemnation is only appropriate in a case where the property can be seized upon process; and where, as here, the forfeiture declared is against property of the "offender," it is only appropriate when it can be seized in his hands.'"

It is therefore clear that no penalty is recoverable except for such sheets of the infringing publication as may have been found in the defendant's possession for the purpose of forfeiture and condemnation. Finding by means of a purchase or by means of visual inspection is not enough. The finding must be in the course of a proceeding instituted for the express purpose of condemning and forfeiting the infringing articles. The defendant might sell 100 copies to-day, but, if no copy should be found in his possession to-morrow by the officer charged with the execution of the writ under which the condemnation and forfeiture were to be enforced, no penalty could be recovered.

What, then, is the appropriate course of proceeding for the purpose of enforcing the forfeiture alone, or for collecting the penalty alone, or for the double purpose of enforcing the forfeiture and also of collecting the penalty? The nearest approach to a decision upon either of these questions is *Morrison v. Pettibone* (C. C.) 87 Fed. 330, in which the first branch of the subject was considered by Judge Seaman in deciding a motion for a new trial. The motion was granted upon another ground, but the opinion also examines the question whether replevin is a proper remedy to recover the sheets and plates of an infringing photograph, and reaches the conclusion that such action is appropriate. That was apparently a suit to forfeit the articles themselves, and not to recover the penalty; and the decision does not throw much light upon the question what procedure is appropriate where the plaintiff is seeking either to enforce the penalty alone, or to enforce both the penalty and the forfeiture.

The utterances of the supreme court upon this subject are, I think, not easy to reconcile. In *Thornton v. Schreiber*, Mr. Justice Miller had apparently two successive suits in mind,—one an action to forfeit, whereby the infringing articles may be found in the possession of the defendant, and a subsequent suit for the penalty; the cause of action to be enforced in the second suit only arising when the articles are thus found. This is the only meaning that I can derive from the declaration that "there must be a time before the cause of action ac-

crued at which [the infringing articles] are found in the possession of the defendant." On the other hand, in *Bolles v. Outing Co.*, Mr. Justice Brown intimates that a single suit may be used for both purposes; but he does not mean the ordinary action of replevin, for he is careful to refer to the proceeding as a suit "in the nature of replevin." The passage is as follows:

"No remedy is provided by the act, although by section 4970 a bill in equity will lie for an injunction; but the provision for a forfeiture of the plates and of the copies seems to contemplate an action in the nature of replevin for their seizure, and, in addition to the confiscation of the copies, for the recovery of one dollar for every copy so seized or found in the possession of the defendant. While the forfeiture is not limited as to the number of copies, it is limited to such as are found in, and not simply traced to, the possession of the defendant."

It seems to me to be clear that the action of replevin, as it is now known to the profession, cannot be used for either purpose or for both without laying violent hands upon it. As it is now used,—at least, in the courts of Pennsylvania, to which I shall confine my attention,—the claim property bond is an essential part of the proceeding. A plaintiff may use this form of action when he claims personal property in the possession of another, if the claimant has the right to possession. This contingency may present one objection to its use when the object is to forfeit, although the answer may be, as suggested by Judge Seaman in *Morrison v. Pettibone*:

"That the term 'forfeit,' as used in the statute, is not to be taken in its strict, ordinary sense; that the act of congress, clearly intending to give to the proprietor an exclusive right of property in that which has been produced by his mind and skill, confers as well an ownership in all copies which are made by infringers; that through the act of piracy the title to the imitation vests in the proprietor of the copyright, in that sense only being forfeited, and, so regarded, replevin would lie to obtain possession."

However this may be, the right of the defendant to give a claim property bond, and thus retain the property, with an indefeasible title thereto, must be wholly disregarded before the right to forfeit can be enforced. It would be useless to attempt to forfeit sheets and plates, if the defendant may give a bond for the value, and then become the undisputed owner. Moreover, the action of replevin in Pennsylvania has never been used to recover a separate, independent penalty, such as is given by this act of congress. The only money recovery that is permitted is the value of the property, or damages for its detention, or both damages and value.

But as the act of congress has given a special right of action, which the injured party may use to enforce either or both of the punishments provided for infringement, it is probably not too much to say that it does not pass the wit of the bench and the bar to find a satisfactory method of procedure. It may well be that the action on the case,—now called "trespass" in Pennsylvania,—being an action *ex delicto*, and therefore appropriate to redress such a wrong as is done by an infringer, might be so molded as to accomplish either or both purposes. The writ of summons delivered to the marshal might be so framed as to contain a clause directing him to seize the offending articles, and thereafter the cause might proceed, at the plaintiff's

option, either to judgment of forfeiture alone, or for recovery of the penalties alone, or to enforce both these punishments for the defendant's wrongdoing.

These, however, are suggestions merely. For the present I am concerned simply with the case in hand, and here I think it is apparent that neither of the remedies referred to by the supreme court has been adopted. Instead of one suit, there were two suits, and therefore the single action "in the nature of replevin" was not followed. Neither was the proceeding by means of two writs—assuming that course to be permissible—properly carried out. Apparently guided by *Thornton v. Schreiber*, the plaintiff caused two writs to issue at the same time; one beginning an action of replevin to seize the magazines, and the other beginning an action of assumpsit to recover the penalties provided by the act. The writs were put into the marshal's hands together, and were served simultaneously upon the defendant. The action of replevin has not yet been tried, but in the action of assumpsit a trial has been had, and the verdict now being considered has been rendered for the plaintiff. The precise question, therefore, is not whether a single action would lie, both for condemnation and for penalty, but whether, since the plaintiff has chosen to bring two suits, the action of assumpsit was not prematurely brought, or, in other words, whether the plaintiff had a cause of action for the penalty at the time the writ in assumpsit was issued. In my opinion, assuming two suits to be permissible, he had no such cause of action, and the defendant is therefore entitled to judgment upon the pending motion. In *Thornton v. Schreiber*, *supra*, as already pointed out, the court declared that "there must be a time before the cause of action accrued at which [the infringing articles] are found in the possession of the defendant." The subsequent decisions in *Bolles v. Outing Co.* show that the finding must be by means of a proceeding instituted for the express purpose of condemnation and forfeiture. Taking the decisions together, I think the result would be that no action for the penalty could be brought until the infringing publications have been "found." It is this finding that would give the plaintiff a right to sue for the penalty, and obviously he could not begin a suit until he had a cause of action. When, therefore, the present plaintiff issued a writ of assumpsit to recover the penalty denounced by the act, he was suing prematurely. At that time no infringing copies of the photograph had been "found" in the defendant's possession, and no cause of action accrued. The purchase of one copy by the boy was not a finding for purposes of condemnation and forfeiture, and gave no right to sue, even for the minimum penalty of \$100. That no cause of action had yet accrued appears clearly, I think, from the further consideration that when the writ of assumpsit was issued it would have been impossible for the plaintiff to file a statement or declaration. He could not know at that time for how much he was entitled to sue,—whether for the penalty upon one copy or for the penalty upon a thousand copies. This could only be determined after the writ of replevin should be executed, and only then, as it seems to me, did the plaintiff have a distinct, ascertainable cause of action for the penalty.

Considered, therefore, from either point of view, the plaintiff's ac-

tion of assumpsit cannot be maintained. It is not a single suit "in the nature of replevin," in which both forfeiture and penalty may be enforced; and if maintainable at all as a suit for the penalty, and for the penalty alone, it was brought before the cause of action accrued. It is hardly necessary to add that, as the plaintiff is seeking to enforce a highly penal statute, he is rightly held to a strict compliance with the forms of legal procedure, especially where he is suing a defendant who was apparently innocent of any intent to infringe, and is liable, if at all, by reason of the mere fact of publication, and not because he was consciously doing the plaintiff a wrong.

The defendant's motion for judgment upon the reserved point notwithstanding the verdict must prevail.

In re BUCKINGHAM.

(District Court, D. Ohio, E. D. January 20, 1900.)

No. 334.

HOMESTEAD — SECOND ALLOWANCE FROM PROCEEDS OF SALE OF REAL ESTATE — BANKRUPTCY.

Under Rev. St. Ohio, § 5440, providing that when a homestead is charged with liens, some of which preclude the allowance of a homestead, and a sale of such homestead is had, then, after payment of the liens precluding such allowance, the balance, not exceeding \$500, shall be awarded to the head of the family, where the proceeds from the sale of real estate, out of which a widow, who is the head of a family, is allowed the sum of \$500 in lieu of a homestead, are entirely consumed in the payment of mortgages executed by the widow against the property, and as to which her homestead right has been waived, the widow is not precluded from subsequently claiming a homestead exemption out of the proceeds of the sale of other real estate in the hands of a trustee in bankruptcy.

The following is the opinion of DOYLE, Referee:

This is a hearing upon exceptions to the determination of the trustee in setting off exemptions to the bankrupt. The exception is to the determination of the trustee in setting off to the bankrupt, in lieu of a homestead, the balance of the proceeds of the sale of certain real estate which were turned over to the trustee by the sheriff of Summit county. The facts in the case are as follows: On October 9, 1899, Frances P. Buckingham filed her petition in the district court in voluntary proceedings in bankruptcy, and was on said day duly adjudged a bankrupt. The petition discloses that the bankrupt was the owner of certain interests in real estate, which were heavily incumbered by mortgage and judgment liens. This real estate was all involved in partition suits pending in the court of common pleas of Summit county, Ohio, and decrees had been taken therein prior to the commencement of the bankruptcy proceedings. The property has been disposed of by the sheriff, and the proceeds applied in the manner provided for by the decree of said court; and a balance of \$308.99 of the proceeds of the sale of lots and lands in one of said partition suits, after payment of the liens provided for under the decree of the court, has been turned over to the trustee in bankruptcy. This is the money out of which the trustee has made an allowance to the bankrupt in lieu of a homestead. The bankrupt has no homestead, and is a widow. One of said suits involved her interest in certain lots and lands, which, for convenience, we shall designate as parcel No. 1. Another suit involved her interest in certain lots and lands, which, for convenience, we shall designate as parcel No. 2. On parcel No. 1 there were a number of judgment liens, of which Newton Chalker was the owner of one, which came first in the order of priority, and next two mort-

gages which followed said judgment liens in the order of priority. The court found in that case that Frances P. Buckingham was a widow, and a resident of the state of Ohio, and not the owner of a homestead; that, as against the judgment liens (of which Newton Chalker's was one) found and established in said case, she was entitled to have set off to her out of the proceeds of the sale of said property the sum of \$500 in lieu of a homestead against said judgment lien holders; that by giving her said mortgage to the plaintiff, and her second mortgage to the defendant Laberta Laidlaw, she had released to them her homestead right. It was therefore ordered by the common pleas court that there should be paid to the plaintiff the sum of \$455.05 in full of plaintiff's mortgage, and that the remaining balance of said \$500 should be paid to Laberta Laidlaw to apply on her second mortgage. The claims of said judgment creditors were not satisfied out of the proceeds of said property, and the mortgages absorbed the whole of Mrs. Buckingham's exemption in lieu of a homestead. In the other suit, involving what we have designated as parcel No. 2, the property was disposed of, and the proceeds applied to the payment of liens as against which there were no exemptions; and the balance of \$308.99 was by the sheriff turned over to the trustee in bankruptcy in this case, and is now the subject of bankrupt's claim for an exemption. The trustee has set apart this sum to be retained by the bankrupt in lieu of a homestead, she having selected the same. The judgment creditors, represented by Newton Chalker, Esq., one of their number, who have judgment liens on said parcel No. 2, out of the proceeds of which said \$308.99 came, excepted to the said exemptions set off by the trustee. It is contended by the creditors that said bankrupt has already had set off to her the \$500 to which she is entitled in lieu of a homestead to hold exempt from levy and sale, out of the proceeds of parcel No. 1, and that she cannot now claim any exemption of like character out of the proceeds of the sale of parcel No. 2. On the other hand, bankrupt contends that she has not in fact had set off to her the exemption to which she is entitled, under the laws of Ohio, in lieu of a homestead, because the proceeds of parcel No. 1 were entirely absorbed by the liens thereon.

The bankruptcy act does not of itself prescribe any exemptions. The only exemptions to which bankrupts are entitled are those to which they may be entitled by the states in which they resided at the time of the filing of their petition in bankruptcy. The question, then, to be determined in this case, is whether, under the statutes of Ohio and the decisions of Ohio courts, Mrs. Buckingham would be entitled to have this money set over to her in lieu of a homestead. Bankr. Act 1898, § 6; Id. § 2, subd. 11; Id. § 47a, subd. 11; rule 17 of the supreme court orders and rules in bankruptcy (18 Sup. Ct. vi.). See, also, *In re Kerr*, 9 N. B. R. 566, Fed. Cas. No. 7,729; *Brandenburg*, Bankr. 79; *In re Camp*, 1 Am. Bankr. R. 165, 91 Fed. 745; *In re Stevenson*, 2 Am. Bankr. R. 230, 93 Fed. 789.

Section 5441, Rev. St. Ohio, provides as follows: "Husband and wife, living together, a widower living with an unmarried daughter or minor son, every widow and every unmarried female, having in good faith the care, maintenance and custody of any minor child or children of a deceased relative, residents of Ohio, and not the owner of a homestead, may, in lieu thereof, hold exempt from levy and sale, real or personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding five hundred (\$500) dollars in value, in addition to the amount of chattel property otherwise by law exempted." The personal property mentioned in said section is held to include credits or money. *Chilcote v. Conley*, 36 Ohio St. 545. Section 5440, Rev. St. Ohio, provides as follows: "When a homestead is charged with liens, some of which, as against the head of the family, or the wife, preclude the allowance of a homestead to either of them, and others of such liens do not preclude such allowance, and a sale of such homestead is had, then, after the payment, out of the proceeds of such sale, of the liens so precluding such allowance, the balance, not exceeding five hundred dollars, shall be awarded to the head of the family, or the wife, as the case may be, in lieu of such homestead, upon his or her application, in person, or by agent or attorney." This money in the hands of the trustee is subject to the same rules of distribution as though it were still in the hands of the sheriff. If the sheriff were distributing the money, he would, under the circumstances, be subject to the provisions of the statutes

of Ohio, above quoted. Now, if the bankrupt had not received allowance as an exemption out of the proceeds of the sale of the other parcel of land, there would be no question about her right to retain this money which has been turned over to her by the trustee. It is undoubtedly true that successive allowances in lieu of a homestead at unreasonably short intervals of time would not be allowed. Nor would more than one allowance be made out of the same property. The object of the exemption and homestead laws is to protect the family and keep it from want. When there is no homestead, the law provides that the head of the family may retain \$500 in lieu thereof, in addition to certain specific chattels, which are exempt. Not only is this provision humane and just to those dependent on the head of the family for sustenance and support, but it is also a wise provision to protect the community, in many cases, from the necessity of supporting those who, through want of frugality and prudence, might be a charge upon the town, on account of their property being all taken to satisfy the demands of creditors. Creditors are allowed to exhaust a man's property until he is reduced to a certain amount. They cannot reduce it below that. The law protects him in the enjoyment of property in the amount of \$500. This \$500 may be by him consumed for his support and the support of his family, and he may use it in other ways, and then acquire other property out of which he would be entitled to the same amount of allowance exempt from levy and sale on execution. It is not contemplated by the statute that the debtor, having once received his exemption, can never receive it again. A man, in the course of a lifetime, through the various vicissitudes of fortune, might own many homesteads, and as many times ask the protection of the law to save said homestead from sale on execution. He might be called upon many times to exercise the same right in respect to those specific chattels which are exempted under the law, and he also might find it necessary to assert his rights to have saved to him, as exempt from execution, the allowance of \$500 allowed in this state in lieu of a homestead. To say that the debtor, having once had this exemption set off to him, was thereafter barred from having the exemption set off again, would defeat the object of the statute. If, at the time the creditor attempts to subject certain property of the debtor to the payment of his claim, the debtor should select that property as the property out of which he wished the allowance of his exemption to be made to him, and he has other property subject to levy, and the creditor should then turn about and levy upon that property, we do not believe that the debtor could also claim an exemption out of the other property at that time. But after the creditor had waited any considerable length of time, during which it might reasonably be expected that the debtor had consumed or used or wasted, without fraudulently contriving to consume, use up, or waste the same for the purpose of defrauding his creditors, we see no reason why the debtor might not claim an allowance of the exemption, if he had no homestead, and did not have \$500. Unless such an equitable rule be followed in the interpretation and application of this statute, its objects will be defeated. Exemption laws are to be liberally construed to accomplish the purpose of the exemption. *In re Tilden*, 1 Nat. Bankr. N. 134, 1 Am. Bankr. R. 300, 91 Fed. 500; *Sears v. Hanks*, 14 Ohio St. 298, 301. By such a construction as this no violence is done to the letter of the law. The statute, without reservation, provides for the \$500 exemption as against levy and sale on execution; and there is nothing to prevent a man, as soon as one exemption is allowed him, from squandering the same in time to make another claim before other property can be levied on and put up for sale.

In the case at hand the bankrupt, it seems, while apparently securing her exemptions by the decree of the common pleas court, in fact received nothing. The court ordered that there be set off to her in lieu of a homestead the \$500 to which she would have been entitled by the statute, but the \$500 was in fact consumed by the mortgages on the property pursuant to that decree. This is exactly what would have happened in the distribution of the proceeds of a homestead under the provisions of section 5440. The judgment creditors against whom she could claim this exemption complained because the mortgages against which she could not claim the exemption absorbed all the property. In the face of the positive provisions of section 5440, we do not see how any other disposition could have been made of the property in that case.

It was unfortunate for them that she had mortgaged the property. It was also a great hardship that she had given mortgages which were second to their judgment liens in priority. But, considering the status of the law on the subject,—that, as against a mortgage executed by the debtor, no exemption can be claimed,—we do not see how they could have expected any different outcome, when the debtor's property was subjected to the payment of debts. Creditors are presumed to know the law as well as other citizens. This is one of the vicissitudes of giving credit. The debtor has as much right to mortgage his property as he has to incur an indebtedness in any other way. It is a general principle of business that the man who receives security is the least likely to fail to collect his debt. The creditor who does not take security takes his chances against not only the misfortunes of his debtor, but also the positive acts of his debtor in securing other creditors. It may be true, as counsel for the creditors argue, that if a second mortgage can absorb an exemption, as it did in this case, there is nothing to prevent a debtor from putting a mortgage on every piece of property secondary to judgment liens thereon, and thus defeat the judgment liens by reason of this allowance in lieu of a homestead exemption; but what other practical administration of the provisions of section 5440 can be made, than to bring about just such a result? The humane policy of the homestead act does not seek the protection of the debtor, as is well said by the court in *Sears v. Hanks*, 14 Ohio St. 298, 301, but its object is to protect his family from the inhumanity which would deprive its dependent members of a homestead. This, we take it, will apply to the provisions in lieu of a homestead as well as to a homestead. It seems to be the policy of the law that the acts of the head of the household shall not, so far as the exemption laws are concerned, deprive the family of the protection of its provisions. Homestead exemption statutes are not a personal privilege. The object is to preserve a family home. When a man ceases to be the head of a family or acquires a homestead, the right ceases. If this right ceases before the fund is disposed of, then the money would go to creditors. If his family die, or he acquire a homestead, his exemption stops. *Cooper v. Cooper*, 24 Ohio St. 488, 490. The making of a mortgage is virtually a waiver of these exemptions by the head of the household, and, although it is a direct encroachment upon the resources out of which other creditors must be paid, yet the debtor is nevertheless entitled to his exemptions out of the balance of the property. This waiver of the homestead or of the exemptions by a debtor does not operate as a waiver in favor of any other creditors. The right to mortgage and otherwise waive this exemption in favor of one creditor is sustained in numerous cases. *McConville v. Lee*, 31 Ohio St. 447; *Niehaus v. Paul*, 43 Ohio St. 63, 1 N. E. 87; *In re Beede*, 19 N. B. R. 68, Fed. Cas. No. 1,226; *In re Poleman*, 5 Biss. 526, 9 N. B. R. 376, 19 Fed. Cas. 918; *Bush, Bankr.* pp. 85, 90; *In re Jones*, 2 Dill. 343, 13 Fed. Cas. 931; *Brandenburg, Bankr.* 81 et seq. Such waiver by a debtor gives general creditors no greater rights than they had before. Even a fraudulent conveyance by a debtor for the purpose of defrauding his creditors, after being set aside, will not deprive the debtor's family of the homestead, or of the exemptions in that property to which he would have been entitled if no fraudulent conveyance had been made. *Sears v. Hanks*, 14 Ohio St. 298; *Tracy v. Cover*, 28 Ohio St. 61; *Bills v. Bills*, 41 Ohio St. 206; *Roig v. Schults*, 42 Ohio St. 165; *Bankr. Act*, § 66e; *Brandenburg, Bankr.* 81, and cases there cited; *In re Peterson*, 1 Am. Bankr. R. 254; *In re Detert*, 11 N. B. R. 293, 7 Fed. Cas. 545; *Bush, Bankr.* 83; *Smith v. Kehr*, 2 Dill. 50, 22 Fed. Cas. 584; *McFarland v. Goodman*, 6 Biss. 111, 16 Fed. Cas. 90; *Penny v. Taylor*, 10 N. B. R. 200, 19 Fed. Cas. 194. Throughout the evolution of the exemption and homestead laws in Ohio, there has been evinced a policy on the part of the legislature to preserve intact specific chattel property to the debtor, or a certain sum of money, not subject to levy and sale on execution. It could hardly have been expected that the tools, implements, and other chattels once exempted by him could last forever. Necessarily they would wear out and be consumed, and their places would be taken by others. The same will hold true in the case of the money exemptions allowed in lieu of a homestead, as provided for in the later statutes, and exemptions once claimed in the right of these statutes will not preclude the debtor from making the claim again. Act March 1, 1831 (29 Ohio Laws, p. 101, § 29); Act March 9, 1840 (38 Ohio

Laws, p. 41); Swan's St. p. 487; Act March 23, 1850 (48 Ohio Laws, p. 29). This latter act is the beginning of the Ohio homestead law. See section 2. Section 8 of the same act, as amended March 22, 1858 (55 Ohio Laws, p. 22), provides for the allowance of \$300 in lieu of a homestead. This is the first act providing for the allowance in lieu of a homestead, and simply provides that the debtor shall hold exempt from execution or sale personal property not exceeding \$300 in value, in addition to the amount of chattel property exempted, provided that he was not the owner of a homestead. See 2 Swan & C. St. p. 1145. This act was again amended April 9, 1869 (66 Ohio Laws, p. 48). Section 5441 was put in its present shape by the revision of 1880, the amendments of April 12, 1884 (81 Ohio Laws, p. 148), and as amended April 26, 1898 (93 Ohio Laws, p. 316). *Burgess v. Burgess*, 9 Ohio St. 426, has been cited as a model for the interpretation of exemption statutes. That was an interpretation of the statute exempting certain chattel property, and tools and implements to a certain amount. The purpose of the act was to preserve the implements to the debtor, with which to make a livelihood for his family. It was not intended to benefit others who might chance to be the owners of such implements. The court there followed the evident intent of the legislature. That is what ought to be done in interpreting other exemption statutes.

Now, then, we cannot consider that Mrs. Buckingham has in fact received any allowance in lieu of a homestead out of the proceeds of the sale of parcel No. 1. The court has virtually distributed the same in accordance with the priorities of liens, taking into account their relations to each other with reference to her homestead rights, pursuant to section 5440. In that adjustment, by reason of the mortgages which she had executed, she was deprived of that allowance. Not having received that allowance, she is still entitled to it, if anything remains out of the proceeds of the balance of her property. Inasmuch as she has elected to take it out of the proceeds of parcel No. 2, we are inclined to believe that she is entitled to it. In Pennsylvania the courts have interpreted the exemption laws or that state substantially in the way in which we have interpreted the statutes of Ohio. See *Krauter's Appeal*, 150 Pa. St. 47, 24 Atl. 603. The court there say that, in their spirit, these humane laws secure to the unfortunate honest debtor, at all times, the use and enjoyment of \$300 worth of property. To hold him confined for all time to the goods once selected, or to money exempted by him, or to the property into which either may have been converted, might soon leave him without anything. If the goods or money should not be consumed in living, the former would in time undoubtedly depreciate in value, and the same improvidence that made or kept the debtor poor would ordinarily leave him little to represent that which he might attempt to barter or invest. The law has not conferred upon an officer charged with the execution of process power to make such inquiries as would enable him to determine what may have become of property and money once set off. This is a case where property had once before been set off to the debtor, and he had afterwards made a claim when a levy was made upon other property. In the argument of Mr. Crittendon, in *Re Miller*, 1 Nat. Bankr. N. 263, 1 Am. Bankr. R. 647, he says, "It may be true that different or several exemptions may be successively claimed by the execution debtor, if the transactions or occurrences are entirely different and distinct, and far enough apart, but not otherwise." In the *Miller Case* the bankrupt had actually received his commutation exempt of \$300. Then, within a very short time, he claimed another like exemption, without any showing that the other had been lost, wasted, or consumed. Such a proceeding would not come within the spirit of our Ohio statutes, and the ruling in that case would not be inapplicable in an Ohio case. But in this case the bankrupt has not in fact received the exemption. In more ways than one, we think that the following rule, set down by the supreme court of Ohio in the case of *Niehaus v. Paul*, 43 Ohio St. 63, 1 N. E. 87, and in *Cooper v. Cooper*, 24 Ohio St. 488, will apply: "The right to demand an allowance in lieu of a homestead, under Rev. St. § 5441, out of the proceeds of the second sale, is to be determined by the state of facts at the time the surplus arising from such sale was finally disposed of by the court." The following decisions and authorities for the interpretation of exemption statutes sustain the ruling that a debtor may make successive claims to his exemptions, subject to such qualifications as are above indicated: 12

Am. & Eng. Enc. Law (2d Ed.) 159; *Chatten v. Snider*, 126 Ind. 387, 26 N. E. 166; *Weis v. Levy*, 69 Ala. 209; *Alabama Conference v. Vaughan*, 54 Ala. 443; *Krauter's Appeal*, 150 Pa. St. 47, 24 Atl. 603; *Hanley v. O'Donald*, 30 Pa. St. 261; *Frost v. Naylor*, 68 N. C. 325; *Hall v. Hartwell*, 142 Mass. 447, 8 N. E. 333; *Waite v. Franciola*, 90 Tenn. 191, 16 S. W. 116. The report of the trustee setting off exemptions to the bankrupt is therefore approved.

T. J. Leeser, for creditors.

Rowley & Bradley, for bankrupt.

RICKS, District Judge. This case is now before the court upon a motion to confirm the report of the referee, which sustains the action of the trustee in this case in setting off exemptions to the bankrupt. Upon the facts of this case, it seems very clear that this exemption now complained of was not in fact a second exemption in favor of the bankrupt out of the same property or the same course of judicial proceedings; but I am not prepared to say that, if the facts were as claimed by the adversary party, and the bankrupt was getting two exemptions out of the same property, such exemptions would not stand. The very elaborate and able report of the referee, it seems to me, sustains even that extreme proposition. The referee has marshaled the authorities on this question in a very complete manner, and his argument on the case is very conclusive, and I confirm it without hesitation or doubt as to its correctness.

IN RE PIERCE.

(District Court, D. Washington, S. D. July 11, 1900.)

BANKRUPTCY—JURISDICTION—PROPERTY OF DECEASED PARTNER—ADMINISTRATION—POSSESSION OF ADMINISTRATOR.

Upon the filing of a petition in bankruptcy by one individually and as surviving partner of a late co-partnership, the bankruptcy court has complete jurisdiction over the partnership estate, although such estate, together with the personal estate of the deceased partner, was in course of administration in a state court before the petition in bankruptcy was filed, provided possession of the partnership assets can be obtained by the referee without forcibly interfering with the custody of the administrator.

In Bankruptcy.

The following is the certificate of R. D. McCully, referee in bankruptcy:

"I, R. D. McCully, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: The bankrupt files his petition in bankruptcy, both individually and as surviving partner of the late firm of D. W. Pierce & Son. By his schedules he sets forth: (1) The indebtedness of the partnership estate (Schedule A, 1, 2, 3); (2) property of partnership estate (Schedule B, 1, 2, 3); (3) individual property of bankrupt (Schedule C, 1, 2). The partnership estate, together with the personal estate of the deceased partner, Daniel Winchester Pierce, was in course of administration in the superior court for Klickitat county some months before bankrupt's petition was filed, and the property belonging to the partnership estate was then, and still is, in the hands of the administrator of said estate. The estate of Daniel Winchester Pierce, deceased, including the partnership estate, is hopelessly insolvent. Has the bankruptcy court any jurisdiction over the partnership estate? If so, to what extent? And said question is certified to the judge for his opinion thereon."

HANFORD, District Judge. Upon consideration of the certificate of R. D. McCully, referee, submitting the question: "Has the bankruptcy court any jurisdiction over the partnership estate? If so, to what extent?"—it is considered by the court that this court has complete jurisdiction of this case, and jurisdiction over the partnership estate of the late firm of D. W. Pierce & Son, provided possession of the assets can be obtained by the referee without forcibly interfering with property in the legal custody of an administrator. If the administrator will voluntarily surrender possession of the estate, the trustee may take it; but the trustee cannot take possession of any property of which the administrator has custody without his consent.

In re SHENBERGER.

(District Court, N. D. Ohio, E. D. June 1, 1900.)

BANKRUPTCY—ASSETS—ESTATE IN REMAINDER IN LANDS.

Under a devise to S. during life, with remainder to her husband, provided that upon the death of either of such devisees the share so devised to him shall be equally divided between his children if living, the husband has an interest in the property devised, during the life of S. and while having children living, that should be included in his schedule of assets in proceedings in bankruptcy.

In Bankruptcy.

F. C. Semple, for petitioner.

J. P. Henry, for creditors.

RICKS, District Judge. This case comes before the court upon exceptions to the action of the referee, and upon the petition to review the action of the referee and the exceptions to the application for the discharge of the bankrupt. The only question before the court is whether the bankrupt should have included in his schedules a certain interest which he had in lands, a part of which came to him by will and under the law of descent.

An agreed statement of facts is filed, which enables the court to consider briefly the exact matter in contention between the creditors and the bankrupt. This agreed statement of facts shows the following: That the said Shenberger is a resident of Ashland county, Ohio, married, the father of living children, and occupying a 50-acre tract of land under the will of his father, Michael Shenberger, and not the owner of other real estate,—a copy of said will being attached to the exceptions filed in this case by Emma Gongwer; and it is conceded that said will was duly probated in the probate court of Ashland county, as provided by the laws of Ohio. It is further conceded by the exceptor that the return as made by the bankrupt as to his assets did not include any real estate for the reason of advice by counsel that he was not the owner of said tract in controversy, and had no interest therein that could or would pass to any trustee appointed under the bankruptcy act, and that the failure to set out said land in the schedule was not a fraudulent statement of his true condition. The will

of Michael Shenberger, hereinbefore referred to, in item 1 provides that Rowanna Shenberger, his wife, shall have all the real and personal property during life; and item 3 provides that, on her death, the 50-acre tract in controversy shall pass to the bankrupt, Peter J. Shenberger, conditioned by item 4 of said will, as follows:

"That, should any of my said children die, then and in that case the share so devised to such child shall be equally divided between their children then living."

It is contended by the creditors of the bankrupt that, under the bankruptcy law:

"The title to all property which the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him [under the laws of Ohio], passes to the trustee."

The test as to whether the property is of a character to pass, or not, depends upon the local laws governing the situation. If of such character that it is subject to levy and sale as property of the bankrupt under local laws, it passes to the trustee; otherwise, it does not. In *Hobbs v. Smith*, 15 Ohio St. 419, the following language is found in the opinion of the court by Judge Welch:

"The general object of the testator seems to have been to give the devisee an absolute ownership of the land, and yet to shield it from the payment of his debts. This is simply impossible. The law makes what a man owns, whether held by legal or equitable title, liable to the payment of his debts, unless it be property specially exempted. No legal acumen or skill can evade this policy of the law, and, as often as it is attempted, it must result in one of two things,—either in the devisee taking nothing by the will, or in leaving what he does take liable for the payment of his debts. The liability attaches to the ownership, and it is beyond the power of any draftsman to invent a form of devise or conveyance that shall separate them."

Accepting this as the spirit in which an interest in these lands passed to the bankrupt, and accepting the test given, to wit, that if any interest in any of the property not scheduled could be reached by the creditors proceeding under the Ohio statutes, I think the bankrupt had an interest in the property referred to which should have been included in his schedule of assets. The action of the referee is therefore set aside, and the exceptions sustained, with direction to correct the schedules as provided by law.

In re HOFFMANN.

(District Court, S. D. New York. July 12, 1900.)

BANKRUPTCY — DISCHARGE OF BANKRUPT — CONCEALMENT OF ASSETS — SALE — FRAUD.

Evidence that a bill of sale for a stock of goods was made by the owner to an employé on a small salary; that only a small part of the alleged consideration was paid in cash, the balance being represented by an alleged indebtedness for borrowed money, which the circumstances of the vendee indicated an inability to loan; that although the vendor was a married man, with a family to support, and the alleged ground of making the transfer was that the business had run down, the vendor after the sale became the employé, in turn, of the vendee, and the business was continued the same as before; that the vendor's bank accounts showed no decline in his business either before or since the bill of sale; that none of the claims filed

against the vendor in bankruptcy were in favor of business creditors; and that the vendor's wife had obtained a separation from him, and he had become liable under a decree for the payment of alimony,—shows such a concealment of assets by the vendor as will bar his discharge in bankruptcy.

In Bankruptcy.

The following is the opinion of PRENTISS, Referee:

Two specifications in opposition to the discharge of said bankrupt were filed in behalf of said John Boyle, which said specifications are, in substance, as follows:

(1) That said bankrupt knowingly and fraudulently concealed certain of said assets and has failed to set forth all his assets in his schedules, in that he failed to place in his assets a stock of goods, consisting of awning cloths and materials, etc., and store fixtures at premises No. 270 West Broadway, and also the good will of his business, and his right, title, and interest in a certain patent for a lock, which in fact belong to him, but which he attempted to transfer to Alice L. Dolon about the year 1898 by indenture in writing, which said transfer was without consideration, and which said stock, fixtures, and good will of said business and patent were reasonably worth about \$10,000, and that said bankrupt never really parted with possession or control of said property and patent, but still has them concealed under the name of said Dolon.

(2) That the bankrupt has intentionally and fraudulently omitted to place in his schedules the property above mentioned, and transferred and assigned them to said Dolon subject to a secret trust by which said Dolon was to hold said property until the bankrupt was relieved of certain obligations which he was able but unwilling to meet.

The substance of these specifications is that the bankrupt transferred all his property in 1898 to Alice Dolon without consideration, to avoid the payment of certain debts, and on the secret trust that the same should be held for or returned to him.

It appears from the testimony in substance that the bankrupt was in the business of manufacturing awnings, etc., at 270 West Broadway; that he had been in business since about 1871; that about 1892 said Alice Dolon entered the employment of the bankrupt as bookkeeper, machine worker, and attending in the store, at a salary stated by the bankrupt's wife to be about six or seven dollars per week, but said by the bankrupt to be from ten to fifteen or seventeen dollars a week, the high rates being paid during the busy season, from the 1st of March to the end of September in each year; that at the time of entering bankrupt's employ, she was a poor woman, dependent upon her own work, and that she continued in the bankrupt's employ down to about February, 1898, the time of the transfer of his property to her. This transfer was made by a written bill of sale, dated February 14, 1898, in which the consideration is stated to be \$1,200. It appeared, however, from the bankrupt's statement that only \$200 of this amount, or thereabouts, was paid in cash, the remaining \$1,000 being the amount for which he claimed to have been indebted to the said Dolon for moneys borrowed at divers times, previous to said date.

It further appears that since the said transfer the business has been conducted at the same place and with the same fixtures and appliances under the name of "Wm. H. Hoffmann, Mgr., A. Dolon, Successor," and on the letter heads in use in said business the name of Wm. H. Hoffmann appears in large letters, the rest of the title above given appearing in much more modest type, as appears by one of said letter heads hereto annexed, marked "Schedule C."

It further appears that ever since the transfer of said business, the bankrupt has been in the employment of the said Dolon in said business, as he expressed it, running errands and doing what she tells him to do. It also appears that the business has proceeded much as theretofore, and the purchases have been made from some of the same parties, including the opposing creditor, John Boyle.

It also appears that the bankrupt is a married man, with wife and family; that his wife has obtained a separation from him, and that he became liable to pay her alimony under a decree in the proceeding for such separation, and

that she has brought an action against the said Alice Dolon, claiming damages for the alienation of her husband's affections.

It is claimed by the opposing creditor that this transfer of property to Alice Dolon was made by the bankrupt with a view to escape the payment of a larger sum as alimony to his wife, and some foundation for this claim appears in the testimony of the witness Banton. On the other hand, it is claimed by the bankrupt that his business had been running down since 1892 or 1893 until the date of the transfer, which seems to be the only reason given by him for selling out the business.

The transfer of the business is not controverted, and appears by the bill of sale which was put in evidence. It remains to consider whether it was made in good faith, or subject to some secret understanding whereby the property was to be held for the benefit of the bankrupt. As bearing upon this question, it is well to consider:

- (1) The alleged reason for the transfer.
- (2) The consideration.
- (3) The general circumstances of the case.

(1) The bankrupt claims that the transfer was made because his business had run down and became of little value; if that be so it is hard to understand why he wished to sell the business to a person who had been, so far as it appears, a faithful employé for six years, and also why, if the business were bad, he should be willing, after selling it to a person of less experience than himself, to enter into the employment of that person on a salary, and that too when he had a wife and family to support. It is difficult to see how he could expect to realize more as an employé in the business in charge of his former store attendant than he could make out of it himself when he was in sole control. If, as the bankrupt intimates, the business were so bad that he wished to dispose of it, it would seem that he would have made some effort to dispose of it to people familiar with that line of business, and at least to have obtained some competitive bids for it, which does not appear to have been the case. Furthermore it appears from the deposits in the Seventh National Bank, in which the moneys received from the business appear to have been deposited, both before and after the bill of sale, that the monthly balances to the credit of the bankrupt continue approximately the same during the entire period when he claims that the business was running down, and it also appears that since the bill of sale the balances in favor of his successor, Alice Dolon, have continued to be very similar in amount. In other words, so far as this bank account shows, the condition of the business, with some fluctuations, has continued to be substantially the same from the 1st of January, 1893, down to the present time.

(2) In regard to the consideration received for the transfer, some \$200 or thereabouts was received in cash; as to the remaining \$1,000, which the bankrupt claims to have owed said Dolon, the testimony fails to show at what times and in what amounts it was borrowed.

(3) The facts in evidence throw doubt on the whole transaction. Considering the fact that this Alice Dolon was without means in 1892, and had nothing whatever but the salary, varying between six and seventeen dollars per week, it is hardly possible that after deducting her living expenses she could have saved enough money to have loaned the bankrupt \$1,000 in the interim between her employment and the transfer of the business. That she might accumulate some small savings is most probable, and this she appears to have done, for in her account in the Greenwich Savings Bank, which was opened on December 31, 1894, by a deposit of \$15, it appears that she deposited April 27, 1895, \$15; August 9, 1895, \$10; January 7, 1896, \$25; July 10, 1896, \$25; April 15, 1897, \$20; July 9, 1897, \$20; and August 3, 1897, \$10; and this would seem to be a fair statement of what she would be likely to accumulate during that interval of time; so that it seems highly improbable that she could have advanced the bankrupt \$1,000, as claimed, especially as there was no money withdrawn from this account since its inception. The showing of the various bank accounts is also suggestive. Prior to the date of the bill of sale, February 14, 1898, Alice Dolon appears to have only the account in the Greenwich Savings Bank, above mentioned. On the other hand, the bankrupt had an account in the Greenwich Savings Bank, which was opened October 19, 1894, and was closed February 15, 1898. He also had an account in the Dry Dock Savings Bank,

opened September 29, 1895, and closed February 15, 1898. He had also what appears to be his business account in the Seventh National Bank, opened October, 1894, and closed February 15, 1898. It further appears that since the date of the bill of sale Alice Dolon, besides adding \$80 to the Greenwich Savings Bank account on July 9, 1898, opened another account in the Bank for Savings on July 10, 1899, and also opened an account in the Seventh National Bank, above mentioned, on the 14th of February, 1898, which accounts are all still open. It thus appears that at about the date of the bill of sale all the bank accounts of the bankrupt were closed, and that then or soon thereafter accounts in the name of Alice Dolon were opened.

Furthermore, it appeared by the schedules, which disclosed only six creditors, that none of the claims are in favor of business creditors, existing prior to February 14, 1898, except probably the claim of the opposing creditor, John Boyle.

Under these circumstances, it is impossible to believe that bad business or business debts induced the bankrupt to make an assignment, and the testimony points somewhat directly to the transfer for a trifling consideration of a fairly good business, and a continuation of the same interests under different names. There appears to have been a transfer of the entire business, and that not a bad one, for no sufficient reason, and for no sufficient consideration.

Whether the transfer was made to avoid the payment of increased alimony or not is not important, if in fact the bankrupt thereby attempted to conceal his property from creditors. It is claimed by the counsel for the bankrupt that as the creditor Boyle was no creditor at the time of the transfer, and has since, although suspecting the nature of the transaction, continued to deal with the bankrupt's successor in business, he is not in a position to set aside the transfer, but the question here is not, what this creditor is in a position to do, but whether the facts are such as to justify any action on the part of the trustee to recover these moneys for the creditors generally. It is also suggested that, if there were a secret trust, it was of such a nature that the bankrupt himself could not enforce it against the will of the transferee, Alice Dolon. While this may be true as regards the bankrupt, it may not be true as regards the trustee in bankruptcy.

Upon all the testimony and proceedings in this matter, I am unable to avoid the conclusion that the transfer to Alice Dolon was not a bona fide transaction, and that practically the business has continued to be managed by and for the interest of the bankrupt, and whether or not it may be possible for the trustee to set aside the transaction on the ground of the secret trust, and recover assets to the estate, the testimony does not, in my opinion, present a case in which a discharge should be granted.

I am therefore of the opinion that the bankrupt's discharge should be denied.

Franklin Bien, for petitioner.

BROWN, District Judge. Upon the evidence in the above case a jury would, in my judgment, find without hesitation that the transfer to Dolon was a mere subterfuge and sham, and that the business was in effect all the time the business of the bankrupt, as before, carried on upon a secret trust for his benefit, and hence a concealment of assets from the trustee which should bar the bankrupt's discharge.

In re ROLLINS GOLD & SILVER MIN. CO.

(District Court, S. D. New York. July 12, 1900.)

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—MINING CORPORATION NOT WITHIN ACT.

A corporation organized for the purpose of "mining and reducing gold, silver, and other ores, and selling the same," and whose property consists of 26 mining claims, with the necessary machinery and appurtenances, about 1,200 acres of agricultural lands, and 300 or 400 acres of placer min-

ing property, nearly all of which it has leased for eight years past, and has done nothing save receive the royalties or rent to which it is entitled under the lease, is not within Bankr. Act 1898, § 4b, providing that "any corporation engaged principally in manufacturing" may be adjudged an involuntary bankrupt.

2. SAME—ADMISSION OF INSOLVENCY BY DIRECTORS OF CORPORATION.

An admission of inability to pay debts, and willingness to be adjudged a bankrupt on that ground, which is constituted an act of bankruptcy under Bankr. Act, § 3, is within the authority of the directors of a corporation, and is not a corporate function to be exercised by the whole body of corporate members.

3. SAME—CORPORATIONS—DIRECTORS AS CREDITORS.

Creditors of a corporation, who happen also to be stockholders and directors in the company, are not precluded by reason of such relation from commencing proceedings in involuntary bankruptcy against the corporation.

In Bankruptcy.

The following is the opinion of Referee F. K. PENDLETON:

An order to show cause having been made why the order adjudicating the above company a bankrupt should not be set aside and the petition and proceedings thereunder dismissed, the matter was referred to me by an order entered on the 6th day of February, 1900, to take the testimony and proofs in regard thereto and to report the same, together with my opinion thereon, with all convenient speed.

The grounds of the application are:

(1) That the Rollins Gold & Silver Mining Company was not a corporation engaged principally in the business of manufacturing, trading, etc., as required by section 4 of the bankruptcy act, and not therefore subject to the provisions of that act.

(2) That no act of bankruptcy was committed by the said company, in that the board of directors of a corporation has not the power to make the statutory admission required by section 3 of the act, of the inability of the company to pay its debts and its willingness to be adjudged a bankrupt, the power to do so being vested in the stockholders exclusively.

(3) That the corporation was adjudged a bankrupt as the result of a scheme on the part of the president of the company and his associates in the board of directors, whereby the company has practically obtained the benefits of the act as a voluntary bankrupt.

(4) That the corporation was not at the time of the filing of the petition for the adjudication herein, unable to pay its debts.

The first question involved is whether the above company is one of the corporations made by section 4, subd. "b," of the bankruptcy act, amenable to its provisions. That section provides that "any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits" may be adjudged an involuntary bankrupt.

This corporation was organized under the laws of the state of New York, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February 17, 1848. The objects for which the corporation was formed were stated in the certificate or articles of incorporation to be "the mining and reducing of gold, silver and other ores and selling the same."

In the New York & Westchester Water Co. Case (D. C.) 98 Fed. 711, it was held that the question as to whether a corporation is included within the meaning of section 4, subd. "b," or not, depends not on the extent of its powers, but on its pursuits,—not whether it has the power, under its articles of incorporation, but whether it in fact is engaged in one of the occupations there mentioned, and that the words of the act, "manufacturing, trading," etc., should be interpreted according to their commonly accepted meaning. It has been decided that selling the product of one's own land is not "trading or mercantile pursuit."

Under the present act it has been held that mining is not a manufacturing trading or mercantile pursuit. In re Elk Park Mining & Milling Co. (D

C.) decided by Judge Halleck. The case seems not to be reported, but the copy of the opinion submitted to me is filed herewith.¹ It appears from the public press in the last few days that a similar decision was rendered by Judge Carland, of the United States circuit court for the state of Missouri, in the Victoria Zinc-Min. Co. Case (oral opinion). I think these decisions clearly correct. It was held in *Byers v. Coal Co.*, 106 Mass. 131, that a mining company is not a manufacturing company within the meaning of the statute imposing upon officers and stockholders of manufacturing companies liability for debts. In another case that a company mining coal is not a manufacturing company within the meaning of the act releasing manufacturing companies from taxation. *Appeal of Commonwealth* (Pa. Sup.) 18 Atl. 133. The above is conceded by counsel for petitioning creditors, at whose instance this company was declared a bankrupt. But it is contended that reducing or milling ore is manufacturing within the meaning of the act.

The question is therefore whether the Rollins Gold & Silver Mining Company was principally engaged in milling and reducing ore, and if so whether that business is manufacturing.

It appears from the evidence that the property of the corporation was situated in Colorado, and consisted of 26 mines or mining claims, with the necessary machinery and appurtenances, a stamp mill which cost about \$25,000, some 1,200 acres of agricultural lands, and 300 or 400 acres of placer mining property; that the company had leased for almost the whole of the last eight years all its property, and has done nothing except receive the royalties or rent that it became entitled to under the lease. The mining of ore has been carried on by the lessee or his sublessees, the lessee operating the mill to grind ores so mined, and perhaps for other miners. So far as milling ores for others is concerned, that is not manufacturing, but rather rendering or performing labor or services for hire.

I think, however, it very clear that the business carried on by the lessee cannot in any sense be held to be the business of the lessor, and that on the above facts the company is not principally or at all engaged in milling and reducing ore. But even if it were, I do not think that milling and reducing ore come within the meaning of the word "manufacturing" as used in the act. It is certainly not within the commonly accepted meaning of the word, nor do I think it within its technical meaning.

The words "manufacture" and "manufacturing" have been defined frequently. "Manufacture" has been described as anything made or manufactured by hand or manual dexterity or by machinery. To form by manufacture or workmanship, by the hand or by machinery, to make by art and labor. To manufacture has been said to be "to make or fabricate from raw material by hand, by art or by machinery and work into convenient forms for use."

In *Carlin v. Assurance Co.*, 57 Md. 515, it was held that a flour mill operated by steam, with a middling purifier and bran duster, belting and other machinery, was a manufacturing establishment, as the word was used in a policy of insurance. Charcoal produced by burning bone and bone dust by pulverizing bone have been held manufactures of bone within the meaning of the revenue act. *Schrieffer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481.

In *Hawes v. Petroleum Co.*, 101 Mass. 385, it was held that a company, among the purposes of which as stated in its articles of incorporation was "refining oil coal and other minerals," was within the provisions of an act to define and regulate the enforcement of the liabilities of officers and stockholders of manufacturing corporations. In all these cases a practically new article was produced or created. The Massachusetts court held in another case that cutting natural ice and storing it was not manufacturing. *Hittinger v. Inhabitants of Westford*, 135 Mass. 258.

Brande's Encyclopædia defines "manufacture" as a term employed to designate the change or modification made by art or industry in the form or substance of material articles in the view of rendering them capable of satisfying some desire or want of man; and manufacturing industry to consist in the application of art, science or labor to bring about certain modifications or changes of already existing materials. He includes under the term "manufac-

¹ Now reported in 101 Fed. 422.

ture" all branches of industry, with the exception of fishing, hunting, mining and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature. He says that the term is generally applied to those departments of industry in which the raw material is fashioned into desirable articles by art or labor without the aid of the soil, but that there is no real good reason for such limitation, and that it is obvious from the slightest consideration that agriculture is nothing but a manufacture, for the business of the agriculturist is so to dispose of the soil, seed, manure or other materials, that they may supply him with other and more desirable products.

This definition is certainly going very much further than the ordinary acceptance of the term, but even in this view the industries excepted are "fishing, hunting, and mining and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature," which would include the industry of milling and reducing ore. Mining and milling would seem to be, taken together, one industry, having for its object "to obtain possession of material products in the state in which they were fashioned by nature." Mining, the process of extracting from the earth the rough ore, would seem to be the first step in the process, milling or reducing the second step, to wit: the further separating of the materials found together, the one from the other, and extracting from the mass the particular natural product desired.

I think, therefore, the application should be granted on the first ground.

As to the second ground, it would seem to be disposed of in this district by the case of *In re Marine Machine & Conveyor Co.* (D. C.) 91 Fed. 630. It seems to me very clear that the admission is entirely within the authority of directors of a corporation charged with the management of its affairs, and is not a corporate function to be exercised only by the whole body of corporate members. The provisions as to dissolution of corporations are statutory, and are based on the lawmaking power's conception of expediency, and do not, it seems to me, have any bearing on the present question.

As to the third ground: Congress, the lawmaking power, prohibited corporations availing themselves of the provisions of the act, but allowed creditors of certain corporations to make them involuntary bankrupts.

There is no limitation on the word "creditors," which could exclude creditors who were at the same time directors, officers or employes. In fact section 59, subd. "e," of the act, which provides that employes or relations shall not be counted among creditors in computing the number who must join in involuntary proceedings, limits the exclusion to those who have not joined in the petition, clearly indicating that they may act as petitioning creditors. I do not think there is any reason to suppose congress intended to make any discrimination against directors, officers or stockholders.

The present proceedings were brought by three creditors, two of them were assignees of debts due officers or directors of the company, and it is contended that the proceedings are brought with the connivance of the officers of the company and for some purposes of their own. There is no proof that these particular claims were not valid debts of the company, but the contention is that they were assigned without consideration and for the purpose of bringing these proceedings.

I do not think the question of the jurisdiction of the court depends in any way on the objects and purposes of the creditors in bringing the proceedings or that they acted with the knowledge and consent of officers and directors of the company. Assuming the jurisdictional facts to exist, the creditors may be directors or stockholders of the company, and in one sense their action in bringing involuntary proceedings against the company would be to allow the company to avail itself of the benefits of the act, but I do not think this alone any objection or that it is prohibited by the statute. The act does not allow corporations to go into voluntary bankruptcy, but it does not seem to me that that should preclude creditors who happen to also be stockholders or directors of the company from exercising the rights of creditors to bring involuntary proceedings if facts of insolvency, etc., exist.

As to the fourth ground: There was some evidence to show that the company's property was worth the amount of its debts, but it was under lease and

not in the possession of the company, and although the evidence is not very full, the fair inference from it is that the company was not in funds to pay its current debts. The question of its financial condition was not very fully gone into in the testimony, principal reliance being placed by counsel on the other grounds, and, in the view I have taken, it seems unnecessary to pursue this point further.

The application should be granted on the first ground, all of which is respectfully reported.

H. F. Andrews, for petitioner.

BROWN, District Judge. Upon the above findings, the proceedings are dismissed upon the first ground above stated.

In re HORTON.

(Circuit Court of Appeals, Eighth Circuit. June 4, 1900.)

No. 18.

BANKRUPTCY—INTEREST OF TRUSTEE IN LITIGATION IN STATE COURT—INJUNCTION.

Where, four months prior to being adjudicated a bankrupt, a debtor sold certain buildings, under an agreement with the vendee that if any liens were established against the property the latter might discharge the same out of part of the purchase price retained by him, and thereafter mechanics' liens were filed against the buildings, and suits brought to enforce the same in a state court, after proceedings in bankruptcy had been instituted against the vendor, the trustee of the bankrupt is not entitled to have the suits for the enforcement of the liens against the buildings enjoined, and the proceedings removed to the bankrupt court.

Petition for Revision of Order of the District Court of the United States for the District of Nebraska, in Bankruptcy.

T. J. Mahoney, for petitioner.

Myron L. Learned and Henry E. Maxwell (J. W. Hamilton and John L. Kennedy, on the brief), for respondent.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a petition filed under section 24 of the recent bankrupt act, to revise in matter of law an order made by the district court of the United States for the district of Nebraska in a bankruptcy proceeding. The bankrupt, the Greater America Exposition, a corporation, was adjudicated a bankrupt on January 5, 1900. Theretofore, on September 7, 1899, it had conveyed certain buildings which belonged to it to the Chicago House-Wrecking Company. A part of the consideration for the purchase was paid by the wrecking company in cash. The balance of the purchase price was retained by it upon an understanding or agreement, in substance, that, if any liens were established against the property sold, the wrecking company might discharge the same out of the proceeds of the sale which remained unpaid. Subsequently, in the months of October and November, various persons filed mechanics' liens against the buildings, and in due time brought suits against the wrecking company and

the bankrupt corporation, in a state court, to enforce the liens. Thereupon the trustee of the bankrupt filed a petition in the United States district court to stay the prosecution of such suits. On the hearing of the application the district court made an order staying the prosecution of said suits for the purpose of obtaining a personal judgment against the bankrupt, but it declined to stay the prosecution of the same against the wrecking company for the purpose of establishing a lien against the res. This is the order which is brought before us for review. We are satisfied that the order complained of was a proper order. We are of opinion that the bankrupt court had no right to stay the suit to enforce the lien as against the res in the possession of a third party, to wit, the wrecking company, although the trustee of the bankrupt was incidentally interested in the amount of the lien which might be established, by virtue of the contract which the bankrupt had entered into with the vendee. The fact that a trustee in bankruptcy may be interested in the result of a litigation which is pending between third parties in a state court does not entitle him to have the proceedings in such action stayed, as between such third parties, and to have the controversy transferred for adjudication to the bankrupt court. Various questions arising under the bankrupt law were discussed on the argument, but we find it unnecessary to consider them on the present occasion. The bankrupt had made a valid sale of the property in controversy before proceedings in bankruptcy were instituted against it. It had no interest whatever in the property against which the plaintiffs in the suits pending in the state court were seeking to establish liens, and, having no interest in the property itself, the trustee of the bankrupt cannot successfully claim that the jurisdiction of the state court to establish liens against the property should be ousted, and that controversy transferred to the bankrupt court. Finding no error in the order of the district court, the petition for review is dismissed.

In re BLAIR et al.

(District Court, S. D. New York. June 25, 1900.)

1. BANKRUPTCY—PREFERENCES—RECOVERY BY TRUSTEE.

Money collected on execution and received by the creditor before the filing of a petition in bankruptcy against the debtor, but within four months prior thereto, although it constitutes a preference, within Bankr. Act 1898, § 60a, cannot be recovered back by the trustee, under section 60b, unless it is shown that the creditor had reasonable cause to believe that a preference was intended.

2. SAME—JURISDICTION OF BANKRUPTCY COURTS.

Under Bankr. Act 1898, where a judgment was collected by execution, and the money paid over to the judgment creditor before the filing of a petition in bankruptcy against the judgment debtor, although within four months prior thereto, the court of bankruptcy has no power, in a summary proceeding on petition of the trustee, to compel the creditor to repay the money, but the remedy of the trustee is by plenary action in a court of competent jurisdiction.

In Bankruptcy. On motion to compel creditor to repay to the trustee money collected on execution, and received by the creditor,

through an attachment and judgment, within four months prior to the filing of the petition in bankruptcy.

Hayes & Bitterman, for the motion.
Zeller & Miehlung, opposed.

BROWN, District Judge. Although the collection by execution and payment to the creditor constituted a "preference" (Bankr. Act, § 60a), yet, as the money was received by the creditor before the petition in bankruptcy was filed, the transaction thereby became consummated, thus differing from *In re Kenney*, 3 Am. Bankr. R. 353, 97 Fed. 554. If the preference was received by the creditor, without reasonable cause to believe a preference was intended (Bankr. Act, § 60b), it seems not to be recoverable back by the trustee. Here the petition does not charge that the creditors had reasonable cause to believe the bankrupts to be insolvent; but only the fact of their insolvency at that time, which the creditors in their answer deny, and also deny all knowledge of that fact, if true.

Under the recent decision of the supreme court, I am of opinion that this transaction being completely executed by the payment of the money by the sheriff before the petition was filed, the remedy of the trustee is by plenary action alone in the state court. See *Hicks v. Knost*, 2 Am. Bankr. R. 153, 94 Fed. 625; *In re Knost*, 2 Am. Bankr. R. 475; *Strobel & Wilkin Co. v. Knost*, 3 Am. Bankr. R. 631, 99 Fed. 409.

Motion denied.

THE WINIFRED.

(District Court, S. D. New York. June 25, 1900.)

SALVAGE—AMOUNT OF AWARD—TOWAGE SERVICES.

The W., a steamer carrying freight between New York and New Orleans (her value being \$150,000, her freight \$10,000, and her cargo of the value of \$550,000), became wholly disabled in a hurricane on the high seas. The V., a steamer valued at \$250,000, carrying passengers and mails from New York to Havana, sighted the W., and, in answer to her signals of distress, came to her assistance, and, by request of her master, towed her safely to the port of Nassau, 250 miles, the trip requiring about three days. A boat of the V. made three trips to the W., at some peril, to carry hawsers, two of which parted. No other vessel was at hand, and, although the W. was in the track of steamers when picked up, she was drifting out of it. *Held*, that the V. was entitled to a salvage award of \$23,000, in addition to her expenses, to be apportioned pro rata between the W., her freight and cargo, and to be distributed, \$3,500 to the officers and crew of the V.,—an extra allowance being made to the seamen who manned the boat,—and the remainder to the owners.¹

In Admiralty. Suit to recover for salvage services.

Cowen, Wing, Putnam & Burlingham, for libelants.

Convers & Kirlin, for the Winifred.

Maxwell Evarts and R. D. Benedict, for the cargo.

¹ Amount of salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

BROWN, District Judge. This libel was filed to recover salvage compensation for services performed by the libelants' steamer *Vigilancia*, in towing the steamship *Winifred* and her cargo from a point on the high seas, between Jupiter and the Bahamas, in latitude 29° 8' N., and longitude 78° 7' W., about 250 miles to the port of Nassau, New Providence, on the 15th, 16th and 17th of August, 1899. The *Winifred* had become disabled and unmanageable in a hurricane of extreme violence with an occasional velocity from 120 to 140 miles per hour, which struck her on August 12th and continued through the 13th and 14th, but moderated during the night of the 14th and the morning of the 15th. The hurricane was the most violent which had been known to the master during his long experience.

The log of the ship from hour to hour during the 13th and 14th, mentions in detail the heavy seas shipped, the destruction of the steam steering gear, the smashing of skylights, the flooding of the saloon, carrying away of the smokestack, carrying away and destruction of all the small boats save one, smashing of ventilators and steam pipe and fouling of the pumps with coal so that they could not be made to work. At 2 p. m. on the 15th, the entry states that it was "unanimously agreed that the ship was beyond control"; and during that day it is stated that "all hands were bailing water out from the engine room and stoke hole. Water not decreasing"; and that all the sail was gone except the fore staysail.

In the afternoon of the 15th the officers of the *Vigilancia*, bound on one of her regular trips with the mails from New York to Havana, noticing the *Winifred*'s signals of distress, bore down towards her, and after an interchange of signals, in which the master of the *Winifred* signaled that he could not abandon his ship, that he was out of provisions, and that he had no small boat fit to send out to the *Vigilancia*, the latter agreed to take the *Winifred* in tow and sent through a heavy sea a small boat of her own to the *Winifred* to take a line for the towing cable, which was made fast. After a short period the cable parted, and the *Vigilancia* lay by until the next morning, when a cable was again adjusted and the towing resumed; but the hawser during the forenoon again parted, after which a new steel hawser of the *Vigilancia*'s was made use of, and with this the vessel was towed safely to Nassau, arriving there between 8 and 9 p. m. of the 17th. On leaving, the *Vigilancia* received from the master of the *Winifred* a certificate that the latter steamer when taken in tow "was in a disabled condition and totally unmanageable."

The *Vigilancia* was a steamer 321 feet long by 45 feet beam, of about 4,000 gross tons, and valued at about \$250,000. She carried the mails, and on this trip had 64 passengers. The *Winifred* was somewhat smaller, in the employ of the Southern Pacific Company, carrying cargo from New York to New Orleans without passengers. Her agreed value on the trial, less cost of repairs, was \$150,000, her freight, \$10,032, and her cargo about \$550,000. At the time the *Winifred* was taken in tow she was in the ordinary track of steamers from New York to West Indian ports. During the night of the 15th, however, she drifted about 50 miles to the eastward, and if not taken in tow by the *Vigilancia*, she would naturally have been soon out

of the ordinary line of traffic. No other steamer at the time was in her vicinity. She was in every way, however, a staunch steamer, and though much water reached the engine room and the lower hold, I think this came in principally from the deck and from the smashing of her upper works, and not from any serious leaks in the hull.

The chief engineer considered that the loss of the smokestack might be temporarily supplied by certain devices which he had heard of, but which he had never executed, by means of which the vessel might have reached port in favorable weather in 10 or 12 days. So much damage, however, had been done to the ship, that her need of salvage aid was extreme; and this can in no wise be disparaged by the subsequent opinion of her officers looking backward as to what they might possibly have done. *The Alaska*, 23 Fed. 608; *The T. F. Oakes* (D. C.) 87 Fed. 232. I must treat the case as one in which the need of salvage service was urgent, the values at risk on the part of the *Winifred* large, and the *Vigilancia* called upon to render assistance under circumstances which, owing to her own delay already suffered from the hurricane, and the necessity of an expeditious delivery of the mails, made the service desired by the *Winifred* an unwelcome one, but nevertheless a service which, from the situation of the *Winifred*, it was impossible to refuse. The passage in the small boat to the *Winifred* in a rough sea was accompanied by some danger. This passage was made three times, owing to the breaking of the hawsers. After the steel hawser was properly attached, the towage was performed at moderate speed and without extraordinary incidents in such a service. The injuries to the *Vigilancia's* hawsers, the loss of coal, the additional material and expenses, as testified to, amount in all to about \$1,500.

Without dwelling further upon the particular circumstances of this towage service, which has no precise parallel reported, and having considered attentively all the points urged by counsel, I think a reasonable salvage award to the *Vigilancia* will be \$23,000, together with her expenses of \$1,500 above stated, with costs of the suit, including the expense of taking testimony at New Orleans and Baltimore; and that these amounts should be apportioned pro rata upon the ship, freight and cargo, according to their values as above stated. Of this amount, \$3,500 should be awarded to the officers and crew, and the residue to the owners of the *Vigilancia*. Of the \$3,500, \$500 should be awarded to the master of the *Vigilancia* and \$400 to the chief engineer in full of their claims; \$50 to the second officer who was in charge of the small boat upon her several trips to the *Winifred*, and \$100 to the other seamen who manned the small boat, as an extra award for their special service. The residue of the above sum of \$3,500 should be divided pro rata according to their wages among all the officers and crew of the *Vigilancia*, except the master and chief engineer. Decreed accordingly.

THE CITY OF AUGUSTA.

THE CHICAGO.

OCEAN S. S. CO. OF SAVANNAH v. PENNSYLVANIA R. CO.

(District Court, S. D. New York. June 26, 1900.)

1. COLLISION—STEAMSHIP AND FERRYBOAT—PASSING UNNECESSARILY NEAR NEW YORK PIERS.

It is negligent navigation for a steamship, without necessity, to run at a speed of 8 or 10 knots within 300 feet of the ends of the piers along the New York side of the Hudson, where numerous ferryboats are constantly entering and leaving their slips, which cannot be justified by any previous practice or custom, and which renders such vessel liable for any resulting collision with a ferryboat.

2. SAME—STEAM VESSELS CROSSING—DUTY OF PRIVILEGED VESSEL.

The one of two crossing steam vessels which has the right of way has the right to rely on the performance by the other of her duty to keep out of the way, so long as there is reasonable time and space for her to do so; but, when it becomes obvious that she cannot avoid collision by her own maneuvers, it is the duty of the privileged vessel to at once stop and reverse.

3. SAME—INSUFFICIENT LOOKOUT.

The Chicago, a ferryboat running between New York and the New Jersey shore, and the City of Augusta, a steamship coming in from the sea, came in collision near the end of the New York piers, as the Chicago was about to enter her slip in the night, and the Chicago was sunk, being struck about one-third of her length from the stern. The vessels appeared to have sighted each other at about the same time, which was not until the Chicago was about 200 feet, and the Augusta 400 or 500 feet, from the point of collision, although both carried the usual lights, and there was nothing to obstruct the view between them. The Chicago, being then too near the course of the Augusta to avoid collision by stopping, increased her speed and attempted to pass ahead, signaling her intention; at the same time the Augusta made a similar signal, neither signal being heard by the other vessel. *Held*, that both vessels were in fault for failing to sooner observe each other, and that the Augusta was further in fault in passing up at a speed of 8 or 10 knots within between 200 and 300 feet of the ends of the piers, without necessity, and because she failed to stop and reverse until within 25 feet of the Chicago, although it was evident, when she was 300 feet or more distant from the point of collision, that the Chicago was attempting to pass ahead and that collision could not otherwise be avoided.

In Admiralty. Cross libels for collision and petitions for limitation of liability by the owners of both vessels.

Robinson, Biddle & Ward and H. Galbraith Ward, for Pennsylvania R. Co.

Davies, Stone & Auerbach, Julian T. Davies, and Herbert Barry, for the City of Augusta and Ocean S. S. Co.

Elliott, Jones & Escher, J. J. Macklin, and Cowen, Wing, Putnam & Burlingham, for various damage claimants.

BROWN, District Judge. A few minutes before 1 o'clock on the morning of October 31, 1899, as the steamship City of Augusta was coming in from sea and proceeding near the New York shore towards her slip at Spring street, North river, she came in collision with the Pennsylvania Railroad ferryboat Chicago, which was crossing from

the Jersey side and was about entering her slip at the foot of Cortlandt street. The stem of the steamship struck the starboard side of the ferryboat a little aft of her paddle box about one-third of her length from the rear end and caused her to sink in a few minutes. Several of the passengers were drowned. The ferryboat was afterwards raised, but was not worth the cost of raising. Cross libels were filed by the owners of each vessel for their respective damages, to the amount of \$100,000 for the loss of the Chicago, and \$10,455.42 for the damages to the City of Augusta. Libels were filed for other damage claimants against the latter steamer for loss of life and for damages to property, to the amount of \$187,888.27. The owners of each vessel thereupon filed petitions to limit their liability, each, however, denying fault on its own part and alleging the other vessel to be solely responsible for the collision. Answers were interposed and the causes have been brought on for trial together.

The City of Augusta, plying between New York and Savannah was a single-screw propeller about 302 feet long by 40 feet beam and 2,869 gross tons. The ferryboat was 205 feet long by 65 feet beam and of 1,006 gross tons. The Chicago left her slip on the Jersey side, which is a little further up river than the Cortlandt Street slip, New York, at 12:48 a. m. Her usual time in crossing from bridge to bridge is from 7 to 8 minutes, according to the tide. Her ordinary full speed would, therefore, be at the rate of about 7 to 8 knots. The City of Augusta after a detention of 11 minutes at quarantine, left there at 12:14 a. m. and was abreast of Castle Garden at 12:45; so that her full speed, making some allowance for time lost at the start in getting under full way, must have been about 12 knots against the tide. Her steam pressure was reduced in coming up, so that above Castle Garden her speed was probably about 10 knots. Her master estimates her distance from shore at Castle Garden at about 900 feet. It is his practice as he testifies, to give the order to slow on reaching Castle Garden; but on this occasion, observing the central ferryboat Fanwood coming across from her Jersey slip at Communipaw, which is half a mile below the Pennsylvania slip on the Jersey side, and approaching her slip at Liberty street, he continued on without slowing in order to pass ahead of her, giving to the Fanwood several signals of one whistle, indicating that he would pass ahead. The Fanwood, he says, answered his third signal, turned more up river, and allowed him to pass her about 200 feet distant off pier 8, whereupon he gave the order to slow. About a minute afterwards, as he says (page 164), he observed the Chicago approaching her slip, and gave her successively, as he testifies, at least three separate signals of one whistle, and kept on, intending to pass ahead of her as he had passed the Fanwood. He heard no signal or answer, as he testifies, from the Chicago though the Chicago gave him two whistles at about the same time. The pilot of the Fanwood testifies that he heard only one of these signals from the Augusta followed by an immediate alarm, to which the Chicago within one or two seconds replied with a signal of two blasts. All these signals were given, he says, when the Augusta was about off Liberty street or pier 14, which would be not over about 400 feet from the place of collision. The master of the Augusta says that

after his signals to the Chicago, he gave the order to stop his engine, but no order to reverse until his stem was within about 25 feet of her. The witnesses from the engine room state that the orders to slow, stop and back came very close together and almost as one. The entries in the engineer's log give the same time for all, namely 12:55, because as he says, they were only a fraction of a minute apart. This if correct, would indicate that the Augusta when she signaled and slowed was not over 500 feet below the place of collision, and that the Chicago's pilot may not have noticed the signal because he was preoccupied with giving his own signals and his endeavors to pass the Augusta's bow. He testifies that the lights of the steamer coming up near the shore and in the loom of the shore lights, were not seen or distinguished by him until the Chicago was within about 400 feet of the end of the piers, and the City of Augusta about the same distance below him in the river and about 175 feet nearer the piers; so that seeing it was impossible for him to avoid collision by stopping, he gave a jingle bell for extra speed, hoping to pass ahead of the Augusta as the only chance of escape, and that he heard no signal from her.

When the Chicago was two-thirds past the Augusta, as above stated, she was struck at about right angles by the latter's stem, which penetrated her side about 12 feet. The force of the blow swung the stern of the Chicago, as well as the stem of the Augusta to the eastward until the port side of the Chicago near the after part of the paddle box, was shoved against the lower corner of Starin's pier (No. 13), which is the next pier north of the Cortlandt Street slip. The ebb tide then set the vessels a little down river, and the Chicago sank and rested upon the bottom in from 37 to 47 feet of water a few moments afterwards. As she lay upon the bottom her lower end headed a little towards the New York shore, being 40 feet inside of the line of the outer end of Starin's pier and 190 feet outside of the lower rack of the ferry and 90 feet below it; while her upper end was about 130 feet below Starin's pier and 60 feet outside of it.

There is considerable difference in the estimates of the different witnesses as to the distance of the collision from the New York shore. The master of the Augusta, claiming that she was heading straight towards the New York shore at the time when the Chicago had swung around so as to touch Starin's pier, concludes from that circumstance that at the moment of collision his vessel was 369 feet outside of Starin's pier, taking the length of the Augusta and the beam of the Chicago as guides. It cannot be assumed, however, that in swinging around, the Augusta's turning point would be at her stern; it would more probably be forward of the stern, and that would diminish the estimated distance. Other witnesses, moreover, including some from the Augusta, make her heading at the time the Chicago struck the pier only about 4 points towards the New York shore instead of 8 points; and had the heading of the Augusta been directly towards the New York shore by a swing of 8 points, the Chicago would also have been heading straight down river and would consequently have struck against the end of the pier instead of across the corner, as all the witnesses agree. If the angle was 4 points only, the swing of the

Augusta would also have been only about 4 points, which would reduce her distance at the time of the collision even according to the captain's method of computation, to about 280 feet. The pilot of the Chicago on the other hand, says that at the time of collision, the Chicago was within about 40 or 50 feet of Starin's pier. If two-thirds of the Chicago's length be added to that estimate, the Augusta's stem at the moment of collision would be about 180 feet outside of Starin's pier. The result of these comparisons is much nearer to a substantial agreement than usually happens in such cases, and it may be assumed without any such error as would be material for the purposes of this case, that at the time of collision the Augusta was between 200 and 300 feet outside of Starin's pier.

It seems to me impossible under the circumstances above stated to acquit either vessel of fault. The fault of the Chicago in not having seen the approach of the Augusta much earlier is clear and was not in fact contested on the trial. Though the effect of the electric lights from high buildings on shore doubtless increases the difficulty of distinguishing the lights of vessels coming up near the docks, it cannot be accepted as an excuse for not seeing a vessel with lights like the Augusta's, which must have been visible from the time the Chicago left her slip on the Jersey shore. There was nothing to obstruct the view. The lights were seen by the pilot of the Fanwood, which stopped and swung somewhat to the northward to let the Augusta pass ahead of her.

The testimony on the part of the Augusta's witnesses as to the time of observing the Chicago's green light, and also as regards not hearing the signal of two whistles given by the Chicago is so unsatisfactory, that the entries in the engineer's log and the testimony of her witnesses as to the very close signals given by the Augusta to slow, stop and reverse, and the evidence from the Fanwood satisfy me that the Chicago was not seen from the Augusta until she was very near, except possibly much earlier, when the Chicago was near the Jersey shore, after which no more attention was given her until too late. The testimony of the first officer who was forward with a seaman also on the lookout, who claims to have seen the Chicago from the time she left her Jersey slip, is inconsistent in different parts of the examination; and at all events no report of the Chicago's approach was made to the pilot house. The truth seems to be, that neither vessel was aware of the near approach of the other, until they were so near to each other that, at the speed they were going, neither master deemed himself able to stop in time to avoid collision. This is admitted on the part of the Chicago, and it is no doubt true as respects the City of Augusta, which on account of her delay in slowing must at that time have been going at the rate of from 8 to 10 knots. If the Chicago was seen some time before, watch of her was not kept up; so that the want of a sharp lookout was the common fault of both vessels.

Coming up so near to the piers as the Augusta undoubtedly did, it was her duty to be especially cautious and observant, particularly in respect to ferryboats, whether coming in or going out of their slips. This rule is specially enjoined by inspectors' rule 9, and it has long been laid down in the adjudications independent of statutory regula-

tions. *The Relief*, Olc. 104, 109, Fed. Cas. No. 11,693; *The Favorita*, 18 Wall. 601, 21 L. Ed. 856; *The Breakwater*, 155 U. S. 252, 262, 15 Sup. Ct. 99, 39 L. Ed. 139. Its necessity is manifest, not only in the daytime when traffic is busy, but also in the nighttime when the observation of lights near the shore is more likely to be confusing and when especially the attention of the pilots of ferryboats in endeavoring to make their slips in the strong tide, is necessarily much preoccupied with that duty. I must regard the *Augusta* as blamable for going so near the shore as she undoubtedly did at such considerable speed, when there was no necessity for either. In the space of a third of a mile from Chambers street down, there are four busy ferries. At Cortlandt street the *Augusta* was over a statute mile from her destination at Spring street. There was no good reason why she should not have kept further from the shore and come up astern both of the *Fanwood* and of the *Chicago*. For a steamer of the size of the *City of Augusta* to run at 7 or 8 knots speed within 300 feet of the ends of the piers, is a serious embarrassment to ferryboats in entering or leaving their slips; it adds materially to the dangers of navigation where there are so many ferries; and when this is unnecessary, it cannot be justified by any such alleged previous practice as is here claimed. *The John S. Darcy* (D. C.) 29 Fed. 644, 647; *The Susquehanna* (D. C.) 35 Fed. 325.

But what is more especially blamable in the navigation of the *Augusta*, was her failure to give any order to reverse until a few seconds before collision, and her keeping on at a speed which must have been about 8 knots until within 20 or 25 feet of the *Chicago*, as the master states (page 185, 186), which must have been only 2 or 3 seconds before collision. The bows of the *Chicago* at that time must have been nearly 150 feet past the stem of the *Augusta*. No doubt under the starboard hand rule, the *Augusta* had originally the right of way. She had the right to expect that the *Chicago* would take all necessary steps to avoid her and to count on her doing so as long as there was reasonable time and space to accomplish it. Had the *Augusta* reversed as soon as that point had been clearly passed by the *Chicago*, the *Augusta* must have been held without fault in that regard. But when it was obvious that the *Chicago* could not avoid collision by her own maneuvers, or when the *Augusta* had clear notice that the *Chicago* was going ahead of her, it became the *Augusta's* duty to reverse notwithstanding her previous right of way. Even the pilot Dow, called as an expert in behalf of the *City of Augusta*, did not put the space required for a full stop at less than $1\frac{1}{2}$ to 2 lengths, i. e. for the *Chicago* 300 or 400 feet. He thinks she could swing 8 points without forereaching over a length. This rests, however, on estimates only as to distances and not upon any verified measurements, and cannot, therefore, be trusted.

The *Augusta* failed to reverse when her duty to reverse became plain, since the *Chicago* when she was from 200 to 300 feet distant from the line of the *Augusta's* course was evidently intending to cross her bow. The *Augusta* was then probably about abreast of the Central Ferry slip. It was then self-evident that the *Chicago*, going at full speed could not possibly stop in time to let the *Augusta* pass

ahead of her without collision and that she was intending to pass ahead. The master of the *Augusta* states in effect that at that distance he recognized this fact (page 238). Besides this, moreover, no answer from the *Chicago* had been heard to repeated signals, as the master testifies, though there is no doubt that the *Chicago* did give to the *Augusta* a signal of two whistles, signifying that the *Chicago* would go ahead, the reason for such signal being, as her pilot stated, because he saw that it was impossible for him to avoid the *Augusta* by stopping, and that his only chance of escape was to run ahead of her. The witnesses from the *Fanwood* say the *Augusta's* position when she gave her signal to the *Chicago*, was off pier 14, which was only 450 feet from the place of collision. The witnesses from the *Augusta* testify that they did not hear the *Chicago's* signal given one or two seconds afterwards. It was heard, however, by at least two witnesses from the *Fanwood*, which was further from the *Chicago* than the *Augusta* was, and it is testified to also by several witnesses on the *Chicago*. There can be no doubt, therefore, that the signal was given. There is no reason why it should not have been heard, and attended to on the *Augusta*. That signal was also given at a time when the *Augusta's* witnesses claim that they were watching the *Chicago*,—when the *Augusta* was less than 500 feet from the point of collision; so that either that signal must be deemed heard on the *Augusta*, or else her pilot and lookout were not noticing her as they allege; and in either case not heeding or noticing her must be set down to the *Augusta's* own fault. *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, Adv. S. U. S. 67, 44 L. Ed. —.

All the circumstances indicate that the near presence of the *Chicago* came as a sudden surprise, through previous inattention to her. The *Augusta* is clearly chargeable with notice of the intent of the *Chicago* to go ahead of her, if not by her signal, certainly by her position and speed, from the time when the *Chicago* was over 200 feet outside of the line of the *Augusta's* course. After that she ran at least 350 feet before collision, and the *Augusta* ran as much or more, occupying about half a minute. Had the order to reverse been given by the *Augusta* when the *Chicago* was even a length to port, instead of waiting until the *Chicago* had passed over 100 feet beyond her stem, I have not the least doubt that the approach of the *Augusta* would have been delayed much more than the few seconds necessary to enable the *Chicago* to run 75 or 100 feet further, i. e. about 10 seconds, and thus to have cleared the *Augusta* and avoided this disaster.

Rules 3, 6, and 9 of the board of supervising inspectors impose the duty to reverse upon the *City of Augusta*, as well as the duty to blow timely signals when the vessels approached within half a mile of each other. It is unnecessary to refer to other authorities than the recent cases of *The New York*, 175 U. S. 187, 201, 20 Sup. Ct. 67, Adv. S. U. S. 67, 44 L. Ed. —, and *The Albert Dumois*, 177 U. S. 240, 253, 20 Sup. Ct. 595, Adv. S. U. S. 595, 44 L. Ed. —, and the other cases there cited, as regards the force of those rules and the obligation to hold in fault vessels that run into collision by disregarding them. The faults of the *City of Augusta* are mainly the same as those of *The New York* in the case above cited (175 U. S. 209, 20 Sup. Ct. 67, Adv.

S. U. S. 67, 44 L. Ed. —), to which is to be added her unnecessary navigation at considerable speed so near the piers in the region of so many ferries.

It is urged in behalf of the City of Augusta that at the time when the Chicago had approached within 200 or 300 feet of the place of collision, the Augusta was in extremis, and that no error in the master in not immediately reversing should be deemed a fault. Assuming that both vessels were at that moment in extremis, this defense does not avail either of them, since there were abundant means of observation before, and the situation was brought about by the several prior faults of the City of Augusta, as well as by the faults of the Chicago. The *Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812.

Both vessels must, therefore, be held to blame, and the owners equally liable to answer for the loss and damage caused by the collision, subject to the limitation of their liability to the value of the vessels, to which I find the owners entitled.

Upon the evidence submitted upon the claim for loss of life, I allow under the statute of this state:

To Jane Bryson, administratrix of John Bryson, a driver 50 years old, who was drowned, for the benefit of his widow and next of kin, the sum of \$5,000.

To Mary E. Weir, administratrix of Alexander Weir, a retail coal dealer, aged 30, also drowned, the sum of \$7,500.

To Elizabeth Macready, administratrix of Charles Z. Macready, aged 27, a milk driver and decorator, also drowned, the sum of \$7,500.

The proofs as to the other damage claims may be taken before a commissioner in case the parties interested do not agree.

THE REPUBLIC.

(District Court, S. D. New York. June 30, 1900.)

1. COLLISION—STEAM VESSELS CROSSING.

A steam canal boat was primarily in fault for a collision in East river, close to the Brooklyn shore, caused by her attempting to cross the bow of a ferry boat, which was about to enter her slip, without giving any signal of such intention, where the ferry boat was also on her starboard, and therefore the privileged vessel.

2. SAME—CONTRIBUTORY FAULT—PRIVILEGED VESSEL.

The one of two steam vessels crossing which is privileged cannot be held liable to contribute to the damage resulting from a collision due to the failure of the other vessel to keep out of the way, because she failed to stop and reverse as soon as she might have done, where, until it was too late to avoid the collision, she had no reasonable notice that the other vessel would not perform her duty.

In Admiralty. Suit for collision.

Cowen, Wing, Putnam & Burlingham, for libellant.

J. J. Macklin, for respondent.

BROWN, District Judge. At about 6 a. m. of November 12, 1898, as the libellant's steam canal boat *Gamma*, 96 feet long by 17½ beam,

was coming down the East river against the flood tide near the Brooklyn shore, she came in collision off the lower pier of the Catherine Street Ferry on the Brooklyn side, with the ferry boat Republic, which had crossed from the New York side and was making her Brooklyn slip. The port bow of the ferry boat struck the starboard side of the Gamma about 25 feet from her stem, doing damage for which the above libel was filed.

The captain of the Gamma was intending to land his wife at the pier or bulkhead immediately below the Catherine Ferry slip, and for that reason was directing his course towards the Brooklyn shore. The collision took place about 25 or 50 feet off the end of the pier that bounds the lower slip. The account given by the master of the Gamma is not very consistent as to the position of the two boats at different times. There is no doubt, however, that the ferry boat was seen by him at a considerable distance and when she was on the New York side of the river, and that he saw her afterwards heading towards the Brooklyn shore and showing both her colored lights when some 500 feet distant from him. The Gamma was also seen from the ferry boat when a considerable distance off. The pilot of the ferry boat testifies that another tug was coming down river about 150 feet ahead of the Gamma and about the same distance further out from the Brooklyn shore; that he gave a signal of one whistle to both, which was answered by the tug but not answered by the Gamma, and that the tug passed under his stern at about the time of the collision; that when about 500 feet from the Gamma he gave to her a second signal of one blast, which was long continued, and upon which he expected that the Gamma would keep out of his way, but that she afterwards headed more towards the Brooklyn shore, attempting to cross his bow, seeing which the ferry boat reversed her engines, getting about $1\frac{1}{2}$ turns of her wheel backward, but not sufficient to stop her before collision. The captain of the Gamma, on the other hand, hoping as he says to pass ahead of the Republic, increased his speed, and gave a signal of two whistles shortly before collision.

The primary fault for this collision is plainly upon the Gamma; not only because she had the Republic on her own starboard hand, and for that reason was bound to keep out of her way, but because she had no right to obstruct the ferryboat's entrance to her slip by crossing her bow and making a landing altogether unusual without any proper or timely signal to warn the Republic of her intention. She gave no such signals herself, nor did she respond to the signals given by the Republic until just before collision, when her signal of two whistles was too late to be of any use.

My only doubt in the case has been whether the Republic stopped and backed as soon as she had reasonable notice that this was necessary to avoid collision. If the other tug referred to, which was coming down river and which passed under the stern of the Republic, was in the position which the captain and deckhand of the Republic state, this alone would seem to justify the Republic in keeping on, as she could not safely back earlier, the case being practically the same as that of *The Clinton* (D. C.) 97 Fed. 510. The testimony of the quartermaster, however, is that at the time of collision, the other tug was

several hundred feet astern of the ferry boat. If that is so, the tug's position was not such as to prevent earlier reversal by the Republic.

The test of liability of the privileged vessel in such cases is, whether she stopped and reversed as soon as she had reasonable notice that the other vessel would not perform her duty of keeping out of the way, or could not do so; and whether by reversal at that time the collision would probably have been avoided. In adjudging this question all the circumstances must be taken into consideration, not only the maneuvering power of the privileged vessel but particularly the kind of vessel that is to keep out of the way, her apparent facilities for doing so and any impediments in the way. A very different obligation would rest on the privileged vessel as respects a tug incumbered with a heavy and unwieldy tow, from that applicable to a light and easily maneuvering craft, which might be expected to be able to perform her duty of keeping out of the way within a very limited space. The Gamma in the present case was light and a comparatively small boat; there were no obstacles in the way of performing her duty; she had a pilot house, like a tug, and she was apparently, so far as the pilot of the Republic could perceive, of that class of boats that can be handled with ease and turn or stop within a small space. The Gamma's evidence, however, is that she cannot be so easily and quickly handled as the ordinary tugs about the harbor. The pilot of the Republic had no means of understanding this, and was justified in acting upon appearances. The fact that he reversed and got a turn and a half of his wheel backward before collision, shows that the order to reverse must have been given at some little distance before reaching the line of the Gamma's course and longer before collision than the estimate in seconds testified to. In prudence, I think, he should have stopped somewhat earlier; but to have stopped so much earlier as to have been able to avoid the collision, would have required the Republic to stop and reverse at a time when apparently the Gamma could have avoided the collision much more easily than the Republic could, and when the Gamma was rightly expected to do so. This the Republic was certainly not required to do, because she had a right to expect the Gamma to perform her duty beyond that limit of time. The Gamma was a much smaller boat than the Republic and apparently capable of handling herself and stopping very much easier and quicker. In the position of the two vessels, therefore, it follows that the Republic had a right to expect that the Gamma would keep out of the way, and that she was able to do so, down to a time when the Republic by backing could no longer avoid her. The absence of any signal from the Gamma, gave the Republic the right to expect assuredly that the Gamma would perform her duty to stop and go astern until it was too late for the Republic to avoid collision. Had the Republic reversed a little earlier, collision would still have occurred.

The case is one in which, while the fault of the Gamma is clear, the fault of the Republic is so doubtful, that she cannot justly be required to share the loss. *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84. On these grounds I think the libel must be dismissed.

MEMORANDUM DECISIONS.

BALL v. WARRINGTON. (Circuit Court, E. D. Pennsylvania. May 31, 1900.) No. 20. See 87 Fed. 695. A. U. Bannard and S. Morris Waln, for plaintiff. E. Spencer Miller, for defendant.

DALLAS, Circuit Judge. The court in its charge explained—clearly, I think—the distinction between a defense which might have been interposed to the cause of action upon which the Kansas judgment was founded, and the defense here allowed that it (the judgment sued on) had been collusively procured. The only question submitted was whether the judgment had been obtained by fraud. This question of fact was fully argued by counsel, and the jurors were instructed that their verdict must be based solely upon their answer to it. Therefore the verdict which was rendered necessarily involved the finding that the judgment had been fraudulently secured, and I cannot say that this finding was, under the evidence, so plainly unreasonable as to warrant the court in overturning it. Indeed, I think it could not be set aside without disregarding the whole tenor of the opinion delivered by the court of appeals for this circuit in *Warrington v. Ball*, 33 C. C. A. 609, 90 Fed. 464; and that it was there decided that such a defense is a valid one, and one which is available at law as well as in equity, is unquestionable. The plaintiff has filed ten reasons in support of his rule for a new trial, but they need not be separately considered. They appear to be all substantially met by what I have said, and by the judgment of the court of appeals to which I have referred. The rule for a new trial is discharged.

BALTIMORE & O. S. W. RY. CO. v. VOIGHT. (Circuit Court of Appeals, Sixth Circuit. May 8, 1900.) No. 521. In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio. Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error. C. M. & E. W. Cist, for defendant in error. No opinion. Judgment of the circuit court reversed upon certificate of questions certified to the supreme court of the United States. See 79 Fed. 561.

BEECHER et al. v. VANDERBILT et al. (Circuit Court of Appeals, Sixth Circuit. May 10, 1900.) No. 602. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Alfred Russell and John Atkinson, for appellants. Russel & Campbell, for appellees. Dismissed on stipulation of counsel.

BOARD OF COM'RS OF HAMILTON COUNTY v. BLAIR et al. (Circuit Court of Appeals, Eighth Circuit. May 28, 1900.) No. 1,399. In Error to the Circuit Court of the United States for the District of Kansas. George Getty, for plaintiff in error. W. H. Rossington, Charles Blood Smith, and Clifford Histed, for defendants in error. No opinion. Affirmed, with costs.

BOLES v. BOWMAN. (Circuit Court of Appeals, Eighth Circuit. May 23, 1900.) No. 1,391. Appeal from the Circuit Court of the United States for the Western District of Arkansas. Thomas Boles and Jacob Trieber, for appellant. Sam W. Williams and De E. Bradshaw, for appellee. No opinion. Affirmed, with costs, on authority of *Trust Co. v. Dart*, 33 C. C. A. 572, 91 Fed. 451.

BOSWORTH v. DUNLAP et al. (Circuit Court of Appeals, Eighth Circuit. May 21, 1900.) No. 1,383. Appeal from the Circuit Court of the United States for the District of Colorado. Charles J. Hughes, Jr., and Albert Smith, for appellant. H. M. Hogg, for appellees. No opinion. Affirmed, with costs.

BURT v. LINN. (Circuit Court of Appeals, Eighth Circuit. May 8, 1900.) No. 1,396. In Error to the Circuit Court of the United States for the District of North Dakota. Walter C. Ong and Stephen C. Miller, for plaintiff in error. George S. Grimes, Seth Newman, Burleigh F. Spalding, and Winfield S. Stambaugh, for defendant in error. Motion by defendant in error to dismiss sustained, and writ of error dismissed, with costs.

CHICAGO G. W. RY. CO. v. BOEHM. (Circuit Court of Appeals, Eighth Circuit. May 10, 1900.) No. 1,344. In Error to the Circuit Court of the United States for the District of Minnesota. D. W. Lawler and Lafayette French, for plaintiff in error. J. M. Greenman and R. J. Dowdall, for defendant in error. No opinion. Affirmed, with costs.

CITY OF DENVER et al. v. MERCANTILE TRUST CO. OF NEW YORK. (Circuit Court of Appeals, Eighth Circuit. May 8, 1900.) No. 1,290. Appeal from the Circuit Court of the United States for the District of Colorado. J. M. Ellis and S. L. Carpenter, for appellants. A. M. Stevenson and Charles J. Hughes, Jr., for appellee. No opinion. Affirmed, with costs, on authority of *Levis v. City of Newton* (C. C.) 82 Fed. 1006.

CLARKE et al. v. NORTHWESTERN MUT. LIFE INS. CO. et al. (Circuit Court of Appeals, Eighth Circuit. June 11, 1900.) No. 1,354. Appeal from the Circuit Court of the United States for the District of Nebraska. John L. Webster, for appellant. Howard Kennedy, Jr., James W. Carr, Martin Langdon, and W. R. Morris, for appellees. No opinion. Affirmed, with costs. See 94 Fed. 262.

CONSTABLE v. MILLER. (Circuit Court of Appeals, Second Circuit. January 31, 1899.) In Error to the Circuit Court of the United States for the Southern District of New York. William B. Coughtry, for plaintiff in error. Henry L. Burnett, for defendant in error. Writ of error dismissed for failure to print the record.

DUFF MFG. CO. v. KALAMAZOO RAILWAY-SUPPLY CO. (Circuit Court of Appeals, Sixth Circuit. June 15, 1900.) No. 839. Appeal from the Circuit Court of the United States for the Western District of Michigan. James I. Kay, for appellant. F. L. Chappell, for appellee. No opinion. Decree of circuit court affirmed. See 102 Fed. 171.

EAST TENNESSEE TEL. CO. v. MAYOR, ETC., OF CITY OF GREENVILLE, TENN. (Circuit Court of Appeals, Sixth Circuit. May 15, 1900.) No. 789. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. Walter S. Roberts, for appellant. Dana Harmon, for appellee. No opinion. Decree of the circuit court reversed for want of jurisdiction.

EVANS-SNIDER-BUEL CO. v. JUSTICE et al. (Circuit Court, E. D. Pennsylvania. May 29, 1900.) No. 83. Richard C. Dale, for plaintiff. John G. Johnson, for defendants.

DALLAS, Circuit Judge. Upon the trial of this case certain questions were prepared by counsel and submitted to the jury, to be answered by them. To the first of these questions the jury answered that the wool consigned to the defendants was shorn from sheep which, at the time of the making of the mortgage upon which the plaintiff's claim is based, were in Elmore county; and the fact thus found was essential to the plaintiff's case, for it is conceded that, if those sheep were then in Blaine county, the wool in question was not protected by the mortgage, because it had not been recorded in that county. The defendants have taken a rule for a new trial, upon the ground that this finding was not supported by evidence, and, upon full investigation, I am satisfied that it was not. The mortgage itself recited that the mortgaged live stock was then in Elmore and Blaine counties. It contained nothing to suggest that there were not lambs in both counties; and yet the jury must have inferred from testimony that the wool in question had been shorn from "yearlings" (and that fact was not established to my satisfaction), and that it had been shorn from stock which had been in Elmore county when the mortgage was made. It was testified, it is true, that this particular wool was cut from sheep which had been seen in Elmore county. This statement, however, was based by the witness upon the fact that, at the time he had seen them, they were lambs of the spring of 1898; but, conceding this fact, I find no evidence whatever to warrant the deduction from it that the wool in controversy was taken from sheep which had been in Elmore county at the time of the creation of the mortgage, inasmuch as there is nothing to justify a supposition that there were not lambs of the spring of 1898 both in Blaine and in Elmore counties. It follows from what has been said that there cannot be a judgment for the plaintiff upon the verdict. On the other hand, although the defendants' right to judgment non obstante veredicto has been urged with much force, I think it preferable that decision of the questions of law, which have been discussed upon the motion for that judgment, should be postponed until all the facts shall have been finally determined; and accordingly the only order which will now be made is that the defendants' rule for a new trial be, and it is hereby, made absolute.

FERGUSON CONTRACTING CO. v. MANHATTAN TRUST CO. et al. (Circuit Court of Appeals, Sixth Circuit. June 11, 1900.) No. 836. Appeal from the Circuit Court of the United States for the Northern District of Ohio. Henry Crawford, for appellant. John H. Doyle and Louis Marshall, for appellee. No opinion. Decree of circuit court affirmed.

GAHEGAN v. WALKER et al. (Circuit Court of Appeals, Eighth Circuit. May 8, 1900.) No. 1,303. In Error to the Circuit Court of the United States for the Western District of Missouri. Lathrop, Morrow, Fox & Moore, for defendants in error. Motion dismissed, with costs, for want of prosecution.

In re GORMULLY & JEFFREY CO. (Circuit Court of Appeals, Second Circuit. April 30, 1900.) No. 147. Appeal from the District Court of the United States for the Southern District of New York. Roger M. Sherman, for appellant. D. B. Ackerman, for appellees. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Order affirmed on opinion of court below. 95 Fed. 429.

GRAND FORKS NAT. BANK et al. v. RHOMBERG. (Circuit Court of Appeals, Eighth Circuit. May 10, 1900.) No. 1,351. In Error to the Circuit Court of the United States for the District of North Dakota. Burke Corbet and Charles J. Murphy, for plaintiffs in error. J. M. Cochrane and Guy C. H. Corliss, for defendant in error. Dismissed, with costs, per stipulation.

GREGORY v. MERCHANTS' NAT. BANK OF BOSTON. (Circuit Court of Appeals, First Circuit. October 23, 1896.) No. 184. An application by the appellant to PUTNAM, Circuit Judge, for the allowance of an appeal to the supreme court from the decree entered on October 23, 1896 (33 U. S. App. 703, 22 C. C. A. 483, 76 Fed. 683), was denied. Francis A. Brooks, for appellant.

HALEY v. ILES et al. (Circuit Court of Appeals, Eighth Circuit. May 16, 1900.) No. 1,374. In Error to the Circuit Court of the United States for the District of Colorado. W. T. Hughes, for plaintiff in error. Henry T. Sale, for defendants in error.

PER CURIAM. Cause remanded to circuit court, with directions to vacate the order sustaining the general demurrer, and to strike the said complaint from the files, without prejudice, and to permit the plaintiff to file a proper complaint under the provisions of the Colorado Code within 30 days from the date of such order in the circuit court, etc.

HITCHCOCK et al. v. NORTHWESTERN MUT. LIFE INS. CO. (Circuit Court of Appeals, Eighth Circuit. May 14, 1900.) No. 1,358. Appeal from the Circuit Court of the United States for the District of Nebraska. J. H. McCulloch, for appellants. Howard Kennedy, Jr., for appellee. No opinion. Affirmed, with costs.

HITCHCOCK v. NORTHWESTERN MUT. LIFE INS. CO. (Circuit Court of Appeals, Eighth Circuit. May 22, 1900.) No. 1,385. Appeal from the Circuit Court of the United States for the District of Nebraska. J. H. McCulloch, for appellant. John C. Wharton and William Baird, for appellee. No opinion. Affirmed, with costs.

J. B. McFARLAN CARRIAGE CO. v. SOLENAS. (Circuit Court of Appeals, Fifth Circuit. May 7, 1900.) No. 932. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Chas. S. Rice and R. B. Montgomery, for appellant. R. L. Tullis, for appellee. Appeal dismissed, without prejudice, on motion of appellant.

JOHNSON v. CLEVELAND, P. & E. R. CO. (Circuit Court of Appeals, Sixth Circuit. June 11, 1900.) No. 794. In Error to the Circuit Court of the United States for the Northern District of Ohio. L. A. Russell, for plaintiff in error. Ford, Henry, Baldwin & McGraw, for defendant in error. No opinion. Judgment of circuit court affirmed.

JONES v. MERCHANTS' NAT. BANK OF BOSTON. (Circuit Court of Appeals, First Circuit. October 23, 1896.) No. 181. An application by the appel-

lant to PUTNAM, Circuit Judge, for the allowance of an appeal to the supreme court from the decree entered on October 23, 1896 (33 U. S. App. 703, 22 C. C. A. 483, 76 Fed. 683), was denied. Francis A. Brooks, for appellant.

KEHRES et al. v. EXCHANGE NAT. BANK OF POLO, ILL. (Circuit Court of Appeals, Sixth Circuit. June 11, 1900.) No. 784. In Error to the Circuit Court of the United States for the Northern District of Ohio. Clarence Brown, for plaintiff in error. Alexander L. Smith, for defendant in error. No opinion. Judgment of circuit court affirmed.

LASCELLES v. BIDWELL. (Circuit Court, S. D. New York. March 19, 1900.) Motion for Preliminary Injunction. Charles Henry Butler, for the motion. Henry L. Burnett, U. S. Atty., opposed.

LACOMBE, Circuit Judge. Motion denied on authority of Cruickshank v. Bidwell, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. Ed. —. Complainant has an adequate, summary, and expeditious remedy at law under the customs administrative act.

McMILLAN et al. v. McKEE. (Circuit Court of Appeals, Eighth Circuit. May 28, 1900.) No. 1,389. In Error to the United States Court of Appeals in the Indian Territory. W. A. Ledbetter and S. T. Bledsoe, for plaintiffs in error. Stuart Dennee, for defendant in error. Dismissed, with costs, pursuant to rule 23 (31 C. C. A. clixiii., 90 Fed. clxiii.), on motion of defendant in error.

MISSOURI PAC. RY. CO. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 23, 1900.) No. 1,040. Appeal from the Circuit Court of the United States for the District of Kansas. Alexander G. Cochran, C. E. Benton, J. H. Richards, and Ralph Richards, for appellant. I. E. Lambert and W. C. Perry, for appellee. No opinion. Affirmed, without costs to either party in this court.

MONSARRAT v. MERCANTILE TRUST CO. (Circuit Court of Appeals, Sixth Circuit. June 5, 1900.) No. 816. Appeal from the Circuit Court of the United States for the Southern District of Ohio. Swayne & Swayne, Thomas E. Powell, and Charles H. Stephens, for appellant. Morrison R. Waite, Lawrence Maxwell, Jr., Parsons, Shepard & Ogden, and Alexander & Green, for appellee. Dismissed under rule 23 (31 C. C. A. clixiii., 90 Fed. clxiii.).

In re MORRIS et al. (Circuit Court of Appeals, Second Circuit. May 5, 1900.) No. 168. Appeal from the District Court of the United States for the Southern District of New York. M. R. Crow, for appellant Morris. Wm. L. Marshall, for appellant Bouker. Allan McCulloch, for appellee. Before WAL-LACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed on the opinion of the court below. 98 Fed. 711.

PEASE v. WHITE MFG. CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 14, 1900.) No. 1,192. Appeal from the Circuit Court of the United

States for the District of Minnesota. P. H. Guncel and William H. Blodgett, for appellant. A. C. Paul and C. G. Hawley, for appellees. No opinion. Affirmed, with costs, on authority of the opinion of the circuit court. 89 Fed. 589.

PICKERT LAND, GRAIN & STOCK-RAISING CO. v. LINN et al. (Circuit Court of Appeals, Eighth Circuit. May 8, 1900.) No. 1,395. In Error to the Circuit Court of the United States for the District of North Dakota. Walter C. Ong and Stephen C. Miller, for plaintiff in error. George S. Grimes, Seth Newman, Burleigh F. Spalding, and Winfield S. Stambaugh, for defendants in error. Motion by defendants in error to dismiss sustained, and writ of error dismissed, with costs.

PIRIE et al. v. CHICAGO TITLE & TRUST CO. In re FRANK et al. (Circuit Court of Appeals, Seventh Circuit. June 22, 1900.) No. 698. Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois. Zach Hofheimer, A. J. Pflaum, S. O. Levinson, and Jos. W. Moses, for appellants. Eli B. Felsenthal, Milton J. Foreman, and Herman Frank, for appellee. Before WOODS and GROSSCUP, Circuit Judges.

PER CURIAM. It is agreed by counsel that the question presented upon this record is identical with that decided by this court in Columbus Electric Co. v. Worden, 39 C. C. A. 582, 99 Fed. 400; In re Ft. Wayne Electric Corp., Id. The order below is therefore affirmed.

PITTSBURG, C., ST. L. & C. R. CO. v. LONG ISLAND LOAN & TRUST CO. (Circuit Court of Appeals, Seventh Circuit. January 31, 1899.) No. 241. Appeal from the Circuit Court of the United States for the District of Indiana. Lawrence Maxwell, Jr., and Charles E. Burr, for appellant. E. W. Kittredge and Joseph Wilby, for appellee. Dismissed on stipulation.

PURCELL MILL & ELEVATOR CO. v. KIRKLAND. (Circuit Court of Appeals, Eighth Circuit. May 17, 1900.) No. 1,199. In Error to the United States Court of Appeals in the Indian Territory. Nathan Frank, J. W. Hocker, and Zol. J. Woods, for plaintiff in error. Yancey Lewis, Henry M. Furman, C. L. Herbert, and Jesse Hill, for defendant in error. Dismissed, with costs.

ST. CHARLES CAR CO. v. HOUSE et al. CORBETT v. SAME. (Circuit Court of Appeals, Fifth Circuit. May 15, 1900.) Nos. 901, 902. Appeals from the Circuit Court of the United States for the Eastern District of Texas. Walter Gresham and D. F. Rowe, for appellant. F. C. Dillard, J. W. Terry, and T. W. Ford, for appellees. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. These two appeals are in the same case and on the same record as the appeal in Railway Co. v. House (C. C. A.) 102 Fed. 112, and the motions to dismiss the appeals assign the same grounds as in the latter-mentioned case. There is no distinction of any moment in the matter of appeal in these cases. For the reasons assigned in Railway Co. v. House, the motions to dismiss are overruled.

SULLIVAN et al. v. DENISON. (Circuit Court of Appeals, Eighth Circuit. May 16, 1900.) No. 1,370. Appeal from the Circuit Court of the United States

for the District of Colorado. Charles M. Campbell, for appellants. Charles H. Toll and Weed Munro, for appellee. Appeal dismissed, with costs, on motion of appellee.

SUTHERLAND v. DELAWARE WATER CO. (Circuit Court of Appeals, Sixth Circuit. May 10, 1900.) No. 830. Appeal from the District Court of the United States for the Southern District of Ohio, in Bankruptcy. J. W. Mooney, for appellant. F. M. Mariott, for appellee. Dismissed upon stipulation of counsel.

TEXAS & P. RY. CO. v. GLANCY. (Circuit Court of Appeals, Fifth Circuit. January 11, 1899.) No. 720. In Error to the Circuit Court of the United States for the Eastern District of Texas. T. J. Freeman, for plaintiff in error. D. W. Humphreys and W. P. McLean, for defendant in error. Dismissed, on stipulation of counsel, under rule 20 (31 C. C. A. clix., 90 Fed. clix.).

TOURTE v. VAN NOSTRAND. (Circuit Court of Appeals, Fifth Circuit. February 1, 1899.) No. 737. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. A. E. & Oliver S. Livandais, for plaintiff in error. E. H. Farrar, for defendant in error. Dismissed, on stipulation, pursuant to rule 20 (31 C. C. A. clix., 90 Fed. clix.).

In re TURNER. (Circuit Court of Appeals, First Circuit. April 20, 1900.) No. 300. G. Philip Wardner, George E. Curry, and Florence F. Sullivan, Jr., for petitioner. Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge. On motion of the petitioner, the petition is dismissed, without costs.

UNITED STATES v. PERALTA (GWINN et al., Interveners). (District Court, N. D. California. May 28, 1900.) No. 100. On Demurrer to New Intervening Petition. Former opinion (99 Fed. 618) reaffirmed. Boyd & Fifield, for petitioner. Frank L. Coombs, U. S. Atty.

HAWLEY, District Judge (orally). The petition of Mary E. H. Gwinn as intervener herein having been heretofore dismissed, without prejudice, a new petition has been filed by her and one Miers F. Truett, asking the court to grant the same relief as was prayed for in the former petition. To this petition a demurrer has been interposed upon the ground, among others in said demurrer specifically mentioned, "that the petition herein does not state facts sufficient to warrant or authorize the court in granting the relief prayed for." The present petition is not subject to the objection made at the former hearing to the form of the pleadings, and that portion of the opinion which discusses that question may be said to be now eliminated from the case, because the present petition does set forth the steps that were taken, and the orders and decrees that were made and rendered, by the district court after the entry of the decree of November 30, 1859 (filed December 1, 1859), and states in detail certain facts concerning the plat of survey of November 25, 1895, made by the surveyor general, upon which the petitioners rely, and the action of the officers of the general land office in regard thereto. It will thus be seen that there are many details in the facts set out in this petition that were not embodied in the former petition. But these additional facts simply present the questions herein involved more clearly and distinctly than before. The legal principles are precisely the same as were presented, discussed, and decided by this court in *U. S. v. Peralta*, 99 Fed. 618, and the views therein expressed are as applicable to this petition as to the former one. The reasons given by the

assistant commissioners of the general land office to the surveyor general (which are annexed to and made a part of the petition) for refusing the petitioner's request for the issuance of a patent in accordance with the survey of the surveyor general of California made in 1895 are in all respects consistent with the views expressed in the former opinion. Their conclusion in regard thereto is identical, viz. "that the particular matter raised by the petitioner has long since become *res judicata*." In the light of all of the facts, and of the consideration heretofore given to this case, I deem it unnecessary to again discuss the same questions. It is enough to say that I have carefully read the petition and the elaborate and exhaustive brief filed by the learned counsel on behalf of the petitioners, and examined the numerous authorities cited therein, and my conclusion is that the demurrer should be sustained, the motion of the petitioners be denied, and the petition dismissed. It is so ordered.

UNITED STATES v. UNION PAC. RY. CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 14, 1900.) No. 652. In Error to the Circuit Court of the United States for the District of Kansas. W. C. Perry and I. E. Lambert, for plaintiff in error. A. L. Williams, N. H. Loomis, and R. W. Blair, for defendants in error. No opinion. Affirmed, without costs to either party in this court. See 84 Fed. 1022.

WALLACE v. BOMAR. (Circuit Court of Appeals, Fifth Circuit. January 24, 1899.) No. 778. In Error to the Circuit Court of the United States for the Northern District of Texas. C. W. Starling and U. F. Short, for plaintiff in error. A. M. Carter and J. E. Bomar, for defendant in error. Dismissed on stipulation of counsel.

WELSBACH LIGHT CO. v. SUNLIGHT INCANDESCENT GAS-LAMP CO. (Circuit Court of Appeals, Second Circuit. February 28, 1899.) Appeal from the Circuit Court of the United States for the Southern District of New York. Charles G. Coe, for appellant. John R. Bennett, for appellee. Appeal dismissed for failure to print the record. See 87 Fed. 221.